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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. XXVI.

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MURRELL v. PACIFIC EXPRESS COMPANY.

[54 ARKANSAS, 22.]

COMMON CARRIERS — NEGLIGENT DELAY. — MEASURE OF DAMAGES for the breach of a contract of carriage by negligent delay includes such damages only as are the direct and immediate consequence of the breach, and deemed to have been contemplated by the parties when they made the contract, whether the carrier is a natural or an artificial person. If it is an express company, it is liable for the difference between the market value of the goods at the time and place where they ought to have been delivered and such value when they were delivered, together with any extra expense incurred in writing or telegraphing for them, but not for the difference between the price for which the shipper had contracted to sell them and their market value when and where they were delivered, unless the company was notified that they were shipped to complete sales already made.

ACTION to recover damages for negligent delay in the transportation of trees. Plaintiff alleged that by reason of the carrier's negligent delay, he lost certain contracts for the sale of the trees, to his damage in the sum of \$282; and that in waiting for them, he incurred expenses in the sum of \$21.50. Defendant entered a general denial. Plaintiff recovered a verdict and judgment for \$16.50, as expenses incurred in waiting for the trees. He appealed.

Blackwood and Williams, for the appellant.

J. M. Moore, for the appellee.

HEMINGWAY, J. Upon the question of negligence, the jury found against the defendant. It is therefore obvious that the plaintiff was not prejudiced by any error in the admission or

exclusion of evidence, or in declaring the law to the jury pertinent to that issue.

As to the measure of plaintiff's damages, the court declared the law, that if the defendant had no notice that the trees were shipped for delivery under sales theretofore made, the plaintiff could recover only the difference between their market value at the time and place when they ought to have been delivered and such value when they were delivered, and also any extra expense that he incurred in writing or telegraphing for the trees. This the appellant contends was error. He contends that he was entitled to recover the difference between the price for which he had contracted to sell the trees and their market value when and where they were delivered, although the defendant was not advised that they were shipped to complete contracts of sale theretofore made.

It seems to be conceded that the rule announced by the court is correctly stated as applicable to contracts between natural persons, and to contracts of shipment by railroad companies; but it is contended that a different rule applies to contracts of carriage by express companies. No authority is cited that sustains the distinction contended for, and we should be surprised to know that any existed. That the rule defining the duties of express companies under contracts of carriage differs from that applicable to primitive means of transportation is doubtless true; that a delivery by an express company would be negligent for unreasonable delay which would display the greatest diligence of a stage-coach, or might be more expeditious than a stage-coach could make by use of such diligence, is also true. But the difference is confined to the determination of the question of diligence or negligence, and does not affect the rule as to the measure of damages when negligence is proved. This rule is not affected by the character of the parties to the contract, but is uniform in its application, whether the breach be committed by natural or artificial persons. It requires the party guilty of the breach to compensate the innocent party, — to pay the damages which are the direct and immediate consequence of the breach, and are deemed to have been contemplated by the parties when they made the contract: 3 Sutherland on Damages, 216; *Western U. Tel. Co. v. Short*, 53 Ark. 443. The fact that the guilty party is a corporation, or that it is a natural person, would neither enlarge nor curtail

the scope of damage within the contemplation of the parties as likely to arise from a breach of their contract. It cannot, therefore, affect the amount of such recovery.

Upon the law and the undisputed facts, the judgment was right, and will be affirmed.

CARRIERS — MEASURE OF DAMAGES FOR DELAY IN DELIVERY. — The measure of damages against a carrier for delay in the transportation of live-stock is the expense of keeping, shrinkage, and depreciation in value of the stock occasioned by the delay: *Ayres v. Chicago etc. R'y Co.*, 71 Wis. 372; 5 Am. St. Rep. 226, and note. A loss by depreciation of market is the proximate result of a delay in transportation, and a carrier is liable therefor: *Sisson v. Cleveland etc. R. R. Co.*, 14 Mich. 489; 90 Am. Dec. 252, and note. A carrier is liable for any injury to goods caused by a delay in transportation: *Michaels v. New York Central R. R. Co.*, 30 N. Y. 564; 86 Am. Dec. 415, and note; *Ruthbone v. Neal*, 4 La. Ann. 563; 50 Am. Dec. 579, and note; *St. Clair v. Chicago etc. R'y Co.*, 80 Iowa, 304. The measure of damages for a delay in the delivery of goods given to a carrier for transportation is the difference in value between the time when they ought to have arrived and when they did arrive: *Atlanta etc. R. R. Co. v. Texas Grate Co.*, 81 Ga. 602. See extended note to *American Ex. Co. v. Smith*, 31 Am. Rep. 567-570.

KILLOUGH v. HINTON.

[54 ARKANSAS, 66.]

ESTATES — LACHES IN APPLYING FOR ORDER TO SELL PROPERTY OF DECEDENT TO PAY DEBTS. — A delay of more than twenty years after letters of administration have been granted, before applying for an order to sell the lands of the decedent to pay his debts, is not unreasonable, when such lands have been set aside as dower, and the application is made upon the death of the widow.

Sanders and Watkins, for the appellant.

N. W. Norton, for the appellees.

HUGHES, J. This was an action of ejectment by appellant, as administrator *de bonis non*, to recover the possession of lands belonging to the estate of his intestate, which were in possession of the appellees, the heirs of the intestate, and which they had divided among themselves, and which were assigned to the widow of the intestate as dower in his real estate in the year 1873, and had been held by her till her death in 1887. The widow qualified as administratrix of her husband's estate in 1867, soon after his death, and made her final settlement of her administration in 1880, showing that she had exhausted the assets of the estate except this land in

controversy, which settlement was confirmed the 15th of October, 1880.

A large number of debts had been probated against the estate of appellant's intestate, and remained unpaid. The appellant, as sheriff, qualified as public administrator *de bonis non* of said estate, the 12th of October, 1887, and brought this suit soon after to recover possession of said lands, for the purpose of sale of same to pay the unprobated claims against the estate. More than twenty years had elapsed after administration was first granted upon the estate before appellant brought this suit.

Defendants, appellees, pleaded that there was unreasonable delay, and that the action was barred, the cause of action, as they averred, not having accrued within ten years next before the institution of this suit.

The widow had occupied the residence of the intestate after his death till her death, but had never selected a homestead, or had one assigned her out of the real estate of the deceased, which consisted of 2,000 acres, 640 of which was in a body and included the land in controversy, assigned to the widow as dower, and in possession of which she was at the date of her death.

The court below found that one quarter-section of the land, the northeast quarter of section 1, in controversy, was the homestead of the widow, and gave judgment as to it in favor of the administrator. As to the other quarter-section, the southeast quarter of section 1, in controversy, the court found for the heirs, holding that the homestead could not be sold in the lifetime of the widow, but that the reversionary interest in the other piece might have been sold, notwithstanding the life estate of the widow, and that as to this there was no good reason for the delay. Both parties filed motions for new trial, which were overruled, and they appealed.

Was appellant's right of action barred? Were the creditors guilty of such laches as barred their right to have these lands subjected to sale for the payment of their unpaid claims probated against the estate?

Only the reversionary interest could have been sold while the widow's dower continued. Were the creditors bound to have that sold within the ordinary period of limitation?

"The necessity for a prompt and speedy settlement of the administration of the estates of deceased persons, in order that creditors may be satisfied and devisees and heirs be put

in the indisputable possession of their inheritance as early as a just regard for the right of creditors will permit, requires a limitation upon the time when either creditors or executors and administrators may apply for the subjection of real estate to the payment of debts. It is admitted by all the authorities, that, in the absence of statutory regulation of the subject, it is the duty of courts to determine what shall be considered a reasonable time in this respect, and to refuse the application if the parties who demand it have been guilty of palpable laches. Courts have found this duty not without difficulty, and no precise rule to be inflexibly followed has been anywhere laid down": 2 Woerner's American Law of Administration, sec. 465.

There is no statute bar in this state against the enforcement of allowances of claims against estates by the probate court: *Mays v. Rogers*, 37 Ark. 155. "The analogy of the statute of limitation is followed in many of the American states."

In *Mays v. Rogers*, 37 Ark. 155, it was said: "The power of the administrator must be exercised in a reasonable time, and will be lost by gross laches or unreasonable delay. . . . The heirs should not be forever deterred from making improvements on the property, or prevented from selling it, by the possibility that it may be sold for the debts of the estate. . . . What is such reasonable time must be determined by the court, in its sound discretion." And it was held in this case that a delay of ten years, where there was no hindrance or proper cause therefor, was unreasonable, and that the lien on the real estate was lost thereby. There were other lands than the interest the administrator was seeking an order to sell, and he had made no effort to sell any lands for ten years after grant of letters to him as administrator *de bonis non*.

That was unlike the case at bar, where the administrator had exhausted the assets, except the lands assigned to the widow as dower, and which he applied for an order to sell soon after her death.

Upon consideration of the circumstances of this case, we cannot say there has not been reasonable cause for delay, or that the creditors or the administrator have been guilty of gross negligence or palpable laches.

The lands were assigned to the widow as dower in 1873, and she occupied and held them till 1887, when she died.

To have sold them before her death would have been a sacrifice of the interests alike of the creditors and heirs. How

hazardous a speculation would a purchaser have made! "Who would have bid, except a price proportioned to such hazard?" *Liddel v. McVickar*, 11 N. J. L. 58; 19 Am. Dec. 369; 2 Woerner's American Law of Administration, sec. 465; *Moore v. Ellsworth*, 51 Ill. 310.

Had the land been forced to sale encumbered by the widow's dower, the creditors "would not have derived any appreciable benefit from the sale; the heirs would have lost the lands, and the creditors their debts. . . . What just cause of complaint have the heirs that that result was not precipitated? We think it unreasonable to hold the creditors bound to resort to a fruitless and destructive sale": *Bursen v. Goodspeed*, 60 Ill. 277.

Whether there was a homestead or not in the lands, the dower interest covered both tracts, and the court erred in holding the action barred as to the southeast quarter of section 1, township 8 north, range 3 east, as it was not barred as to either tract. For this error, the cause is reversed and remanded, with directions to the circuit court to render judgment for the appellant as administrator for the recovery of the northeast quarter and the southeast quarter of section 1 in township 8 north, range 8 east.

Laches in Applying for Orders to Sell Real Property of Decedent to Pay Debts.*

In Absence of Statute, What is Reasonable Time is within Discretion of Court.—The law favors the speedy settlement of estates, to the end that the creditors may receive their pay, and the heirs their inheritance. It is therefore necessary that some limitation should be placed upon the time within which either creditors, executors, or administrators may apply for the subjection of the real estate of the decedent to the payment of debts. The authorities are agreed that, in the absence of statutory regulation, it is the duty and within the discretion of the courts to determine what is a reasonable time in this respect, upon consideration of all the circumstances of each particular case, and to refuse the application to sell the land when the party applying has been guilty of such gross laches or unreasonable delay as to render a sale inequitable: *Hatch v. Kelly*, 63 N. H. 29; *Mays v. Rogers*, 37 Ark. 155; *Liddel v. McVickar*, 11 N. J. L. 44; 19 Am. Dec. 369; *Estate of Godfrey*, 4 Mich. 308; *Moore v. White*, 6 Johns. Ch. 360; *McCoy v. Morrow*, 18 Ill. 519; 68 Am. Dec. 578; *Hall v. Woodman*, 49 N. H. 294; *Estate of Crosby*, 55 Cal. 574; *Estate of Arguello*, 85 Cal. 151; *Gunby v. Brown*, 86 Mo. 253; *Ferguson v. Scott*, 49 Miss. 500.

In *Mays v. Rogers*, 37 Ark. 155-159, the court said: "The lands and tene-

*REFERENCE TO MONOGRAPHIC NOTES.

Laches as a ground for denying relief in equity: 54 Am. Dec. 120-124; 23 Am. St. Rep. 148-151.

Limitations in equity: 12 Am. Dec. 365-373.

Stale claims: 2 Am. St. Rep. 795-803.

ments of which an intestate has died seized are, by the statute, made assets in the hands of his administrator for the payment of his debts, and in case of a deficiency of the personal estate, may, under an order of the court, be sold for that purpose. But this charge upon the real estate is not a perpetual one which may be enforced by the administrator after any lapse of time. The heirs should not be forever deterred from making improvements on the property, or prevented from selling it, by the possibility that it may be sold for the debts of the estate. The power of the administrator must be exercised in a reasonable time, and will be lost by gross laches or unreasonable delay. What is such reasonable time must be determined by the court, in its sound discretion, under the circumstances of the case."

In *McCoy v. Morrow*, 18 Ill. 519, 523, 69 Am. Dec. 578, the court expressed a similar opinion in the following words: "Creditors have a lien in this state against the estate of their deceased debtors for satisfaction of their debts, and which they may enforce through administration, even against purchasers from heirs or devisees. And there is no statute interposing any limitation of time within which the lien must be enforced. The questions then are, Will delay and laches of the creditor destroy his lien and right to pursue the land of which the debtor died seized in the hands of the grantee of the heir holding under conveyance duly recorded? and if so, in what period of time? The notion that this lien is perpetual and may be enforced at any time against land, after alienation by the heir, is wholly inadmissible. Such a rule would render titles to land insecure to a vast extent; and no man who holds land derived through heirs or devisees, after having exhausted all the means the law affords for the ascertainment of the validity of his title, and the existence of liens and encumbrances against the lands, could be reasonably certain that he would not, after the lapse of years, be stripped of his title through such a secret lien, without actual notice or means of defense. At any period his lands might be demanded, and finally wrested from him or his heirs by force of a conveyance under judicial order and sale, obtained without notice in fact, and founded on an apparent debt against some unknown person for years in the grave, through whom his title had passed, and which debt had been hunted or trumped up for that special purpose. . . . The creditor, under our law, has ample means of, without delay, compelling administration, and, through administration, subjecting the debtor's estate, real and personal, to the payment of the debts against the estate. If he fails to do so within a reasonable time, he will be held to have waived his lien against property descended, and the grantee of the heir will take the title discharged of the lien. It is not necessary in this case to decide what shall be a reasonable period of time for that purpose; for here the delay is so great [nineteen years] as to leave no room, either from adjudged cases or the analogies of our law, for question."

In *Gusby v. Brown*, 86 Mo. 253, it was decided that in the absence of a statute of limitations prescribing the time within which an administrator must procure an order for the sale of the land to pay the debts of the estate, he must do so within a reasonable time, and that what is such reasonable time must be determined by the court from all the circumstances of each particular case. So in *Estate of Godfrey*, 4 Mich. 308, it was ruled that when it becomes necessary to sell the real property of an intestate for the payment of his debts, his administrator should move for a sale at the earliest opportunity, and as there is no statute of limitations relating to the subject, it is for the court to determine, in its discretion, what is a reasonable time under the circumstances, and whether the administrator has exercised reasonable diligence.

An early statute in New York provided that in case the personal assets of the deceased were insufficient to satisfy his debts, his administrator should apply to the court to subject the real estate of the decedent to the payment of such debts, "as soon as conveniently may be," and Chancellor Kent, in discoursing upon what would be a reasonable time within which to make application, said: "This is the substance of the provisions of the act upon the subject, and I infer from them that the law intended that the executor or administrator should make his application with due diligence, and in a reasonable time, and if he does not, the judge or surrogate has, from the nature of his judicial trust, a discretion to reject the application. What is a reasonable time may be another question. All I mean at present to say is, that the judge of probate, or surrogate, must be entitled to determine, in sound discretion, what is a reasonable time, under the circumstances of the case, and to determine when the executor did first discover, or had ground to suspect, the insufficiency of the personal estate, and whether, as soon as conveniently might have been, he had made out an account, and filed an inventory, and applied the assets in hand according to the requisitions of the statute. If he has been guilty of gross negligence or palpable laches on these points, he is clearly not in season within the meaning of the act, and the judge or surrogate ought not to permit him, or the creditor who prompts him, by this summary proceeding to sweep away the real estate of the heir": *Moore v. White*, 6 Johns. Ch. 360-376. So in *Hatch v. Kelly*, 63 N. H. 29, 30, the court said: "But if it be assumed that when the license was applied for the personal estate was insufficient for the payment of the debts, it was properly refused. Whether it should be granted is a question of fact to be decided upon equitable principles, regard being had to the circumstances of the case. It was through their own laches that the creditors have failed to obtain their pay. If they, immediately after the exclusive right of the heirs to administration expired, had applied for administration themselves, they could have collected their debts from the personal estate. But being aware of the debtor's death, and having in the probate records convenient means of ascertaining the non-administration of the estate, they suffered the heirs to take possession of and spend the personal estate, and the creditors of the heirs to attach and levy upon the real estate, and the title under the levy to become perfected as against the heirs, before taking any steps to have the estate administered; and they took no steps in this direction. Their delay should be regarded as an abandonment of their rights. If, under these circumstances, license to sell could not be denied, the title of an innocent third party would be defeated." After a review of the cases on the subject, the court, in *Estate of Crosby*, 55 Cal. 574, 586, said: "A full examination of the foregoing and other cases, in which it was admitted that the statute of limitations did not apply, will show it to have been held, nevertheless, from the very nature of the proceedings and the character of the duties imposed upon courts where the estates of deceased persons are administered, as well as from the various provisions of the statutes of different states, which, however they may differ in detail, are all impressed with an evident legislative intent that the proceedings shall be promptly inaugurated and continuously prosecuted without unnecessary delay; that the courts of probate retain the power, and it is their duty, to refuse an order granting leave to sell, when the delay amounts to laches." This reasoning was followed in the subsequent case of *Estate of Arguello*, 85 Cal. 181, to the extent that a probate court has discretionary power to deny a petition for the sale of the real property of the decedent, when there has been un-

reasonable delay without circumstances to excuse its presentation, but a finding by the lower court that the delay was excusable will not be reversed, unless there has been an abuse of discretion.

No Definite Rule as to What Constitutes Laches. —Owing to the different facts arising in the different cases, the courts have been under very great difficulty in establishing any definite rule as to what lapse of time will constitute laches on the part of the creditor or administrator in applying for the sale of land to pay the decedent's debts, and while no inflexible rule in this respect has been anywhere laid down, the authorities agree that application must be made within a reasonable time. Referring to this difficulty, in *Liddell v. McVicker*, 11 N. J. L. 44-56, 19 Am. Dec. 369, the court said: "There is no limitation expressly made, no period expressly fixed by the legislature, within which the order for sale should be applied for or made. Reflection and experience both teach the extreme difficulty of prescribing any fixed rule which would, in general, operate safely and justly. This lesson is more impressively taught by the very wide conclusions to which enlightened courts have been led. . . . A discretion is very properly, as it is very necessarily, confided to the orphans' court. Each case must, in some measure, depend on its own particular circumstances. A convenient time for one would for another be very inconvenient. The time, reasonable according to the situation of one estate, would in another be very unreasonable." So the court, speaking of this topic, in *Ferguson v. Scott*, 49 Miss. 500-502, expressed itself as follows, through Simrall, J.: "The policy of the statute is, that there shall be a speedy administration of an estate, by payment of creditors, and turning over the surplus to the distributees. To enable the administrator to perform the first duty, the law charges the real estate, as well as the personal, with the debts, and deducting the exemptions, gives authority to the administrator to apply the lands whenever he shall discover the personal property insufficient. An examination of the authorities will show that no definite rule can be laid down as to the time within which the creditor must initiate proceedings to subject the land, or rather cause it to be done by the administrator. It would be reasonable, and less mischievous in its consequences, to allow a longer delay and indulgence where the heir or devisee continued the owner, than where the lands had been sold to an innocent purchaser; stale demands are not to be favored. If a creditor, with a knowledge of his rights, sits still, making no assertion of them until third persons act as if no such claim existed, and acquire interest in the property by purchase, for their protection it would not be unreasonable or unconscionable to deny relief against the property because of the staleness of the claim. A time is not prescribed by the statute within which the administrator must bring his petition to sell, but he must not delay until the heir and devisee may have reason to suppose that there are no valid debts, and when a purchaser may fairly be supposed to have advanced his money on the like confidence. The statute very clearly indicates that the sale must be made when the condition of the personal assets has satisfied the administrator of the necessity."

Cases Showing What Delay will Constitute Laches. — In an early case, Chancellor Kent laid down the rigid rule that an unexplained delay of more than one year by the executor or administrator, after he had entered upon the execution of his trust, would justify the court in refusing to grant his application to sell the real property of the decedent for the purpose of paying the latter's debts: *Mooers v. White*, 6 Johns. Ch. 360. In another case, it was held that a delay of seven years must be deemed an abandonment of the right to sell: *Hatch v. Kelly*, 63 N. H. 29. A delay of twelve years is inexcusable:

Gunby v. Brown, 86 Mo. 253. So a delay of ten years, unexplained to the satisfaction of the court, is unreasonable, and discharges the lien of the creditors upon the real estate: *Mays v. Rogers*, 37 Ark. 155; so a delay of fourteen years: *Jackson v. Robinson*, 4 Wend. 436. A lapse of seventeen years before application made by the administrator will bar his right: *Estate of Crosby*, 55 Cal. 574; *Estate of Godfrey*, 4 Mich. 308; *Brown v. Hanauer*, 48 Ark. 277; and so will a delay of nineteen years: *McCoy v. Morrow*, 18 Ill. 519; 68 Am. Dec. 578; as will a delay of thirteen years: *Wingert v. Wingert*, 71 Cal. 103.

Laches Generally Based on Analogy of Statute of Limitations. — In many states, the reasonable time within which the right to sell the land of the decedent to pay his debts must be exercised is fixed by analogy to the statute of limitations. This rule was laid down at an early day by the supreme court of the United States in the case of *Ricard v. Williams*, 7 Wheat. 59-110, where Justice Story said: "But we do think it is a case clearly within the same equity as those which are governed by the statute of limitations, and that, by analogy to the cases where a limitation has been applied to other rights and equities not within the statute, the reasonable time within which the power should be exercised ought to be limited to the same period which regulates rights of entry. It would be strange, indeed, that when the estate of the heirs in the land, which is but a continuation of the estate of the intestate, is extinguished by the statute, the estate should still be considered as a subsisting estate of the intestate himself; that the administrator should possess a power over the property which the intestate could not possess if living; and that a lien created by operation of law should have a more permanent duration of efficacy than if created by the express act of the party. The convenience of mankind, the public policy of protecting innocent purchasers, and the repose of titles honestly acquired, require some limitation upon powers of this nature, and we know of none more just and equitable than this, that when the right of entry to the land is gone, or the estate is gone, by an adverse possession from those who held as heirs or devisees, the whole interest in the land, the power of the administrator to make sale of the land for the payment of debts, is gone also." The same rule prevails in Connecticut: *Sumner v. Child*, 2 Conn. 607; *Gregory v. Rhoden*, 24 S. C. 90-99; and in Indiana: *Nettleton v. Dixon*, 2 Ind. 446, where the statute fixes the limit at fifteen years; *Scherer v. Ingberman*, 110 Ind. 428. In Illinois, no statute of limitations exists barring proceedings by administrators for the sale of lands to pay debts, and there the rule is well settled that the right to sell the real estate of a deceased person for such purpose will be barred after the lapse of seven years, by analogy to the statute of limitations relating to the lien of judgments and right of entry on lands, unless the delay is satisfactorily explained, and that in this respect each case must rest upon its own peculiar facts: *McCoy v. Morrow*, 18 Ill. 519; 68 Am. Dec. 578; *Unknown Heirs v. Baker*, 23 Ill. 430, (484); *Rosenthal v. Renick*, 44 Ill. 202; *Myer v. McDougal*, 47 Ill. 278; *Moore v. Ellsworth*, 51 Ill. 308; *Bursen v. Goodspeed*, 60 Ill. 271; *Wolf v. Ogden*, 66 Ill. 224; *Bishop v. O'Conner*, 69 Ill. 431; *Furlong v. Riley*, 103 Ill. 628; *McKean v. Vick*, 108 Ill. 373. In Arkansas, the rule prevails that the right of a creditor to apply for a sale of the decedent's land for payment of a probate claim accrues upon the discharge of the administrator, and is barred unless his application is filed within ten years from that time: *Brown v. Hanauer*, 48 Ark. 277.

Laches may Create Equitable Estoppel in Less Time than the Statute of Limitations. — There may be cases where the delay of the administrator or executor

in applying for an order to sell the lands of the decedent to pay his debts is "of such character and under such circumstances as will bar his right to prosecute his action in less time than that fixed by the statute of limitations. But it is only in cases where the laches are of such character and under such circumstances as to work an equitable estoppel"; *Scherer v. Ingeman*, 110 Ind. 428; *Rosenthal v. Renick*, 44 Ill. 202-205, where it is said that "in many cases a much shorter limitation might be properly applied to protect innocent purchasers against this secret lien, or even when the title is still in the heirs." So in *Gregory v. Rhoden*, 24 S. C. 90-99, McGowan, J., said: "It is true, this proceeding to make the land liable is equitable in its character, to which the statute of limitations, as such, has no proper application. But if the creditor has been guilty of laches in asserting his equity, the court may refuse him its aid, and bar the equitable remedy at a period short of that which would raise a presumption of payment."

Laches by Analogy to Statute of Non-claim against Administrator. — In many of the states, statutes exist which require that all claims against an estate must be presented to the executor or administrator thereof within a certain time after he goes into office, or from the time of his appointment, and that if not so presented, such claims are barred; and a number of the states have adopted the rule, that when the claims of creditors are barred by such statute at the time when the executor or administrator files his application to sell the land in payment of creditor's claim, then the application will be denied, unless the delay is satisfactorily explained and the claim is made within a reasonable time after the expiration of the period limited by such statute. This rule prevails in Iowa, where claims against the estate must be made within eighteen months from the time of the appointment of the administrator; and if he does not present his application to sell the land within that time, his application will be denied, unless the circumstances of the case would justify a court of equity in making an exception to the rule, in which case the application must be made within a reasonable time: *McOrary v. Tasker*, 41 Iowa, 255; *Conger v. Cook*, 56 Iowa, 117; *Hadley v. Gregory*, 57 Iowa, 157; *Orensell v. Slack*, 68 Iowa, 110. Under these decisions, a delay of from five to thirteen years has been held to be unreasonable and to amount to laches. So in Maine and Massachusetts, in consequence of the limitations of suits against administrators to four years from the time of accepting the trust, license to sell the decedent's land in payment of his debts will generally be refused, unless the application is made within the four years, or within a reasonable time thereafter, with a satisfactory explanation for the delay. In these states, the lapse of more than four years before application to sell will bar the right, in the absence of clear explanation for the delay: *Nowell v. Nowell*, 8 Me. 220; *Nowell v. Bragdon*, 14 Me. 320; *Smith v. Dutton*, 16 Me. 308; *In re Allen*, 15 Mass. 58; *Heath v. Wells*, 5 Pick. 159; 16 Am. Dec. 383; *Palmer v. Palmer*, 13 Gray, 326. The statute now limits the time to two years in which claims may be enforced against an administrator, and an application to sell the decedent's land is generally denied after the lapse of that time in making the application: *Aiken v. Morse*, 104 Mass. 277; *Tarbell v. Parker*, 106 Mass. 347; *Edmunds v. Rockwell*, 125 Mass. 363. The same rule prevails in Mississippi, where the period of limitation against the administrator is one year after publication of notice to creditors: *Ferguson v. Scott*, 49 Miss. 500. In New Hampshire, claims against an estate are barred in three years after grant of administration, except in exceptional cases, unless suit is commenced or is pending at the expiration of the three years; and the court in *Hull v. Woodman*, 49 N. H. 295-304, said: "Therefore no

because of the probate court should ever be granted to sell real estate to pay or discharge debts or claims which have been suffered to lie more than three years after administration granted without being paid, except in an exceptional case." And when an exceptional reason exists for extending the time, the administrator must make his application to sell within a reasonable time after the cause for delay has been adjusted or ceased to exist, or his application will be refused. Application to sell, filed fifteen years after his appointment, is not made within a reasonable time. In Michigan, under the same rule, the right of the administrator to sell land is barred in six years, unless some special reason for the delay is shown: *Church v. Holcomb*, 45 Mich. 23; *In re Moores*, 84 Mich. 474. In New York his right is barred in three years from the grant of administration: *Stocum v. English*, 62 N. Y. 494; *Platt v. Platt*, 106 N. Y. 488.

Laches, Rule against, when Strictly Applied. — The rule that when a claim against an estate is barred by delay in presenting it, the right of the administrator to apply for an order to sell land belonging to the estate in payment of claims is also barred, should be more strictly applied when the land has passed into the hands of the heirs or of innocent purchasers, than in cases where it still remains in the hands of the administrator: *Ferguson v. Scott*, 49 Miss. 500; *Hall v. Woodman*, 49 N. H. 296; *Creswell v. Slack*, 68 Iowa, 110; although it has been decided, in one state at least, that the right of the administrator to sell the land will not be barred by delay, where the decedent's real estate remains in the hands of the heirs: *Mowry v. Robinson*, 12 R. I. 152.

Laches under Particular Statutes. — Under special statute, in Pennsylvania, the lands of the decedent continue liable for the payment of his debts, in the hands of his widow and heirs, for five years after his death, and unless a claim is reduced to judgment within that time, it is barred by lapse of time. If reduced to judgment within the five years, the lien of the judgment continues the lien of the claim five years longer, and if the land is not sold within the ten years, the claim of the creditor and the right to sell the decedent's land in payment thereof are barred by lapse of time: *Hope v. Marshall*, 96 Pa. St. 395; *Allen v. Krips*, 119 Pa. St. 1; 125 Pa. St. 504. In North Carolina, an administrator cannot sell lands of the decedent to pay his debts, when the devisee has sold such land more than two years after the grant of administration; nor when such lands were sold by the devisee during the two years, and after its expiration sold by his vendee to a purchaser for value without notice: *Davis v. Perry*, 96 N. C. 260; *Murchison v. Whitted*, 87 N. C. 465.

Reasonable Delay, What will or will not Excuse. — The cases uniformly hold, that though by strict analogy to statutes of limitation or of non-claim against administrators, or otherwise, the right of the personal representative of the deceased or of his creditor to subject his land to the payment of his debts may be barred by lapse of time when the application to sell is made, still the delay, if reasonable, may be excused, and the application granted, when a satisfactory explanation for such delay is furnished. Thus the fact that the petition of an administrator for leave to sell real estate of the decedent for the payment of debts is not filed until some months after the expiration of the time for filing claims against the estate is sufficiently excused by showing that the property could not have been sold sooner without great sacrifice, because the value of real estate was depreciated, and there was no demand for or opportunity to sell the same: *Conger v. Cook*, 56 Iowa, 117; *Estate of Montgomery*, 60 Cal. 645. So the delay may be satisfactorily explained by showing that the estate remains unsettled, that its settlement has been necessarily delayed, and that the lands remain in the same condition as

when the decedent died, or that they remain in the hands of the heirs, and that no equities have intervened: *Moore v. Ellsworth*, 51 Ill. 308; *Bursen v. Goodspeed*, 60 Ill. 277; *In re Allen*, 15 Mass. 58; *Palmer v. Palmer*, 13 Gray, 322. So if the estate has not been closed, the will itself may furnish a satisfactory explanation for the delay, if it appears therefrom that it was not intended that the estate should be closed within the time allowed for presenting claims against it: *Church v. Holcomb*, 45 Mich. 29; *In re Moores*, 84 Mich. 474. On the other hand, a delay of ten years after grant of administration in applying for an order to sell real estate of the decedent to satisfy his widow's award is not excused by the fact that the records and files of the probate court were destroyed by fire: *Furlong v. Riley*, 103 Ill. 628. So a delay of thirteen years in making application to sell a lot assigned to the widow as part of her dower is not satisfactorily explained by the fact that she always has occupied and still continues to occupy it as her homestead: *McKeon v. Vick*, 106 Ill. 373.

GILKERSON-SLOSS COMMISSION CO. v. FORBES.

[64 ARKANSAS, 142.]

MORTGAGE OF HOMESTEAD BEFORE ISSUANCE OF PATENT. — When a person has done everything necessary under the homestead laws to entitle him to a patent for a tract of public land, he may mortgage it before the patent therefor is issued to him, and such mortgage may be enforced.

Edward H. Mathes, for the appellants.

BATTLE, J. This action was instituted by Gilkerson-Sloss Commission Company to foreclose a mortgage executed by E. Forbes and his wife upon land acquired by Forbes from the United States under the homestead act of Congress. It was executed after Forbes entered the land and made the proof of residence and cultivation necessary to entitle him to a patent, and after he had received from the proper officer a final receipt, but before the issuance of the patent, and was given to secure a note executed at the same time. The court below held that this mortgage was void, and dismissed the action.

The judgment of the lower court was evidently based on section 4 of an act of Congress entitled "An act to secure homesteads to actual settlers on the public domain," approved May 20, 1862, which provides: "No lands acquired under the provisions of this act shall, in any event, become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor." Does it sustain the judgment of the court?

When a person does everything that is necessary to entitle him to a patent for a tract of public land, he becomes the

equitable owner thereof. The land is segregated from the public domain, ceases to be the property of the government, and in the absence of limitations and restrictions legally imposed, becomes subject to private ownership, and all the incidents and liabilities thereof: *Simmons v. Wagner*, 101 U. S. 260; *Deffebach v. Hawke*, 115 U. S. 392; *Wirtz v. Branson*, 98 U. S. 118; *Carroll v. Safford*, 8 How. 441; *Myers v. Croft*, 13 Wall. 291. Section 4 of the homestead act was certainly not intended for any such restriction or limitation. But it was intended for the protection of the settler, and as an inducement to him to settle upon, cultivate, and improve the public land, by assuring him that he should not be disturbed and his land taken from him by his creditors, by virtue of legal process founded on any debt contracted before his patent was issued. The language of the section is: "No lands acquired under the provisions of this act shall, in any event, become liable," etc. Shall become "liable,"—that is, subject to be taken without express or tacit stipulation under the rules of law or equity. It was not intended as a prohibition upon the right of the settler to alienate by deed or mortgage after he becomes entitled to a patent. It would illy comport with the spirit of the act to place such a restriction upon the power of the settler. The tendency of it would be to defeat the object of the act by making the acquisition of land thereunder less desirable; for it is well known that patents do not issue in the usual course of business in the general land-office until several years after the final receipt or certificate of entry is given; and such a restriction would for many years deprive the settler of a source of credit which might, in many cases, be valuable. In short, it would be an injury to the prudent and necessitous settler, and serve no important purpose of public policy.

The limitation on the right to alienate imposed by the homestead act is confined to the period which expires when the settler becomes entitled to a patent. In order to prevent him defeating the object of the act, he is required to make an affidavit, upon applying and before he is permitted to enter, that his application to enter is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person, and after the expiration of five years to prove, by two credible witnesses, that he has resided upon or cultivated the land entered by

him for the term of five years immediately succeeding his entry, and make an affidavit that no part of the land has been alienated, except for church, cemetery, or school purposes, or for right of way for railroads. After this, there is no express limitation in the act upon the right of the settler to alienate. This clearly indicates that the intention of the act is, that he shall be free to dispose of the land as he wishes after he becomes entitled to a patent to the same.

Our conclusion is, that a creditor cannot in any manner acquire an involuntary lien on land acquired by his debtor under the homestead laws of the United States to secure a debt contracted before the issuance of the patent, but that the owner of the land can mortgage it, after he becomes entitled to a patent, to secure such debts: *Cheney v. White*, 5 Neb. 261; 25 Am. Rep. 487; *Jones v. Yoakam*, 5 Neb. 285; *Nycum v. McAllister*, 33 Iowa, 374; *Newkirk v. Marshall*, 35 Kan. 77; *Webster v. Bowman*, 25 Fed. Rep. 889; *Lewis v. Wetherell*, 36 Minn. 386; 1 Am. St. Rep. 674.

The judgment of the court below is reversed, and the cause is remanded, with instructions to sustain the demurrer to the appellees' answer, and for other proceedings not inconsistent with this opinion.

PUBLIC LANDS — MORTGAGE OF HOMESTEAD BEFORE ISSUANCE OF PATENT. — A valid mortgage may be given by one who has made entry under the homestead laws of the United States, upon the land so entered, before he has received the certificate therefor: *Lang v. Morey*, 40 Minn. 396; 12 Am. St. Rep. 748, and note; *Lewis v. Wetherell*, 36 Minn. 386; 1 Am. St. Rep. 674, and note.

WOOSTER v. CAVENDER

[54 ARKANSAS, 158.]

MORTGAGES — RELEASE BY MISTAKE — EQUITABLE RELIEF. — A prior mortgagee who, in good faith and without culpable negligence, has released the lien of his first mortgage, and has taken a second mortgage to secure his debt, in ignorance of an intermediate mortgage on the same premises, may have the lien of his prior mortgage restored in equity, provided it can be done without working hardship or injustice to innocent parties. The fact that the intermediate mortgagee has made advances after the release of the prior mortgage, with full notice of the nature of the transaction, will not bar relief.

Samuel R. Allen, for the appellant.

E. A. Bolton, for the appellees.

HEMINGWAY, J. The appellees released the lien of a prior mortgage, and took a second mortgage to secure their debt. They were ignorant that an intermediate mortgage, covering the same property, had been made to the appellant. They would not have released their prior mortgage if they had known of the one intermediate. The evidence discloses that they acted in good faith, without culpable negligence. The appellant made some advances under his mortgage, before the second mortgage of the appellees was executed, and while their first mortgage appeared upon the records as a paramount lien; as to those advances, he understood at the time that they had the paramount lien. He made further advances after the first mortgage appeared satisfied of record, but with full notice that it was satisfied only by the execution of the second; and he could not have been misled by such record satisfaction, nor have believed that the appellees intended to postpone their lien to his. As the appellees acted in good faith and without culpable neglect, under a mistake as to a material fact, it is within the ordinary powers of a court of equity to grant them relief, provided it can be done without working hardship or injustice to innocent parties: 1 Story's Eq. Jur., sec. 110; 2 Pomeroy's Eq. Jur., sec. 849.

In cases in all respects like the present, courts of equity have extended their aid and restored the lien of the satisfied mortgage; such action, we think, is sustained by correct principle, as well as by the authority of adjudged cases: *Bruse v. Nelson*, 35 Iowa, 157; *Hutchinson v. Swartsdeller*, 31 N. J. Eq. 205; *Cobb v. Dyer*, 69 Me. 494; *Campbell v. Trotter*, 100 Ill. 281; *Jones on Mortgages*, sec. 971; *Corey v. Alderman*, 46 Mich. 540; *Young v. Shaner*, 73 Iowa, 555; 5 Am. St. Rep. 701; *Robinson v. Sampson*, 23 Me. 388; *Geib v. Reynolds*, 35 Minn. 331.

The judgment is affirmed. —

REVIVAL OF MORTGAGE RELEASED BY MISTAKE. — Where a mortgage is released, and a new one taken, on property on which there was a judgment subsequent to the first mortgage, of which the mortgagee was innocently ignorant, a court of equity will decree that the new mortgage shall take precedence to such judgment: *Young v. Shaner*, 73 Iowa, 555; 5 Am. St. Rep. 701, and extended note. A mortgage canceled of record will be decreed a subsisting lien when such cancellation was made under the mistaken impression that the mortgage was satisfied: *Banta v. Freeland*, 15 N. J. Eq. 103; 82 Am. Dec. 269, and note.

WESTERN UNION TELEGRAPH CO. v. DOUGHERTY.

[54 ARKANSAS, 221.]

TELEGRAPH COMPANIES — STIPULATION LIMITING LIABILITY. — A stipulation by a telegraph company that it will not be liable unless a claim for damages is presented, in writing, within sixty days from the time the message is sent is reasonable, and will be enforced, even though the company is guilty of negligence.

U. M. and G. B. Ross, for the appellant.

Dougherty, for himself.

HUGHES, J. This is an appeal from a judgment for fifty dollars against the appellant in favor of appellee, to compensate him for damages sustained by the failure of appellant's servants to deliver a telegram sent by appellee from Newport to Clarendon, Arkansas. There was printed upon the face of the blank form upon which the telegram was written these words: "The company will not be liable for damages in any case where the claim is not presented, in writing, within sixty days after sending the message." The circuit court made the following declaration of law in the case: "The condition in reference to delay in presenting claim has no application to a failure to deliver, caused by the negligence of defendant's agents." The only controversy in the case is over the correctness of this declaration, and the solution of this depends upon the reasonableness and validity of the above stipulation on the blank of the telegraph company upon which the message was written by appellee's agent and sent over appellant's telegraph line.

It has been several times held by this court that a common carrier may limit its liability by contract, though it cannot stipulate against its own negligence or the negligence of its servants. The question is not one of power or right to make regulations, but of reasonableness of the regulations. The stipulation that the company would not be liable where the claim is not presented within sixty days was an agreement of the plaintiff with the telegraph company, and was not in violation of any statute, and if reasonable and not against public policy, was binding upon him. We know of no principle of the common law that would prohibit it. It was not a contract to cover the negligence of the telegraph company. It was a stipulation against the delay and neglect of the plaintiff in presenting his claim, and it does not appear unreasonable. By reason of the character of the business, and the

great number of messages sent over the lines of a telegraph company, and the importance of early information of claims to enable the company to keep an account of its transactions, and the impossibility of recalling them all and accounting for them from memory after the lapse of a considerable period of time, it does not appear that a stipulation that a claim for damages should be presented, in writing, within sixty days from the time the message is sent is unreasonable: *Wolf v. Western U. Tel. Co.*, 62 Pa. St. 87; 1 Am. Rep. 387; *Young v. Western U. Tel. Co.*, 65 N. Y. 163; *Cole v. Western U. Tel. Co.*, 33 Minn. 227; *Heimann v. Western U. Tel. Co.*, 57 Wis. 562.

Such a condition is not only not a stipulation against the negligence of the company, but it implies that a liability may be incurred for negligence; and it requires that one who seeks to recover damages for such negligence shall present his claim, in writing, within sixty days, or be held to have waived it. *Conventio vincit legem: Messengale v. Western U. Tel. Co.*, 17 Mo. App. 257. "When a definite term is fixed, the question of its reasonableness is to be determined by the court": *Messengale v. Western U. Tel. Co.*, 17 Mo. App. 257. In the above case, thirty days were held to be a reasonable time. And twenty days have been held sufficient.

We know of no public policy that would be violated by conceding to a competent person the right to make a reasonable contract; and it is not unlawful for such a person to limit himself to less time than would be allowed by the statute of limitations within which to assert his claim for damages for violation of a contract. Such a one may renounce a privilege allowed him by law, and such renunciation will bind him. It is said that "statutes of limitation prohibit, not the limitation of actions, but the indefinite postponement of them": *Greenhood on Public Policy*, 505; *North Western Ins. Co. v. Phoenix Oil etc. Co.*, 31 Pa. St. 448; *Wolf v. Western U. Tel. Co.*, 62 Pa. St. 87; 1 Am. Rep. 387; *Western U. Tel. Co. v. Rains*, 63 Tex. 27; see *Gray on Telegraphs*, 62.

The authorities are almost uniform in maintaining the reasonableness and validity of such a stipulation.

The third declaration of law made by the circuit court was erroneous for the reasons above indicated; wherefore the judgment is reversed, and the cause is remanded for a new trial.

TELEGRAPH COMPANIES — DAMAGES — STIPULATION LIMITING TIME FOR CLAIMING. — A telegraph company may lawfully contract that any claim for damages must be made within sixty days: *Western U. Tel. Co. v. Jones*, 95

Ind. 228; 48 Am. Rep. 713, and note; *Wolf v. Western U. Tel. Co.*, 62 Pa. St. 53; 1 Am. Rep. 387; *Western U. Tel. Co. v. Morris*, 77 Tex. 173. See extended notes to *Capehart v. Seaboard etc. R. R. Co.*, 31 Am. Rep. 510, 511; and *Western U. Tel. Co. v. Blanchard*, 45 Am. Rep. 491, 492. In *Western U. Tel. Co. v. Dunfield*, 11 Col. 335, and *Western U. Tel. Co. v. Culberson*, 79 Tex. 65, it was held that a stipulation limiting such time to thirty days was reasonable.

TURMAN v. BELL.

[54 ARKANSAS, 273.]

MORTGAGES — FORECLOSURE AGAINST EQUITABLE OWNER — PARTIES. — The equities of a grantor in an absolute deed, who retains an unrecorded defeasance, are postponed only to the lien of the subsequent mortgagee of his grantee without notice, and cannot be extinguished or foreclosed by suit to which he is not a party. He may therefore redeem from the purchaser under foreclosure, especially when he gives notice of his equities at the foreclosure sale, and prior thereto records his defeasance.

MORTGAGES — FORECLOSURE PURCHASER — SUBROGATION. — A purchaser at foreclosure sale under a mortgage succeeds to all the rights of the holder of the mortgage foreclosed.

MORTGAGES — PRIORITY AND EXTENT OF LIEN — NOTICE. — A second mortgagee with notice of his mortgagor's mortgage on the same land can enforce his lien only to the extent of his mortgagor's claim. If he is without notice, he can enforce his lien to the extent of his entire mortgage debt.

REGISTRATION — UNRECORDED DEED NEGLIGENTLY WITHDRAWN FROM RECORDER'S OFFICE IS NOT NOTICE. — Where the holder of a deed, after filing it for record, negligently withdraws it from the recorder's office before it is recorded, and before attaching thereto any certificate of its record, such deed is not notice to an innocent purchaser for value, so as to protect such holder.

NOTICE — POSSESSION BY GRANTOR AFTER CONVEYANCE AS NOTICE OF EQUITIES. — Where a grantor who has given a warranty deed continues in open and notorious possession of agricultural land at the time of the grant, and for a considerable time thereafter during crop season, subsequent purchasers are put upon notice and under duty to make inquiries as to his rights and equities in the land, unless he has, either expressly or by a recognized course of dealing, held out his grantee as authorized to convey.

PRACTICE — PARTIES. — A co-defendant to a cross-complaint must be made a party, or must appear, before his rights can be adjudicated.

NEW TRIAL IN EQUITY WILL BE GRANTED, when the case cannot be intelligently determined because both parties have without fault failed to introduce material evidence.

SUIT to remove cloud on title. Turman, the appellant, conveyed the land in dispute to one Gilbreath, as security for a loan, retaining a written defeasance. Gilbreath afterwards mortgaged the land to the National Bank. The bank fore-

closed without making Turman a party, and the appellees, Bell and others, purchased at the foreclosure sale, and afterwards brought this suit to cancel Turman's defeasance, making Gilbreath's administrator a party. Turman, by cross-complaint, asked to redeem upon payment of the debt due by him to Gilbreath's estate, but he failed to make the latter's administrator a party, nor did the latter appear. Judgment dismissing Turman's cross-complaint and canceling his deed of defeasance. Other facts appear in the opinion.

J. M. Moore, George H. Sanders, and T. P. Winchester, for the appellant.

L. P. Sandels and C. E. Warner, for the appellees.

HEMINGWAY, J. As a general rule, no person can be affected by any judicial proceeding to which he is not a party; and a judgment takes effect only between the parties, and gives no rights to or against third persons: Freeman on Judgments, sec. 154. So a foreclosure is effectual against only those persons interested in the equity who were parties; and while the foreclosure of a paramount lien conveys title, it is subject to the right of redemption of junior encumbrancers who were not parties to the proceeding: 2 Jones on Mortgages, sec. 1395. In this case, the parties have treated the transactions between Gilbreath and Turman as a mortgage, and we think properly. Turman was therefore the equitable owner of the land, and Gilbreath held the legal title only by way of security. The mortgagees of Gilbreath could not, therefore, foreclose Turman's equity of redemption in a suit to which he was not a party.

It is argued that Turman is estopped to assert his equities against the bank, the mortgagee of Gilbreath, because he permitted the bank to take its mortgage and kept his equities hidden. If the fact be as alleged, the estoppel would only operate to postpone the rights of Turman to the lien of the bank. It would not extinguish his rights or authorize the bank to foreclose them by a suit to which he was a stranger.

It is further argued that he is estopped to assert his equities against the plaintiffs, purchasers at the foreclosure sale, because he permitted them to purchase without disclosing his interest. This contention, we think, rests upon no basis of fact. Before the sale under the decree, he filed with the recorder, and had recorded, Gilbreath's deed of defeasance, and

that gave notice of his rights under it to all persons dealing with the property. Moreover, he was present at the sale, and before the land was offered he gave notice of his equities to all persons in attendance. It is true that there is a conflict of evidence as to the latter fact, but we think the fair preponderance sustains our statement. He testified positively that he gave the notice by reading a paper which he had previously prepared. To strengthen his statement, he produced the paper and incorporated it in his testimony. His narrative is either true or corruptly false; for if he in fact did not give the notice, he could not believe that he had given it, or innocently produce as a paper read one which in fact he had not read. He is corroborated in his statement by a number of witnesses. On the other side, several witnesses testified that they heard him read no such notice, and one testified that he did not read it. They may be honest, and nevertheless Turman's statement may be true. That he read one notice all agree; and it may be that, although he read another, these witnesses failed to observe that the reading included more than one paper. Or, as several years intervened between the day of sale and that of testifying, they may not have recalled on the latter date all that they observed on the former.

So we hold that Turman had an interest in the property of which he could not be deprived by a foreclosure to which he was a stranger, and that he is not estopped to assert it in a proceeding to redeem from the purchaser under the foreclosure.

Upon what terms is he entitled to redeem? In approaching that question, it may be well to say that the plaintiffs, as purchasers at the foreclosure sale, succeeded to all the rights of the bank as holder of the mortgage foreclosed: 2 Jones on Mortgages, sec. 1395, and cases cited. What those rights were as against Turman, we shall now proceed to consider.

If the bank took the mortgage with notice that Gilbreath held the lands only by way of security, and that the equitable title was in Turman, then the rights conferred by the mortgage could not be greater as against Turman than Gilbreath actually held. If, on the contrary, Turman invested Gilbreath with the legal title to the land and clothed him with the *indicia* of absolute ownership, and the bank took its mortgage without notice of his qualified rights, then Turman cannot set up his claim to prejudice the collection of its mortgage debt. That does not imply that Turman may not set up his right to redeem as against the mortgage, but only that he cannot set

it up so as to prejudice or defeat the collection of the claim secured. We hold that if the bank took the mortgage with the notice of Turman's rights, it can collect from the land no more than Gilbreath could; but if it took without notice, it can collect the entire amount due on its mortgage.

Turman contends that the bank took with notice given, — 1. By the filing of the instrument of defeasance for record, and 2. By his open and notorious possession of the land, continued from the time that Gilbreath received his deed until the bringing of this suit.

The facts as bearing upon the alleged notice by registry are: that on the day the defeasance was executed, — being about one month after the execution of the deed, — Turman left it with the recorder of the county to be recorded, and it was then indorsed by the recorder as filed for record. Some time afterwards (the date cannot be definitely fixed from the proof), Turman called for the defeasance, and it was delivered to him by the recorder. It had not been recorded, and there was attached to it no certificate of the recorder that it had been. Subsequently, after having made a search of the records which failed to discover the defeasance, the bank took its mortgage. It appears that the bank had no knowledge of the defeasance. Turman believed that it had been recorded, and did not discover his mistake until after the bank obtained the decree of foreclosure. Upon these facts, it is contended that notice of the defeasance was given from the time it was filed for record. That contention is supported by the decision of this court in the case of *Oats v. Walls*, 28 Ark. 244; and if it is to be followed without limitation, it is decisive of this case. In the opinion in that case, the court used the following language: "In this case, Oats took his deed to the proper office, placed it in the hands of the person there in charge, and paid the fees for recording; this was all he was required to do. And any acts thereafter to be done to perfect the record and make the notice full to all subsequent purchasers, etc., devolved upon the clerk, and could not operate to the prejudice of the mortgagees."

That the holder of the deed has done all that is necessary under our registry laws to give notice of its contents when he files it for record, and that the subsequent misconduct or neglect of the recorder cannot prejudice his rights, is the established law. But while such holder is exempt from prejudice by the misconduct or neglect of the clerk, we do not think the exemption should extend to his own acts that through de-

sign or negligence affect others. If A should file a deed to be recorded, and the recorder should so indorse it, and A should immediately take it out of the office, it would not be contended that such filing imparted any notice. Suppose that A, instead of taking the deed immediately after it is indorsed by the officer, should remain long enough in the office for the officer to record it, and should then take it out, knowing that it had not been recorded, would any one contend that such filing imparted notice to subsequent purchasers from A's grantor? If not, then if A took the deed out of the recorder's office without knowing whether it had been recorded or not, and when he might have known, by examining it for a recorder's certificate, that it had not been recorded, can he insist that such filing imparts notice to subsequent *bona fide* purchasers? The statute requires, when a deed has been recorded, that the recorder attach to it a certificate of the fact of record. When the owner takes a deed from the recorder's office, he can easily ascertain either that the certificate is or is not attached; and if it is not, he has no right to conclude that the deed has been recorded or to remove it from file. If he remove his deed before it is recorded, he places it in the power of the grantor to exhibit a clear title, and thus to mislead and deceive subsequent purchasers. By the exercise of slight care and caution, he could have averted such a possibility; but if he fails to do it, persons ignorant of the deed, who have examined the records, may be induced to purchase, when they have exhausted all usual means of inquiry and information. If they do thus purchase, a loss must be borne. Where should it fall? Upon him whose care and caution could not prevent it, or upon him whose slight care and caution would have prevented it? The question implies its own answer. The party whose negligence made the loss possible should bear it, and should be estopped to set up his prior right against the party without fault.

The doctrine of constructive notice by registration rests upon the idea that all persons may learn and actually know that of which the law gives notice and implies knowledge; and it would contravene every principle of right and fair dealing to permit one to insist upon this constructive notice, and claim the benefit of this implied knowledge, when his act had made such knowledge unattainable. We do not think the filing gave the bank notice of Turman's defeasance.

These are our views, after a careful and serious consideration of *Oats v. Walls*, 28 Ark. 244. The cases cited in support

of that case have been examined and scrutinized by us, and do not conflict with the views herein expressed. In them it was held that where the holder of a deed filed it for record, and subsequent adverse interests were created before it was recorded, the notice was complete by the filing; but they were cases in which the failure to record was due to the delay of the recorder, the loss or destruction of the deed, or its abstraction from the files; in none of them did there enter the element of the owner's misconduct, either willful or negligent. In so far as that case holds that a deed is notice of its provisions from the time it is filed for record, and that the effect of such notice cannot be impaired by the misconduct of the officer, it is approved; but in so far as it holds that the notice continues, as against those who in good faith and for value acquire adverse interests after the deed, unrecorded and without a certificate of record, is withdrawn from the files, it is overruled.

Turman continued in the possession of the lands from the date of his deed to Gilbreath, in August, 1884, until the execution of the mortgage to the bank, in February, 1885,—in fact, until the trial of this cause in the court below; and it is contended that this gave notice of all his rights. As a general rule, the possession of land gives notice to all the world of the rights of the occupant, when there is no record evidence of his right of possession; but to this rule there are well-established exceptions. Whether the continuing possession of a grantor, after he has executed a deed of general warranty, comes within the rule or its exceptions was suggested, but not decided, by this court in the case of *Gill v. Hardin*, 48 Ark. 409. We know of no other case in which the question has been alluded to by this court. Between the appellate courts of other states there is an irreconcilable conflict of ruling, and upon either side are to be found courts of the highest authority.

Those that sustain the application of the rule say that, by the terms of the deed, the grantor has not the right of possession, and that his continuing possession gives notice that he has rights reserved not expressed in the deed; that inasmuch as the records disclose no right of possession, it is but reasonable to conclude that the continuing possession rests upon some right not disclosed by the records, and that the reasonableness of such conclusion imposes upon persons about to deal with the land the duty to make inquiry: *Illinois Central Ry Co. v. McCullough*, 59 Ill. 166; *Daubenspeck v. Platt*, 22

Cal. 330; *New v. Wheaton*, 24 Minn. 406; *Hopkins v. Garrard*, 7 B. Mon. 312; *Webster v. Maddox*, 6 Me. 256; *Seymour v. McKinstry*, 106 N. Y. 230; *Wright v. Bates*, 13 Vt. 341.

On the other side, it is said that the execution of a warranty deed, without reservation, is a most solemn declaration by the grantor that he has parted with all his rights in the property, and directly negatives the reservation of any right; that those who see the deed are warranted in relying upon such declaration as much as if it had been made to them orally upon an inquiry; and that if they acquire interests in faith of such reliance, the grantor in possession will be estopped to assert any right secretly reserved from the grant; that as the grantor has declared that he parted with his entire estate, strangers about to deal with the property would reasonably refer his continuous possession to the sufferance of the grantee, and would not reasonably think to refer it to a reserved right: *Eylar v. Eylar*, 60 Tex. 315; *Van Keuren v. Central R. R. Co.*, 38 N. J. L. 165; *Scott v. Gallagher*, 14 Serg. & R. 333; 16 Am. Dec. 508; *Jaques v. Weeks*, 7 Watts, 261; *Koon v. Tramel*, 71 Iowa, 132; *Bloomer v. Henderson*, 8 Mich. 404; 77 Am. Dec. 453.

If the possession has continued after the making of the deed but a short time, it might be reasonably referred to the sufferance of the grantee; but where it was long continued, it would much more strongly imply a right in the occupant, and the implication would be sufficient to cast upon strangers the duty of inquiry. Where the lands were used for agriculture and sold during a crop season, it would not be reasonable to presume that the grantee would permit the grantor to hold by sufferance after the time when lands were usually entered upon for the purpose of the next year's cultivation; and possession continued after that time could not be explained upon the presumption of sufferance.

We think, with all deference to those who deny the application of the rule in such cases, that the controlling fact upon which their argument proceeds is assumed. Ordinarily, the terms of a general warranty deed import a declaration that the grantor has reserved no rights in the subject of the grant, and by themselves may always bear such implication. But possession is ordinarily notice of a claim of right; and where a grantor continues in possession at the time of the grant and for a considerable time thereafter, should not the fact of possession be construed as an assertion of reserved rights, and as a limitation upon the provisions of the deed? True, the deed

alone denies the reservation of equities, but it denies equally the right to continue in possession. If the grantor then holds open possession against the terms of his deed, is it not a reasonable implication that he has rights not expressed in it? If possession thus qualifies the terms of the deed, and it is open and continued, then the doctrine of estoppel cannot apply, for the grantor may as well expect persons to take notice of his possession as of his deed. We conclude that open and notorious possession of the lands by Turman from the date of his deed till the date of the bank's mortgage would give notice to the bank. But such notice only imposes a duty to make inquiry as to the rights of the occupant; and if he explain his possession in consonance with the right of his grantee to convey, he cannot attack the conveyances of the latter. If Turman held out Gilbreath as authorized to convey the land, either expressly or by a recognized course of dealing, then the bank would have been warranted in treating Turman's possession as in subordination to Gilbreath's right to convey, and would not be prejudiced by the notice.

It appears in a general and indefinite way that Gilbreath made sales of portions of the property conveyed to him by Turman, but the evidence does not disclose the dates or circumstances thereof; and we cannot determine what effect they should have upon the notice by possession. Moreover, the parties directed their attention to the development of the facts with reference to the filing and withdrawing from file of the instrument of defeasance, and did not fully develop the facts relative to Turman's continued possession. They treated the case of *Oats v. Walls*, 28 Ark. 244, as settling the law of notice by registry, and limited their evidence to the good faith of Turman in withdrawing his unrecorded defeasance from the files. Justice demands that further proof be permitted to supply the omission as to the matters above indicated.

It is contended, and the record contains suggestions, that Turman received a part of the money secured by the bank mortgage, in addition to the amount he owed Gilbreath; if so, he can redeem only by paying it as well as his original debt. But if the mortgage represented money borrowed by Gilbreath for his own use, or for the purpose of discharging debts of Turman which he was bound by the terms of his agreement with Turman to pay, then the amount charged on the land in favor of plaintiffs should be credited on Turman's debt to Gilbreath.

It does not appear that Gilbreath's administrator was made a party to Turman's cross-complaint, or that he appeared to it. In order that the rights of the parties may be fully adjudicated, he should be made a party.

We do not usually remand an equity cause for a new trial; but we should vary the practice where it is obvious that a cause cannot be otherwise intelligently determined, and such condition exists without fault of the parties. We therefore reverse the judgment for the reasons indicated, and remand the cause for further proceedings and retrial.

MORTGAGES — FORECLOSURE AGAINST PARTIES HOLDING EQUITABLE INTERESTS. — Holders of outstanding tax liens may, in Kansas, be brought in and their validity determined in a suit to foreclose: *Broquet v. Warner*, 43 Kan. 48; 19 Am. St. Rep. 124. No valid decree for the sale of the property can be obtained at foreclosure against an equitable owner unless he has had his day in court: *Goodenow v. Ewer*, 16 Cal. 461; 76 Am. Dec. 540, and note; *Boggs v. Fowler*, 16 Cal. 559; 76 Am. Dec. 561, and note. Parties interested in the subject-matter of a suit in equity to foreclose must be brought in as parties, though their interests are different: *Wolf v. Ward*, 104 Mo. 127; *Hill v. Townley*, 45 Minn. 167.

MORTGAGES — RIGHTS OF PURCHASER AT FORECLOSURE SALE. — The purchaser at a foreclosure sale is entitled to be subrogated to all the rights which the mortgagee originally had: *Dutcher v. Hobby*, 86 Ga. 198; 22 Am. St. Rep. 444; *Anson v. Anson*, 20 Iowa, 55; 89 Am. Dec. 514, and note.

MORTGAGES — RIGHTS OF JUNIOR MORTGAGEE. — A junior mortgagee who was not made a party to a foreclosure suit by the senior mortgagee, and who has notice of his rights, may foreclose against the mortgagor, or may redeem from the first mortgagee or his assignee: *Anson v. Anson*, 20 Iowa, 55; 89 Am. Dec. 514, and note. See *Maloney v. Eakehart*, 81 Tex. 281.

DEEDS — REGISTRATION AS NOTICE. — The mere depositing of a deed for record does not constitute notice to the public. It must be duly recorded and indexed: *Büchle v. Griffiths*, 1 Wash. 429; 22 Am. St. Rep. 155, and note. An unrecorded deed is not notice to creditors: *Wilkins v. Bevier*, 43 Minn. 213; 19 Am. St. Rep. 238, and note. And the same rule applies in the case of subsequent purchasers: *Anthony v. Wheeler*, 130 Ill. 128; 17 Am. St. Rep. 281, and extended note; *Slater v. Moore*, 86 Va. 26; *Robertson v. Durden*, 89 Ala. 500; *Thomas v. Burnett*, 128 Ill. 37.

REAL PROPERTY — OCCUPATION AS NOTICE OF TITLE. — The occupation of property by a tenant is notice to a judgment creditor of the landlord's title thereto: *Wilkins v. Bevier*, 43 Minn. 213; 19 Am. St. Rep. 238, and note. The possession of real estate is constructive notice of the title of the occupant: *Johnson v. Glancy*, 4 Blackf. 94; 28 Am. Dec. 45, and note. Continued possession under an unrecorded deed gives rights prior to those of a subsequent recorded deed: *Daniel v. Hester*, 29 S. C. 147.

CHRISMAN v. STATE.

[34 ARKANSAS, 282.]

ASSAULT WITH INTENT TO KILL — PROOF OF INTENT. — Under an indictment for assault with intent to kill, the specific intent must be proved. It will not be presumed from proof of an assault with a deadly weapon without provocation.

ASSAULT WITH INTENT TO KILL — INTENT QUESTION FOR JURY. — On the trial of an indictment for assault with intent to kill, it is clearly within the province of the jury to consider the nature of the weapon used and the manner of using it, together with all the other circumstances in the case, in determining whether or not the assault was committed with the intent alleged.

INTOXICATION AS DEFENSE TO CRIME. — Voluntary intoxication will not excuse the commission of a criminal act; yet where a person is accused of a crime which can be committed only by doing a particular thing with a specific intent, it may be shown, in defense, that at the time of doing the act charged, the accused was so drunk that he could not have entertained the intent necessary to constitute the offense.

A. S. McKennon and J. E. Cravens, for the appellant.

W. E. Atkinson, attorney-general, for the appellee.

MANSFIELD, J. The appellant was convicted of an assault with intent to kill and murder F. J. Stanfield. The statute under which the indictment was found declares that "whoever shall feloniously, willfully, and with malice aforethought assault any person, with intent to murder or kill, . . . shall, on conviction thereof, be imprisoned in the penitentiary not less than three nor more than twenty-one years": Mansfield's Digest, sec. 1567. It has been frequently held by this court that an indictment under this section of the criminal law cannot be sustained, unless the evidence would have warranted a conviction for murder if death had ensued from the assault charged to have been committed: *Lacefield v. State*, 34 Ark. 275; 36 Am. Rep. 8, and cases there cited. But it has never been ruled here that such evidence will in every case be sufficient. On the contrary, the decision in the case of *Lacefield v. State*, 34 Ark. 275, 36 Am. Rep. 8, and that in *Scott v. State*, 49 Ark. 156, both distinctly recognize the doctrine laid down by Bishop, that an attempt to commit a crime, such as the attempt charged in this indictment, is an offense consisting of two elements. — "an evil intent and a simultaneous resulting act." Commenting on this class of crimes, Mr. Bishop says: "When we say that a man attempted to do a thing, we mean that he intended to do, specifically, it, and proceeded a certain way in the doing. The intent in the

mind covers the thing in full; the act covers it only in part. Thus to constitute murder, the guilty person need not intend to take life; but to constitute an attempt to murder, he must so intend. . . . The intent must be specific to do some act which, if it were fully performed, would constitute a substantive crime. Therefore . . . general malevolence is not sufficient, even though of a sort which, added to the appropriate act, would constitute an ordinary substantive offense." After further comment on this subject, the same author says: "The doctrine of an intent in law, differing from the intent in fact, is not applicable to these technical attempts; and if the prisoner's real purpose were not the same which the indictment specifies, he must . . . be acquitted. . . . For the charge is, that the defendant put forth an act whose criminal quality or aggravation proceeded from a specially evil intent prompting it; and in reason, we cannot first draw an evil intent from an act, and then enhance the evil of the act by adding this intent back again to it": 1 Bishop's Crim. Law, secs. 729-731, 735. In *Lacefield v. State*, 34 Ark. 275, 36 Am. Rep. 8, the court said, that while "it is true that every person is presumed to contemplate the ordinary and natural consequences of his acts, such presumption does not arise where the act fails of effect, or is attended by no consequences; and where such act is charged to have been done with a specific intent, such intent must be proved, and not presumed from the act." As an application of this doctrine, it was held in that case that where one, "intending to kill A, shoots and wounds B, . . . he cannot be convicted of an assault with intent to kill B." In *Scott v. State*, 49 Ark. 156, the defendant was charged with an assault upon one Bannister, with intent to kill and murder him; and the trial court instructed the jury that if they believed from the evidence that the defendant shot at some one other than Bannister, or if they had "a reasonable doubt as to whom the defendant intended to shoot," they should acquit the defendant, unless they further found from the evidence that the defendant shot into the house of Bannister, and into a crowd where he (Bannister) was at the time situated, without provocation, and when all the circumstances of the shooting showed an abandoned and wicked disposition and a reckless disregard of human life." But this court held that as the "essence" of the crime charged was the specific intention to take the life of Bannister, it was necessary to prove the intent laid in the indictment to the satisfaction of the jury; and the

judgment was reversed on the ground that the concluding portion of the charge quoted above was "liable to mislead the jury into the belief that proof of the particular intent alleged could be dispensed with."

In this case, the evidence shows that the defendant assaulted Stanfield with a knife, inflicting upon the person of the latter a dangerous wound. The testimony furnishes no description of the knife used by the defendant; but from the nature of the wound received by Stanfield, and from what is said of the knife, it may well be inferred that it was a deadly weapon. There was evidence showing that the defendant was intoxicated at the time of making the assault, and that he had been drinking to excess for about four weeks. It was also shown that he had been intemperate for several years; and one of the witnesses stated that when intoxicated he seemed to be irrational, and had the appearance of "a raving maniac." Another stated that for a week or more before the assault on Stanfield, the defendant did not appear to know "what he was about." Others described his condition during the same time by saying that they did not think he "was at himself." Several witnesses, however, on the part of the state, testified that although drunk at the time of the assault, the defendant did not appear to be irrational. The court, against the defendant's objection, gave to the jury the following instruction:—

"5. If the jury believe from the evidence that the defendant assaulted and stabbed the prosecuting witness with a knife, calculated ordinarily to produce death, without provocation, the law presumes that he did it with the felonious design to kill; and the burden of proof is on the defendant to show to the contrary, either by proof on the part of the state or defense."

Tested by the ruling of this court in the cases cited above, and by numerous decisions in other states having statutes similar to that on which the indictment is based, this instruction was erroneous. Whether the defendant assaulted Stanfield with the specific intent alleged in the indictment was a question of fact which it was his right to have determined by the jury, upon the whole evidence in the cause. But, under the instruction copied above, the jury were at liberty to presume the existence of a felonious intent to kill, from the facts mentioned in the court's charge, without considering any others. We do not hold that it would have been improper to

instruct the jury that the defendant should be presumed to have intended the natural and probable consequences of his act in stabbing the prosecuting witness. For it was clearly the province and duty of the jury to consider the nature of the weapon used by the defendant, and his manner of using it, together with all the other circumstances of the case, in determining whether the assault was in fact committed with the intent alleged in the indictment: 1 Bishop's *Crim. Law*, sec. 735, note 1. But the objectionable charge shifted the burden of proof as to the question of such intent, which would still remain for the determination of the jury, although they believed that the facts recited by the court's instruction had been established by the evidence: *Ogletree v. State*, 28 Ala. 693; *State v. Neal*, 37 Me. 468; 1 Starkie on Evidence, 10th ed., 72; *State v. Jefferson*, 3 Harr. (Del.) 571.

We do not think it necessary to review on this appeal the other rulings of the circuit court complained of by the defendant. But as the cause must be remanded, we think it proper to say, that although voluntary drunkenness cannot, as the jury were told by the court, excuse the commission of a criminal act, yet where a person is accused of a crime such as can be committed only by doing a particular thing with a specific intent, it may be shown that at the time of doing the thing charged the accused was so drunk that he could not have entertained the intent necessary to constitute the offense: 1 Bishop's *Crim. Law*, sec. 413. Thus in *Wood v. State*, 34 Ark. 341, 36 Am. Rep. 13, it was held that "if one at the time of taking property is so under the influence of intoxicating liquor that a felonious intent cannot be formed in his mind, he is not guilty of larceny." The law on this subject is further illustrated by a ruling in *Casat v. State*, 40 Ark. 511. In the latter case, it was held that voluntary intoxication cannot reduce murder in the first degree to a lower degree of homicide, unless it is accompanied by a temporary destruction of reason, and that it is not sufficient to prove a condition of mere nervous excitement produced by drinking.

For the error we have indicated, the judgment must be reversed, and the cause remanded for a new trial.

ASSAULT WITH INTENT TO KILL — PROOF OF INTENT. — An assault with a deadly weapon does not raise a presumption of intent to kill, where no killing follows: *Patterson v. State*, 85 Ga. 131; 21 Am. St. Rep. 152, and note; and the specific intent which is an essential element of the crime charged must be proved: *Wessner v. People*, 132 Ill. 536; *State v. Child*, 42 Kan. 611; *People*

v. Chin Eng Quong, 79 Cal. 553. The intent to commit a crime is presumed whenever the means used are such as would ordinarily result in the commission of the forbidden act: *Hugh v. State*, 26 Tex. App. 545; 8 Am. St. Rep. 488; *Englehardt v. State*, 88 Ala. 100; *State v. Musick*, 101 Mo. 261. Intent at the time of the assault is a question for the jury to decide upon: *Hall v. State*, 9 Fla. 203; 76 Am. Dec. 617.

CRIMINAL LAW—INTOXICATION AS A DEFENSE TO CRIME.—Voluntary intoxication is no excuse for committing a crime: *State v. Shores*, 31 W. Va. 491; 13 Am. St. Rep. 875, and note; unless it is proved that at the time the offense was committed, he was too drunk to form an intent: *Walker v. State*, 85 Ala. 7; 7 Am. St. Rep. 17, and note; *State v. Hanton*, 62 Vt. 224. See extended note to *Flanigan v. People*, 40 Am. Rep. 560-570.

ST. LOUIS, IRON' MOUNTAIN, AND SOUTHERN RAILWAY COMPANY v. DAVIS.

[54 ARKANSAS, 389.]

RAILROADS—RISKS ASSUMED BY EMPLOYEE—UNBLOCKED FROGS.—Where an employee enters the service of a railway company, knowing that it uses nothing but unblocked frogs, he assumes the risks incident to their use, and cannot recover for an injury therefrom, although the duty of reasonable care would require the company to substitute blocked for unblocked frogs, to promote the safety of its employees.

MASTER AND SERVANT—SAFE MACHINERY—RISKS ASSUMED BY EMPLOYEE.—When a master employs a servant to do a particular work, with a particular kind of implement or machine, he agrees that it is sound, and fit for the purpose intended, so far as ordinary care and prudence can discover, but not that it is free from danger in its use. The servant agrees to use in the service the particular kind of implement or machine furnished, and if he is injured, his injury must be ranked among the risks of the employment assumed by him in entering the service.

MASTER AND SERVANT—RISKS ASSUMED BY SERVANT.—An employee, when he enters into service, agrees to assume all risks ordinarily incident to his employment; and if he is of mature years, experienced in the business undertaken, and knows what instrumentalities are to be used by him, he assumes the risks incident to their use, as well as any other risk incident to the business. If the master uses proper care in providing the kind of instrument contemplated, the employee cannot complain, although some other kind would have been less dangerous.

RAILROADS—LIABILITY FOR DEFECTIVE MACHINERY.—When a railway employee is injured while using a draw-head which has a patent structural defect, he is entitled to recover without proof that the company had notice of such defect; but if the defect has occurred so recently as to exist in spite of all proper care on the part of the company, the employee is not entitled to recover.

ACTION to recover for personal injuries resulting in death. They were received by one Davis, a brakeman in the employ of the appellant company, while uncoupling a car, and were

alleged to have been caused by reason of a defective and unsafe coupling, and a dangerous and unblocked frog or switch, which detained him longer than was usual or necessary on the railway track, where he was run over by the cars and killed. The court instructed the jury as follows: "1. It was the duty of defendant to exercise reasonable care and prudence to furnish and keep safe tools and appliances for its employees to use in carrying on its business of running trains; and if you believe from the evidence that defendant neglected to perform this duty, and that by reason thereof Davis, while in the performance of his duties as an employee of the defendant, was killed, without fault or neglect on his part contributing directly thereto, you must find for the plaintiff; 2. Davis did not forfeit the right to recover for injuries, if any occurred by reason of defendant's neglect of duty, from merely using defective appliances, unless the defect was so apparent that a prudent man would not have continued in defendant's employ while such appliances were in use; nor does the knowledge of Davis that open frogs were used excuse defendant, if such frogs were defective or improper appliances, and caused the injury, unless you believe that the defect was such as that it was known to Davis, or ought, in the exercise of ordinary care, to have been known to him, to be dangerous and unsafe to remain in defendant's employ while such frogs were used; 4. If the jury believe from the evidence that defendant furnished to Davis a defective draw-head and coupling-pin, and knew, or by reasonable diligence should have known, of such defect, and that by reason thereof, while in the performance of his duty as a brakeman of defendant, Davis was delayed in his efforts to uncouple the cars, and while so engaged, and in consequence of such delay, he, without negligence on his part, was caught in a frog and injured, and that he would not have been caught and injured if the coupling had not been defective, you must find for the plaintiffs." Other facts are stated in the opinion. Judgment for plaintiff. Defendant appealed.

Dodge and Johnson, for the appellant.

Blackwood and Williams, and Samuel W. Williams, for the appellee.

HEMINGWAY, J. Whether the defendant would have promoted the safety of its operatives by substituting upon its road blocked for unblocked frogs, and whether its duty of reasonable care exacted this, are questions that cannot affect the

result in this case. The plaintiff charges negligence in the use of unblocked frogs, not because they were badly constructed, out of repair, or exposed operatives to latent dangers, but because a different kind of frog would have been less dangerous to operatives. Unblocked frogs were in universal use on the roads in this state, including the entire road of the defendant. The injured employee knew, when he entered the defendant's service, that its frogs were unblocked; and if there was danger in their use, he knew it was an incident to the service he was entering. When a master employs a servant to do a particular work with a particular kind of implement or machine, he agrees that they are sound, and fit for the purpose intended, so far as ordinary care and prudence can discover, but does not agree that they are free from danger in their use. The servant agrees to use in the service the particular kind of implement or machine, and if, under such circumstances, harm comes to him, it must be ranked among the risks he assumed when he entered the service: *Lake Shore etc. R'y Co. v. McCormick*, 74 Ind. 447; *McGinnis v. Canada S. B. Co.*, 49 Mich. 466; *Sweeney v. Berlin etc. Co.*, 101 N. Y. 520; 54 Am. Rep. 722; *Diehl v. Lehigh Iron Co.*, 140 Pa. St. 487. Such is the express holding of the courts of Massachusetts, Illinois, and Kansas in cases in which the negligence charged was in the use of unblocked frogs: *Chicago etc. R. R. Co. v. Lonergan*, 118 Ill. 41; *Wood v. Locke*, 147 Mass. 604; *Rush v. Missouri Pac. R'y Co.*, 36 Kan. 129; and this court so ruled in the case of *Davis v. Railway Co.*, 53 Ark. 117. See *Grand v. Michigan Cent. R. R. Co.*, 83 Mich. 564.

We think confusion has sometimes crept into cases like this from the effort to determine them by the rules of contributory negligence. We do not think they necessarily furnish the correct criterion for determination, but that the contract of employment is a necessary element of consideration. It is an elemental principle that an employee, when he enters into service, agrees to assume all risks ordinarily incident to his employment; and if he is of mature years, experienced in the business undertaken, and knows what instrumentalities are to be used by him, he contracts that he will assume the risks incident to using that class of instrumentality, as well as any other risk incident to the business; and if the master uses proper care in providing the kind contemplated, the employee cannot complain, although some other kind would have been less dangerous; his contract hushes his complaint, regardless

of the employer's negligence. Such case is to be distinguished from that of the traveler upon a highway who encounters an obstruction negligently erected by another, which he reasonably believes he can pass in safety, but is injured in attempting it, as was the case in *St. Louis etc. R'y Co. v. Box*, 52 Ark. 368; for in the latter case, the right of recovery is unfettered by the doctrine of assumed risks, and will be defeated only if the negligent act of the traveler contributed to his injury. Whether it can be distinguished from the cases in other states, where an employee continued service after an instrumentality fell out of repair, and thereby received injury, is a question we need not consider: See *Snow v. Housatonic R. R. Co.*, 8 Allen, 441; 85 Am. Dec. 720; *Patterson v. Pittsburg R. R. Co.*, 76 Pa. St. 389; 18 Am. Rep. 412; *Colorado Central R. R. Co. v. Ogden*, 3 Col. 500; *Lasure v. Graniteville Mfg. Co.*, 18 S. C. 276. As the deceased took employment contemplating the use of unblocked frogs, no instruction should have been given as to negligence predicated upon that fact, and the court erred in giving the first and third instruction on the prayer of the plaintiff.

Defendant insists that the court erred in giving plaintiff's fourth instruction, for the reason that there was no evidence to justify it. We think otherwise. The deceased went between two cars to uncouple them; while thus engaged, he was injured. There was evidence that he attempted to draw the coupling-pin while the cars were slowly moving, and that the pin was fast, and detained him in this attempt until he reached a frog, where his foot was caught, and the injury done. It also tended to show that the hole in which the pin rested was too small, and held the pin fast, and that this was the reason why it was not drawn before the frog was reached. If this is true, it tended to prove a discoverable structural defect in the draw-head, and was proper for the jury to consider in determining whether the injury was caused by defendant's negligent failure to furnish safe cars. If there had been no evidence except as to the depression of a draw-head, the instruction would not have been justified, for there was no proof that the defendant knew or could have known of it. It might well have occurred during that trip, and existed in spite of all proper care by defendant; and as the burden of proof was on plaintiff, it would not justify a finding of negligence: *St. Louis etc. R'y Co. v. Gaines*, 46 Ark. 567.

Reversed, and remanded for a new trial.

MASTER AND SERVANT—DANGEROUS APPLIANCES—RISKS ASSUMED BY SERVANT.—Where a servant knows that the appliances used by the master are defective and dangerous, and continues to use them without any promise of change by the master, he assumes all risks therefrom: *Boddy v. Missouri P. R'y Co.*, 104 Mo. 234; 24 Am. St. Rep. 323, and note; *Wender v. Baltimore etc. R. R. Co.*, 32 Md. 411; 3 Am. Rep. 143, and extended note; *Faber v. Carlisle Mfg. Co.*, 126 Pa. St. 388; *Pollich v. Sellers*, 42 La. Ann. 623; *Yates v. McCullough etc. Co.*, 69 Md. 370; *Bemis v. Roberts*, 143 Pa. St. 1; *Radmann v. Chicago etc. R'y Co.*, 78 Wis. 22.

MASTER AND SERVANT—RISKS ASSUMED BY THE SERVANT.—A servant assumes the ordinary risks of the employment: *Augerstein v. Jones*, 129 Pa. St. 174; 23 Am. St. Rep. 174, and note, where the cases on this subject are collected; *Dartmouth etc. Co. v. Achord*, 84 Ga. 14. See note to *Murray v. South Carolina R. R. Co.*, 36 Am. Dec. 281, 282.

MASTER AND SERVANT—LIABILITY FOR DEFECTIVE MACHINERY.—If there are increased perils in a business by reason of the use of defective appliances, of which the servant had no knowledge, and he is injured thereby, he can recover from the master: *Johnson v. First Nat. Bank*, 79 Wis. 414; 24 Am. St. Rep. 722, and note; note to *Eureka Co. v. Bass*, 60 Am. Rep. 157; extended note to *Kelley v. Silver Spring Co.*, 34 Am. Rep. 621-625; extended note to *Chicago etc. R. R. Co. v. Swift*, 92 Am. Dec. 213; extended note to *Bumell v. Laconia Mfg. Co.*, 71 Am. Dec. 218-225; *Pittston Coal Co. v. McNulty*, 120 Pa. St. 414; *Burns v. Ocean S. S. Co.*, 84 Ga. 709.

SIMPSON v. GRAYSON.

[54 ARKANSAS, 404.]

SEDUCTION—DAMAGES FOR.—A FATHER may maintain his action for damages for the seduction of his minor daughter, although she is not a member of his household, but is in the actual employment of another, enjoying the fruits of her labor with her father's consent, if he has not relinquished, past the power to recall, his right to control her services.

SEDUCTION—MEASURE OF DAMAGES—EVIDENCE OF PREVIOUS UNCHASTITY.—In an action by a father to recover damages for the seduction of his minor daughter, he is entitled, as master, to recover for the loss of her services and her lying-in expenses, and also, as parent, for the shame and mortification which the wrong brings upon him and his family if his daughter was previously chaste; but proof of her previous unchastity is admissible in mitigation of the damages due him as parent; and if it is proved that she was notoriously unchaste prior to defendant's intercourse with her, and had thereby disgraced her family to such extent that defendant's conduct added nothing to her parent's suffering, or to the danger of corrupting the family's morals, no damages can be awarded beyond those suffered by the father as master.

ACTION by a father to recover damages for the seduction of his minor daughter while she was living at defendant's house, working for wages. While she was in the employ of the defendant she was subject to her father's right of recall, and he

had not emancipated her, although he did not receive any part of the wages paid her. After the daughter's return from defendant's employment, she was delivered of a child. The expenses of her confinement were alleged by her father to be thirty dollars, and his loss of services fifty dollars, besides great mental suffering on account of his daughter's condition. Judgment for \$750 in favor of plaintiff. Defendant appealed.

F. G. Taylor and W. S. McCain, for the appellant.

G. B. Oliver, for the appellee.

COCKRILL, C. J. The common law regarded the father's action for the seduction of his daughter as an action of trespass for assaulting his servant, whereby he lost her services. It was based upon the relation of master and servant, and not upon that of parent and child; and the measure of damages was such only as a master would recover for a disabling physical injury to his servant. The extent of the recovery has been enlarged by the courts, from the necessity of the case, rather than from the principles which govern the action (see remarks of Lord Ellenborough in *Irwin v. Dearman*, 11 East, 27), until compensation is awarded to the parent as such for the shame and mortification which the wrong brings upon him and his family. No action could be maintained by the father for the injury in his parental capacity; but, in the struggle between substantial justice to the parent and the precedents in actions for seduction, the courts in England and America have clung to the latter and striven to attain the former, until the anomaly has been produced of requiring the action to be prosecuted by the father for an injury inflicted upon him in his relation of master, and permitting a recovery in his relation of parent. The theory of an injury to the master is pertinaciously retained as the essential basis of the father's action, but it is now little more than a legal fiction, used as a peg to hang a substantial award of damages upon as compensation, not to the master, but to the head of the family.

It is a logical sequence from that state of the law that proof of the mere nominal relation of master and servant should be sufficient to give the parent a footing in court to recover damages commensurate with his injury. It is accordingly established, in this country at least, that the father may maintain his action for the seduction of his minor daughter, although she is not a member of his household, but is in the actual

employment of another, enjoying the fruits of her labor with her father's consent, if he has not relinquished, past the power of recall, his right to control her services: *Patterson v. Thompson*, 24 Ark. 55; *Kennedy v. Shea*, 110 Mass. 147; 14 Am. Rep. 584; note to *Weaver v. Bachert*, 44 Am. Dec. 166; Bishop on Non-contract Law, sec. 380.

The plaintiff in this case brought himself within the rule above stated, and was entitled to maintain his action.

There was proof in the case tending to show that the debauched daughter had had illicit intercourse with other men prior to her intercourse with the defendant. It is argued that the court should have instructed the jury that if they found that to be true, they could return damages only for the loss of services and lying-in expenses. That brings us to the other feature of the case, already adverted to.

As the injury which the father, as distinguished from the master, sustained by the seduction of his daughter depends, as Addison expresses it, "upon the value of her previous character" (2 Addison on Torts, *89), it is competent for the defendant to show that she did not have a good character for chastity before his intercourse with her. Such proof diminishes the father's right of recovery, for the damages should be commensurate with the pain and disgrace which follow the wrong, and must vary according as the daughter has been unblemished or profligate: 1 Taylor on Evidence, sec. 356. If it is proved that she was notoriously unchaste prior to the defendant's intercourse with her, and had thereby disgraced her family to such extent that the defendant's conduct added nothing to her parent's suffering or to the danger of corrupting the family's morals, no damages could be awarded beyond what is suffered by the master as distinguished from the parent: 2 Hilliard on Torts, 3d ed., 518. If the proof falls short of that mark, evidence of previous incontinence only mitigates the damages, for to whatever extent the defendant's act, when it can be made the foundation of a suit, has contributed to the girl's downward tendency, to that extent he has injured the parent, and must respond to him in damages: 2 Greenleaf on Evidence, sec. 577; 1 Taylor on Evidence, sec. 356; 2 Addison on Torts, 589; Moak's Underhill on Torts, 348; *Stoudt v. Shepherd*, 73 Mich. 588, 598. The action is in this respect like that of criminal conversation by the husband, in regard to which it has been ruled that proof that the wife had formerly been unchaste, and sought illicit intercourse with the defend-

ant, did not excuse his adultery with her, but mitigated the husband's damages: *Ferguson v. Smethers*, 70 Ind. 519; 36 Am. Rep. 186.

It has been held that when carnal intercourse with a girl takes place without seduction,—that is, without the aid of flattery and artifice, no recovery can be had by the father beyond the loss of service and incidental expenses: *Hill v. Wilson*, 8 Blackf. 123; *Comer v. Taylor*, 82 Mo. 346.

As the girl's willing assent, in the absence of the seducer's arts, is only evidence, at most, of a want of chastity, it would follow that direct proof of unchastity should have the same effect upon the father's recovery. But, as we may have seen, such proof goes only to mitigate the damages. The cases holding that criminal connection without seduction cannot be the basis of the father's action appear to be based upon a false analogy. They seem to confound the statutory right conferred in some of the states upon the female for the redress of her own grievance against her seducer with the father's common-law action for the injury which he sustains. In the statutory suit by the girl, as in the criminal prosecution for the offense there must be proof of seduction in its technical signification: *Polk v. State*, 40 Ark. 482; 48 Am. Rep. 17. But the father's action is independent of the daughter's, and is based upon a different injury. When the ignominy which is heaped upon him is the measure of damages, the daughter's willingness does not excuse the defendant, for without his act, the father had not been injured. It is not a case for the application of the maxim, *Volenti non fit injuria*, unless the father himself is at fault, as by connivance at the act.

It follows that the court did not err in rejecting the appellant's prayers for instructions. The charge of the court indicates a clear conception of the law applicable to the case when read in the light of the testimony. None of the assignments of error was prejudicial to the appellant. The judgment should therefore be affirmed.

SEDUCTION — RIGHT OF FATHER TO MAINTAIN ACTION FOR DAMAGES. — A father may recover for the seduction of his minor daughter, though she does not reside with him, and had the right to use her wages as her own: *Boyd v. Byrd*, 8 Blackf. 113; 44 Am. Dec. 740, and note; *Hornketh v. Barr*, 8 Serg. & R. 36; 11 Am. Dec. 568, and note; *Dodd v. Facht*, 72 Iowa, 579; extended note to *Weaver v. Backert*, 44 Am. Dec. 164-179.

SEDUCTION — WHAT DAMAGES RECOVERABLE. — Loss of social standing may be considered by the jury in estimating damages for seduction: *Hawn v. Banghart*, 76 Iowa, 683; 14 Am. St. Rep. 261. Exemplary damages are

property: *Lumry v. Orsick*, 53 Wln. 612; 26 Am. Rep. 766; *Stevenson v. Belmont*, 6 Iowa, 27; 71 Am. Dec. 392, and note. Loss of services and lying-in expenses may be recovered by a father in an action for the seduction of his daughter: *Clark v. Fitch*, 2 Wend. 459; 20 Am. Dec. 639, and note. Pregnancy, child-birth, and sickness may be considered by the jury in estimating damages: *McCoy v. Trucks*, 121 Ind. 292. General damages may be recovered: *Simons v. Busby*, 119 Ind. 12. See *Stoudt v. Shepherd*, 73 Mich. 566.

SEDUCTION—EVIDENCE OF PREVIOUS UNCHASTITY IN MITIGATION OF DAMAGES.—In an action for damages for seduction, evidence of plaintiff's previous unchastity is admissible in mitigation of damages: *Love v. Masoner*, 6 Bart. 24; 32 Am. Rep. 522; *Rea v. Tucker*, 51 Bl. 110; 99 Am. Dec. 589; *Shattuck v. Myers*, 12 Ind. 47; 74 Am. Dec. 226, and note.

WHITMORE v. TATUM.

[54 ARKANSAS, 487.]

MORTGAGE—SALE TO PAY FIRST INSTALLMENT DOES NOT RELEASE.—PURCHASER OF EQUITY OF REDEMPTION in land sold under execution to satisfy an installment of the mortgage debt, with notice of the facts, takes subject to the lien of the mortgage.

ACTION to foreclose a mortgage. Tatum took a mortgage on land sold to R. A. Whitmore, to secure the payment of four notes given for the purchase price. Upon default in the payment of the first note, Tatum obtained judgment upon it and had the land sold under execution, publicly announcing his mortgage lien for the balance of the purchase-money, and that the purchaser would take subject to such lien. J. B. Whitmore became the purchaser at such sale, and now contends that he took a fee in the land freed from the mortgage lien. Judgment for plaintiff. Defendant appealed.

U. M. and G. B. Ross, for the appellant.

Thomas B. Martin, for the appellee.

COCKRILL, C. J. It has been commonly considered oppressive to the mortgagor for the mortgagee to levy an execution issued upon a judgment for the recovery of an installment of the mortgage debt, upon the equity of redemption in the mortgaged premises, while he retains his title and lien as mortgagee. To avert that evil, some courts have held that a sale under the execution extinguishes the lien of the mortgage. Chancellor Kent, however, expressed the opinion that the true and only remedy for the mischief (where the equity of redemption is the subject of sale under execution, as it is in this state) was for the court of equity to prevent the mortgagee

from proceeding at law to sell the equity of redemption: *Rice v. Annin*, 2 Johns. Ch. 180. The supreme court of New York, while Kent was chief justice, in a *per curiam* opinion most probably delivered by him, had previously ruled that the interest of the mortgagor passed by such an execution sale, and that the interest of the mortgagee was affected no further than the price paid for equity of redemption went to diminish the mortgage debt: *Jackson v. Hall*, 10 Johns. 481. In the case of *Rice v. Wilburn*, 31 Ark. 108, 25 Am. Rep. 549, this court followed the latter case and others in line with it, in preference to those adopting the remedy first mentioned. The question whether the sale in this case might have been enjoined at the suit of the mortgagor is not presented by the record, for he did not complain. But the case of *Rice v. Wilburn*, 31 Ark. 108, 25 Am. Rep. 549, is controlling authority against the complaint of the purchaser at the execution sale. It is there ruled that he takes only the equity of redemption, and the ruling is adhered to.

The appellant in this case was such a purchaser, and was apprised by the record of the lien which he now seeks to defeat. He had also actual knowledge of the fact that there was a balance due upon the mortgage debt, and he must have heard the announcement at the execution sale that the land was to be sold subject to the mortgage lien. There is, then, nothing upon which to base an estoppel by conduct against the mortgagee.

Finding no error, the judgment is affirmed.

MORTGAGES. — RIGHTS OF PURCHASER OF EQUITY OF REDEMPTION: See note to *Fiske v. Tolman*, 26 Am. Rep. 663. See also extended note to *Atkins v. Sawyer*, 11 Am. Dec. 193-198, where this subject is discussed at length.

RUDISILL v. CROSS.

[54 ARKANSAS, 519.]

STATUTE OF FRAUDS — PARTITION FENCE. — A contract for the conveyance of an undivided interest in a partition fence between lands of adjoining owners is a contract for the release of an interest in real estate, and, to be binding, must, in the absence of part performance, be in writing, to satisfy the statute of frauds.

J. H. Crawford, for the appellant.

Merry and Kineworthy, for the appellee.

HUGHES, J. The appellant sued the appellee in the court of a justice of the peace for half the cost of a partition fence, and recovered judgment for \$18.47, from which appellee prosecuted an appeal to the circuit court, where judgment was rendered in his favor, from which the appellant prosecutes this appeal.

The parties agreed to build a partition picket fence between their town lots. Appellant built the entire fence, and appellee refused to pay for half the entire fence, contending that he was to pay for half of that part only of the fence used by him. Appellee had joined his fence to the partition fence. Appellant afterwards proposed to appellee that if he would not pay half the cost of the fence, and would cut loose from it, and not use it at all, and build a fence of his own, he (appellant) would keep the fence built by him as his own; and in that event the appellee need not pay anything for it. Appellee continued to use the partition fence and did not take his fence loose from it, paid nothing towards the cost nor for the use of the partition fence. He says, in his testimony, that at first he did not accept the proposition of appellant, but that he did afterwards agree to it, and told appellee that he could keep all the fence.

The court instructed the jury that "if the jury find from the evidence that there was a second contract, and that Cross released his interest in the fence to Rudisill, this is a sufficient consideration to bind the second contract, and they will find for the defendant."

"The obligation of a land-owner to build and maintain a division fence, in whole or in part, for the benefit of adjoining land, is something more, indeed, than an obligation to furnish the materials and labor necessary from time to time for the erection and reparation of the fence; it imposes a burden upon the land itself. A partition fence ordinarily must rest equally upon the land of the respective proprietors. Hence an agreement of one of those proprietors to maintain such a fence necessarily imports a dedication of the use of the land required to support half of it. To that extent it is therefore an estate in the land itself. In accordance, then, with the general rule that an easement, being an interest in realty, cannot be conveyed or reserved by parol, an agreement by an owner of land to maintain a partition fence between such land and that of an adjoining proprietor cannot ordinarily rest in parol, but, to be binding, must be in writing": 7 Am. & Eng. Ency. of Law,

897, note 2, and authorities cited. "An agreement for a division of the line fence, by adjoining owners, in order to be binding on them and their privies, must be in writing": *Knox v. Tucker*, 48 Me. 373; 77 Am. Dec. 233; *Kellogg v. Robinson*, 6 Vt. 276; 27 Am. Dec. 550.

We are of the opinion that the partition fence in this case was real estate, and that, under the agreement between the parties and the evidence in the case, one half of it belonged to appellee, and that he was indebted to the appellant for one half the cost of erecting the same; that appellee did not convey his interest in any way; that the contract to release his interest in it to the appellant was a parol contract; that appellee, under the contract (referred to as the second contract), did not place the appellant in possession of his interest in the partition fence, because he continued to use it, and did not detach his fence from it.

There was, therefore, no part performance of the parol agreement by appellee to release his interest in the fence that, in a court of equity, would have taken it out of the statute of frauds. If there was a contract resting in parol for the release of the appellee's interest in the fence to appellant, it might have been taken out of the statute of frauds by part performance by appellee by placing appellant in possession of his part of the fence under the contract, and this would have been a good equitable defense which appellee could have made in this action at law: *Mansfield's Digest*, sec. 5083, subd. 4; *Trulock v. Taylor*, 26 Ark. 54.

The "second contract" was therefore void under the statute of frauds, being a contract for the release of an interest in real estate not in writing. It formed no consideration for an agreement by appellant to release appellee from his obligation to pay one half the cost of the entire partition fence, erected by the appellant under an agreement between them that each would make half of the same.

The action was based upon the contract between the parties to build a partition fence, and not upon the statute: *Mansfield's Digest*, sec. 3654.

As this disposes of the real issue in the case, it is unnecessary to discuss other instructions given and refused by the circuit court.

The judgment is reversed and the cause remanded for a new trial.

STATUTE OF FRAUDS—DIVORCE FEE.—An agreement for the division of a line fence must be in writing: *Kean v. Foster*, 48 Mo. 333; 77 Am. Dec. 223. See also *Kellogg v. Robinson*, 6 Vt. 276; 27 Am. Dec. 550.

KINCHELOE v. MERRIMAN.

(2d ARKANSAS, 1881.)

DIVORCE—HUSBAND'S LIABILITY FOR WIFE'S ATTORNEY FEE.—An attorney cannot recover, as against the husband, for legal services rendered his wife in a contemplated suit for divorce on the ground of his cruelty, for the reason that prosecuting or defending a suit for divorce has no relation to her protection as wife.

J. H. Harrod, for the appellant.

Sam Frausenthal and E. M. Merriman, for the appellee.

HUGHES, J. The appellee sued the appellant for an attorney's fee for services rendered the wife of appellant in counseling and advising her in reference to a suit which the wife contemplated bringing against the appellant for dissolution of the bonds of matrimony upon the ground of cruel and barbarous treatment of the wife by her husband. Appellee alleged in his complaint that it was absolutely necessary for the wife's protection and safety that she should have legal advice. The contemplated suit for divorce was compromised, and not instituted. A demurrer to the complaint was overruled, and judgment was rendered for appellee, from which the appellant prosecuted this appeal. Was the appellant liable?

Under our statute, the allowance of alimony and suit money, pending a suit for divorce, is in the sound discretion of the court, and before the court will make the allowance, the wife must show merits: *Mansfield's Digest*, sec. 2563; *Hecht v. Hecht*, 28 Ark. 93; *Counts v. Counts*, 30 Ark. 78. There is no other provision in our statute in reference to suit money in divorce cases. If the allowance is discretionary only with the court *pendente lite*, can it be said that the wife has absolute right to counsel fees in a divorce suit?

In 2 Bishop on Marriage and Divorce, sec. 388, it is said that "the English doctrine is, that a legal person who, in good faith and on probable cause, carries on or defends a wife's divorce suit with her husband can recover at law of the latter the proper compensation for his service and expenses therein, to the extent to which he does not obtain it, by order of the court, in the suit itself."

Lord Campbell held, in *Brown v. Ackroyd*, 5 El. & B. 812, 827, 829, that a wife has authority to pledge her husband's credit for the costs of a divorce suit, where there are reasonable as well as where there are absolute grounds for instituting the suit. Under such circumstances the suit would be necessary and fit for the wife's protection, and she would be authorized to employ a proctor, and her husband would be liable for his fees. And it was said in that case by Crompton, J., that "where there is reasonable apprehension of violence, a divorce may be the most effectual protection, and it may be a necessary, within the rule which authorizes a wife who has left her husband from reasonable apprehension of cruelty to pledge his credit for what is necessary to her."

This doctrine was confirmed in the court of common pleas, and held to apply, though the petition for divorce was not proceeded with, and counsel omitted to pursue the practice of the court for obtaining costs, Erle, C. J., saying: "No doubt such costs come under the description of a 'necessary.' The wife pledges her husband's credit at the beginning of the suit; and I see nothing in the practice of the divorce court to take away the wife's common-law right": *Rice v. Shepherd*, 12 Com. B., N. S., 322.

In the courts in this country, there is a diversity of judicial determination upon this question. In 2 Bishop on Marriage and Divorce, sec. 291, it is said that "the proposition that neither the obtaining of a divorce nor the resisting one has any relation to her protection as wife, is, as applied to the marriage dissolution, not altogether without reason. And there is a great deal of American authority to this, namely, that the wife's legal agent cannot recover compensation of the husband for his services in suits for divorce from the bonds of matrimony, whether she is plaintiff or defendant": *Wing Hurlburt*, 15 Vt. 607; 40 Am. Dec. 695; *Dorsey v. Goodenow*, Wright, 120; *Shelton v. Pendleton*, 18 Conn. 417; *Coffin v. Dunham*, 8 Cush. 404; 54 Am. Dec. 769; *McCullough v. Robinson*, 2 Ind. 630; *Williams v. Monroe*, 18 B. Mon. 514; *Johnson v. Williams*, 3 G. Greene, 97; 54 Am. Dec. 491; *Dow v. Eyster*, 79 Ill. 254; *Cooks v. Newell*, 40 Conn. 596; *Morrison v. Holt*, 42 N. H. 478; 80 Am. Dec. 120; *Ray v. Adden*, 50 N. H. 82; 9 Am. Rep. 175.

We cannot well understand how a suit for divorce could be necessary, or actually afford protection to the wife against personal abuse upon the part of the husband. A proceeding

against him to compel him to keep the peace might be necessary, and might have the desired effect; and for services rendered for the wife in such a proceeding the husband would be liable, on the ground that the wife has the right to pledge her husband's credit to procure services which are necessary to her protection and safety.

In the cases of *Glenn v. Hill*, 50 Ga. 94, *Sprayberry v. Merk*, 30 Ga. 81, 76 Am. Dec. 637, *Gossett v. Patten*, 23 Kan. 340, and some others, the husband was held liable for the wife's counsel fees in an independent action at law, and, in some of the cases, even though the suit for divorce was discontinued, or not brought. But the preponderance of authority in the American states is, that for service rendered a wife in a suit for divorce, an attorney cannot recover in an action at law against the husband, for the reason that prosecuting or defending a suit for divorce has no relation to her protection as wife.

The court erred in overruling the demurrer to the complaint. The judgment is reversed, with directions to sustain the demurrer to the complaint.

MARRIAGE AND DIVORCE — LIABILITY OF HUSBAND FOR WIFE'S ATTORNEY'S FEES IN ACTION FOR DIVORCE. — A husband is not liable at common law for the fees of his wife's attorney in a suit brought by her for divorce: *Clarke v. Burks*, 65 Wis. 359; 56 Am. Rep. 631, and note; *Ray v. Adden*, 50 N. H. 82; 9 Am. Rep. 176; *Morrison v. Holt*, 42 N. H. 478; 80 Am. Dec. 120; *Johnson v. Williams*, 3 G. Greene, 97; 54 Am. Dec. 491, and note; *Sherwin v. Mabey*, 78 Iowa, 467; *Blair v. Blair*, 74 Iowa, 311. See also extended note to *Cunningham v. Irwin*, 10 Am. Dec. 463. The rule appears to be different in California, where the court may grant a wife reasonable attorney's fees: *Turner v. Turner*, 80 Cal. 141; *Robinson v. Robinson*, 79 Cal. 511; *White v. White*, 86 Cal. 212; *Peyre v. Peyre*, 79 Cal. 336.

CASES
IN THE
SUPREME COURT
OF
FLORIDA.

FORBES v. BOARD OF HEALTH OF ESCAMBIA CO.

[27 FLORIDA, 189.]

REPEAL OF STATUTE BY ACT WHICH RE-ENACTS PROVISIONS OF ACT REPEALED, EFFECT OF. — When a repealing act re-enacts substantially the provisions of the act repealed, the latter act is not thereby destroyed or interrupted in its operation. Where, therefore, a state legislature passes an act repealing a statute providing for the appointment of county boards of health, and constituting them corporations, but by another section of the same act enacts substantially the provisions of the act repealed, the repealing act must be construed as an amendment of the act repealed, and the boards created under the latter act are continued in existence with such modifications as are contained in the former act.

ACTION to recover damages. The opinion states the facts.

John C. Avery, for the motion to dismiss the appeal.

R. L. Campbell and P. W. White, contra.

MABRY, J. In September, 1888, appellant, D. S. Forbes, master of the British bark *Tiber*, sued the board of health of Escambia County, a corporation existing under the laws of Florida, for two thousand dollars damages for detaining said bark for the space of twelve days, and compelling her to undergo and pay the cost of fumigation, and the discharge of her ballast, at a quarantine station, under an order and proclamation of said board made on the twenty-third day of April, 1888.

A demurrer to the declaration was sustained by the court below on the twenty-second day of October, 1888, with leave for complainant below to amend the declaration. On the rule day in November, 1888, he filed an amended declaration, to which defendant below again demurred. The demurrer to

the amended declaration was, on the twelfth day of November, 1888, sustained, and plaintiff below not wishing to further amend, it was ordered and adjudged by the court below that said plaintiff take nothing for his writ, and pay the costs of this suit, for which defendant have execution. From this decision of the court plaintiff, on the fourteenth day of December, 1888, in open court entered an appeal to this court, and the transcript of the record was filed here on the eleventh day of January, 1889.

Counsel for appellee filed in this court on April 17, 1890, the following suggestion and motion: "And now comes John C. Avery, an attorney of this court, and attorney of record for appellee, and suggests to the court the dissolution of appellee as a corporation by virtue of chapter 3859 of the laws of Florida, and that the said case is accordingly abated, and should be dismissed by order of court, and he moves the court to so order." The question now to be disposed of is, Has the this suit abated for the reason stated in the foregoing suggestion? It is insisted on behalf of appellee that the act of the legislature, chapter 3603, laws of Florida, approved February 16, 1885, creating county boards of health, has been repealed by the ninth section of the act of the legislature, chapter 3859, laws of Florida, approved June 7, 1889, and that the corporate existence of appellee under the former act has become extinguished. The record shows that this suit has been instituted and was pending on appeal in this court at the time of the passage of the act of 1889. In support of his motion, counsel for appellee cites several authorities sustaining the proposition that upon a dissolution or extinction of the legal existence of a corporation, all suits pending against it are thereby abated, the same as the death of a natural person *pendente lite* abates suits against him. Without questioning the correctness of this proposition, we proceed to inquire whether or not the effect of the act of 1889 was to abrogate the law of 1885 in the creation of county boards of health. The ninth section of the act of 1889 provides, in reference to the act of 1885, that "an act entitled an act to provide for the appointment of boards of health for the several counties of the state of Florida, and define their powers, approved February 16, 1885, be and the same is hereby repealed." Along with this repealing section, however, and taking effect at the same with it, the legislature re-enacted substantially the provisions of the act of 1885 providing for the creation of county boards

of health and constituting them corporations. The first section of the act of 1885 provides that "the governor of the state of Florida shall appoint for every county in this state a board of health, consisting of five discreet persons, not less than two of whom shall be physicians of skill and experience, to serve without pay, as hereinafter provided." The fifth section of this act provides that "every board of health appointed under the provisions of this act shall be a corporation, with power to sue and be sued, contract and be contracted with, and to acquire and dispose of at pleasure property, both real and personal, and to do every other act necessary to the proper exercise of such powers." The first section of the act of 1889, chapter 3859, provides that "the governor of this state, with the advice and consent of the senate, may, as soon as practicable after the passage of this act, appoint for every county in this state a board of health, consisting of three discreet persons, provided that members of county boards of health now established may serve out the term of office for which they were appointed." The eighth section of this act provides that "every board of health existing under the provisions of this act shall be a corporation, with power to sue and contract, and to acquire and dispose of property, both real and personal, and do every other act necessary to the proper discharge of its functions as a board of health." It is a well-settled rule that when a repealing act re-enacts substantially the provisions of the act repealed, the latter is construed not to be thereby destroyed or interrupted in its operation. Endlich on the Interpretation of Statutes, sec. 490, states the rule as follows: "It seems, indeed, to be the general understanding, that the re-enactment of an earlier statute is a continuance, not a repeal, of the latter, even though the latter act expressly repeals the earlier." This author further says, in the same section: "But even a repealing act re-enacting the provisions of the repealed statute, in the same words, is construed to continue them in force without intermission, the repealing and re-enacting provisions taking effect at the same time." To repeal a law, and at the same time re-enact it, does not destroy it, or break its continuity. This rule of construction is sustained by numerous authorities: *Wright v. Oakley*, 5 Met. 400; *Middleton v. New Jersey West Line R. R. Co.*, 28 N. J. Eq. 269; *United Hebrew B'n. Ass'n v. Benshimol*, 180 Mass. 325; *Fullerton v. Spring*, 3 Wis. 667; *Lauds v. Chicago etc. R'y Co.*, 33 Wis. 640; *Scheftels v. Tabert*, 46 Wis. 439; *Steamship Co. v. Joliffe*, 2

Wall. 450; *Lisbon v. Clark*, 18 N. H. 234. This rule of construction has also been applied to criminal statutes, and where the statute repealed is re-enacted in substantial terms by an act which takes effect at the same time as the repealing act, it is continued in uninterrupted operation, and judgment may be rendered upon a conviction under it, though the offense was committed and prosecution commenced before the repeal: *State v. Gumber*, 37 Wis. 298; *State v. Wish*, 15 Neb. 448. An examination of these two statutes, chapters 3603 and 3859, satisfies us that the legislature did not intend by the latter to abolish county boards of health created and existing under the former. At the time of the passage of the act of 1885, the constitutional provision requiring the legislature to establish a state board of health, and also county boards of health, contained in article 15 of the constitution of 1885, had not been adopted, and we think the object of the legislature in passing the act of 1889 was, not to extinguish the existing county boards, but to so modify the law as to adjust them to the workings of a state board of health. Not only did the legislature manifest its intention not to abolish the county boards of health created under the act of 1885 by re-enacting substantially the provisions of this act, but other evidences of such intention are apparent in the act of 1889. The language of the first section of this act plainly recognizes the existence and continuance of such boards. After enacting that the governor may, with the advice and consent of the senate, appoint a board of health to consist of three members, it provides "that members of county boards of health now established may serve out the term of office for which they were appointed." Under the act of 1885, five members constituted the board, and under the act of 1889, three members were to be appointed. If the act of 1889 repealed the act of 1885, and abolished county boards of health existing at the date of the repeal, it is difficult to perceive how the members of the boards so abolished could serve out their terms.

The conclusion to which we have arrived after an examination of these two statutes is, that the act of 1889 must be construed as an amendment of the act of 1885 in creating county boards of health, and that the boards created under the latter act were continued in existence with such modifications as are contained in the former act. This being the case, it follows that the motion made by counsel for appellee must be overruled, and it so ordered.

STATUTES — REPEAL. — “When statutes are repealed by acts which substantially retain the provisions of the old laws, the latter are not held to have been destroyed in their binding effect”: *Hancock v. District Township*, 78 Iowa, 550. A statute amendatory of a statute using substantially the language employed in the latter does not deprive the state of the right to prosecute an offense committed under the latter act: *Sage v. State*, 127 Ind. 15. Usually a revision of a statute simply iterates the former expression of the intent of the legislature: *Cummings v. Everett*, 82 Me. 260. See note to *Friereson v. Harris*, 94 Am. Dec. 220, where the effect of the re-enactment of repealed statutes is discussed.

EX PARTE PRINCE.

[27 FLORIDA, 193.]

HABEAS CORPUS DOES NOT LIE TO CORRECT ANY IRREGULARITY OF PROCEDURE where there is jurisdiction. This writ is not the proper remedy for relief against defective indictments for acts which are offenses under criminal laws, although it may be a remedy where an indictment charges as a criminal offense an act which was not made so by the law obtaining at the time the act was done. It cannot be used as a substitute for a demurrer, a motion to quash, a writ of error, or an appeal, or *certiorari*.

LARCENY, INDICTMENT FOR, SUFFICIENCY OF, CANNOT BE INQUIRED INTO ON HABEAS CORPUS WHEN. — Under a statute which punishes the crime of larceny of any money, goods, or chattels, or bank notes, the sufficiency of an indictment which charges the larceny of divers bills commonly known and denominated as national currency, giving their denomination and value, cannot be inquired into on *habeas corpus*.

LARCENY, GREENBACKS AND NATIONAL BANK BILLS SUBJECT OF. — Both greenbacks and national bank bills are the subject of larceny in Florida.

HABEAS CORPUS. The opinion states the facts.

John S. Beard and F. T. Myers, for the petitioner.

The Attorney-General, for the state.

RANEY, C. J. The return to the writ of *habeas corpus* shows that the petitioner is held by the sheriff of Leon County to answer an indictment found by the grand jury at the late spring term of the circuit court of that county, charging that the petitioner, on the twenty-seventh day of March of the present year, in that county, “did feloniously steal, take, and carry away divers bills, commonly known and denominated national currency of the United States of America, of divers denominations, to wit: one bill of the denomination of twenty dollars, of the value of twenty dollars; two bills each of the denomination of ten dollars, each of the value of ten dollars; one bill of the denomination of five dollars, of the value of five dollars; a more particular description of which said bills is to

the jurors unknown, and which said bills circulated and passed in the said state of Florida as money, and which were then and there the property of one John G. Collins."

The statute under which this indictment is claimed to be found is section 17, page 360, McClellan's Digest, which provides that "whoever commits the crime of larceny by stealing the property of another, any money, goods, or chattels, or any bank note, bond, promissory note, bill of exchange, or other bill, order, or certificate, or any book of account for or concerning money or goods due, or to become due, or to be delivered, or any deed of writing containing a conveyance of land, or any other valuable contract in force, or any writ, process, or public record," shall be punished, if the value of the property stolen exceeds the value of one hundred dollars, by imprisonment in the state penitentiary, or by fine and imprisonment in the county jail, or if it does not exceed such value, by imprisonment in the state penitentiary or county jail, or by fine; the section specifying the maximum punishment of either kind.

The ground upon which the petitioner claims a discharge is, that the indictment does not allege "any sufficient offense" under the laws of this state, and it is argued that it "charges no offense."

A primary question involved in this case is that of the function of the writ of *habeas corpus* where the petitioner is held to answer an indictment, which is the *status* of this prisoner.

In *In re Corryell*, 22 Cal. 179, the petitioner was under indictment for altering "a certain record of and belonging to the office of the secretary of state of the said state, the same being an engrossed copy of a bill which was introduced into the senate of the state" at its session in 1861, describing the same, and alleging it to be "by law a record of and belonging to the office of said secretary of state," and specifying the alteration. The statute of California upon which it was attempted to found the indictment punished the alteration of any minute, document, book, or other proceeding whatever of or belonging to any public office in the state. There was, however, at the time of the alleged alteration, as decided by the court, no law requiring engrossed bills to be transferred to the office of the secretary of state or kept there, and it was consequently held that the petitioner was not charged with any offense known to the criminal laws of the state, and there-

fore that the court had no jurisdiction, as its jurisdiction or power extended only to such matters as the law declared to be criminal, and that the petitioner must for this reason be discharged, the function of the writ being to grant relief where the detention is without jurisdiction, or in other words, illegal. In *Ex parte Kearny*, 55 Cal. 212, the same doctrine is, in effect, approved, though there had been a conviction in that case by an inferior court of limited jurisdiction, and the further feature of the legal necessity that its records should affirmatively show jurisdiction entered into the decision. A municipal ordinance provided that "no person should address to another, or utter in the presence of another, any words having a tendency to create a breach of the peace," and it was held that the ordinance meant that the words must be uttered in the presence of the person whom they intend to provoke to such breach, and the complaint failing to aver that the words alleged to have been uttered were addressed to, or uttered in the presence of, the person of whom they were spoken, the prisoner should be discharged, as it affirmatively appeared from the record that he had been convicted of an act which under the then existing law was not a criminal offense. In *In re Buell*, 3 Dill. 116, the petitioner was arrested in Missouri, and proceedings were taken under the act of Congress for remanding him to the District of Columbia for trial under an indictment found there charging him with libel, and he obtained a writ of *habeas corpus*, and was ordered to be discharged on the ground that the indictment failed to allege a publication of the libel in that district, but made only such an allegation as could be held to have intended a publication in Michigan, and consequently not an offense against the laws of the United States governing the District of Columbia. It is said in the opinion, by Judge Dillon, that mere technical defects in an indictment should not be regarded, but a district judge who should order the removal of a prisoner when the only probable cause relied on or shown was an indictment, and that indictment failed to show any offense against the laws of the United States, or showed an offense not committed or triable in the district to which the removal is sought, would misconceive his duty and fail to protect the liberty of the citizen.

It is unnecessary to say more of these cases than that they are founded upon the theory that an indictment alleging as a criminal offense that which is not made so by the law obtaining at the time the act was done, confers no jurisdiction to

hear and to determine, and that a detention of the person under such circumstances may be relieved against by this writ as one without jurisdiction; that if there is no law punishing the act, there can be no jurisdiction to detain or try: 2 Hale P. C. 144; Bac. Abr., tit. Habeas Corpus, B, 10.

The doctrine upon which these cases must rest is not to be confounded with, nor should the decisions based upon it be permitted to invade or impair, another rule, both well established and essential to a due administration of criminal law; which rule is, that this writ is not the proper remedy for relief against defective indictments for acts which are offenses under criminal laws. In *Ex parte Kearny*, 55 Cal. 212, it is said, in recognition of this distinction: "This is not the case of a complaint inartificially drawn which intimates the existence of the facts necessary to the constitution of the offense, or even of an attempted statement insufficient, but indicating a purpose to declare on the essential facts. It is a total failure to allege any cause of action, and however objectionable the conduct imputed to the petitioner, he is no more, in the eye of the law, charged by the complaint with any crime than if the paper had ascribed to him the most innocent of deeds."

Though, under the above authorities, the inquiry upon *habeas corpus* may extend to the question whether the indictment charges any offense known to the law, as this goes to the jurisdiction, and if it be found that it does not charge any, the prisoner may be discharged as imprisoned without color of law: *Ex parte Prime*, 1 Barb. 340; the purpose of the writ is not to correct any irregularity of procedure where there is jurisdiction. In *Ex parte Kowalsky*, 73 Cal. 120, it is said that where an indictment has been found which, although subject to attack and overthrow upon demurrer, contains enough to show that an offense has been committed of which the court has jurisdiction, the party charged cannot be discharged on writ of *habeas corpus*, but will be remitted to the court in which the indictment is pending for such proceedings as the law may warrant by way of defense, and it was held that the defects, if any, in the indictment under which the petitioner was held were of such a character that they could only be reached in the court where it was pending, and by appeal therefrom. See also *Ex parte Whitaker*, 43 Ala. 323; *Parker v. State*, 5 Tex. App. 579; *Ex parte Harris*, 47 Mo. 164; *Emanuel v. State*, 36 Miss. 627; *Davis's Case*, 122 Mass. 324; Church on Habeas Corpus, secs. 246, 251. The writ cannot be used as a substitute for a demurrer, a motion to quash, a writ of error,

or an appeal, or *certiorari*: *Ex parte McCullough*, 35 Cal. 97; *Ex parte Granire*, 51 Cal. 375; *O'Malia v. Wentworth*, 65 Me. 129; *Ex parte Boland*, 11 Tex. App. 159; *McLaughlin v. Etchison*, 127 Ind. 474; 22 Am. St. Rep. 658; *Ex parte Bowen*, 25 Fla. 214.

If the indictment before us is one charging an act to be a criminal offense which is in law not so, the authorities first cited would justify us, if they are to be regarded as correctly announcing the law, in discharging the prisoner. It is clear, however, that nothing of the kind can be affirmed in this indictment. The statute punishes the crime of larceny of any money, goods, or chattels, or bank notes. The indictment charges the larceny of divers bills, commonly known and denominated as national currency, giving their denomination and value. Of course, the indictment is not for the larceny of coin; yet, admitting for the purposes of this case that the national bank bills, which are a kind or part of the national currency, are not legal tender, and that the term "money" includes only that which is a legal tender (see 15 Am. & Eng. Ency. of Law, tit. Money), still the larceny of such bank bills is an offense under the bank-note provision of this statute, and the larceny of greenbacks or United States treasury notes, which are a legal tender (*Juilliard v. Greenman*, 110 U. S. 421, and cases cited), is an offense under its "money" provision. Whether the indictment sufficiently charges the larceny of either greenbacks or national bank bills, so as to stand the test of a demurrer or motion to quash, is a question with which we have nothing to do in this proceeding, and have not given our attention, but it is certainly indisputable that the language of the indictment is broad enough to cover and does include both greenbacks and national bank bills, and that both are the subject of larceny in this state.

There is nothing in the case of *Leftwitch v. Commonwealth*, 20 Gratt. 716, inconsistent with the above conclusions. It was not a *habeas corpus* proceeding, but a writ of error. The description of what was alleged to have been obtained by false pretense — the statute making this offense larceny — was "the sum of ninety dollars in United States currency," giving its value and stating whose property it was. The indictment was demurred to as not containing a sufficient description of the property so obtained or stolen, the words "United States currency" being merely *nomen generalissimum*. The court held (A. D. 1870) that United States currency might be gold or

silver, or treasury notes, or bank notes: See *Hamilton v. State*, 60 Ind. 193; 28 Am. Rep. 653 (A. D. 1877); and that either of these subjects would be consistent with the indictment, and that the indictment should show what kind of currency was obtained, and that it was too vague.

We have not felt it to be our duty to trace the legislation of Congress authorizing the issue of silver and gold certificates, and define their *status* under the above statute of this state.

The prisoner should be remanded, and it will be so ordered.

HABEAS CORPUS will not lie to correct errors of trial courts, and cannot be substituted for appeals and writs of error: *Ex parte Mitchell*, 104 Mo. 121; 24 Am. St. Rep. 324, and note; extended note to *Commonwealth v. Lecky*, 26 Am. Dec. 40; *In re Thompson*, 9 Mont. 381; *In re Rafferty*, 1 Wash. 382; *In re Blom*, 59 Conn. 372.

HABEAS CORPUS — INDICTMENT. — The sufficiency of a complaint or indictment cannot, in general, be inquired into on *habeas corpus*: *Ex parte McNulty*, 77 Cal. 164; 11 Am. St. Rep. 257. See extended note to *Commonwealth v. Lecky*, 26 Am. Dec. 47, 48.

LARCENY — BANK BILLS AS THE SUBJECT OF: See note to *State v. Homer*, 57 Am. Dec. 276; *Commonwealth v. Rand*, 7 Met. 475; 41 Am. Dec. 455.

ARMSTRONG v. STATE.

[27 FLORIDA, 265.]

INSANITY AS DEFENSE IN CRIMINAL CASE — ACCUSED NOT REQUIRED TO PROVE, BEYOND REASONABLE DOUBT. — In criminal cases, where the plea of insanity is set up as a defense, and evidence is introduced which tends to rebut the presumption of sanity on the part of the accused, if the jury, after considering all the evidence, entertain a reasonable doubt as to his sanity, it is their duty to acquit him. It is therefore error for the trial judge, in such a case, to charge that "when insanity is set up as a defense in a criminal case, it must be established to the satisfaction of the jury by a preponderance of the evidence, and a reasonable doubt of the defendant's sanity raised by all the evidence does not justify an acquittal."

INDICTMENT for murder. The opinion states the facts.

Frank W. Pope, for the plaintiff in error.

The Attorney-General, for the defendant in error.

MABRY, J. The plaintiff in error, Robert Armstrong, was indicted in the Duval circuit court on the eighth day of May, A. D. 1890, for the murder of Carleton Lowe. After arraignment under this indictment, and a plea of not guilty, the plaintiff in error was, at a term of the circuit court of Duval County,

Florida, and on the fourteenth day of May, A. D. 1890, convicted of murder in the first degree, and the sentence of death was passed upon him. From the final judgment of the court imposing the death penalty, Robert Armstrong, defendant below, and plaintiff in error here, prosecutes a writ of error to this court.

The record reveals the fact that Carleton Lowe was, on the twenty-sixth day of February, 1890, about the hour of nine o'clock, P. M., in the city of Jacksonville, Duval County, Florida, shot and instantly killed by the accused, Robert Armstrong. On the trial, testimony was introduced which tended to show that Armstrong was insane at the time Carleton Lowe was killed. On the subject of insanity, the trial judge charged the jury as follows: "When insanity is set up as a defense in a criminal case, it must be established to the satisfaction of the jury by a preponderance of the evidence, and a reasonable doubt of the defendant's sanity raised by all the evidence does not justify an acquittal." Again: "When insanity is set up as a defense in a criminal case, it must be proved by a preponderance of evidence; a reasonable doubt on your part as to the sanity of the defendant is not sufficient; to be acquitted under the plea of insanity, the defendant must prove his sanity by a preponderance of evidence." The court gave to the jury other instructions on the subject of insanity, but the sufficiency of evidence required to sustain a plea of insanity presented in the foregoing charges was not modified by the court in any other instructions given. The view of the law presented by the trial judge on the subject of insanity was, that under a plea of insanity the defendant must prove it by a preponderance of evidence, and is not entitled to the benefit of a reasonable doubt as to his insanity arising from all the evidence introduced on the trial. This court has recently, in the case of *Hodge v. State*, 26 Fla. 11, decided in June, 1890, announced the rule on this subject in force in this state. The decision in the Hodge case, it may be stated, had not been promulgated when the plaintiff in error was tried. In this case it is said by Judge Mitchell, in delivering the opinion of the court, that "the rule of evidence contended for in behalf of the accused is, that when the defense of insanity is relied upon, and evidence is introduced which tends to overthrow the presumption of sanity, if upon the whole evidence the jury entertain a reasonable doubt of his sanity, they must acquit, regardless of whether it be adduced by the prosecution or the

defendant, and that the accused is not required to establish his insanity beyond a reasonable doubt; and in this we think they are correct, and that the charge of the trial judge, that the accused was required to prove his insanity beyond a reasonable doubt, was erroneous." The more humane and advanced rule on this subject is, that if the jury, upon a consideration of the entire evidence, have a reasonable doubt as to the insanity of a party charged with crime at the time of committing it, it is their duty to give him the benefit of such doubt, and acquit; but the jury are to act upon a reasonable doubt of sanity in such cases, and are not to acquit upon any fanciful ground. The law as announced in the charges of the judge to the jury, in the case before us is directly in conflict with that declared by this court in the Hodge case. We think that case is based upon correct principles on the subject of insanity, and it controls absolutely the disposition of the present case.

In criminal cases, where the plea of insanity is set up as a defense, and evidence is introduced which tends to rebut the presumption of sanity on the part of the accused, and the jury entertain a reasonable doubt, after considering all the evidence, as to his sanity, it is their duty to acquit him.

There are other assignments of error in the record, but we do not deem it necessary to pass upon them. The judgment in this cause is reversed for the erroneous charges above mentioned given to the jury on the part of the judge, and as to the other errors assigned we express no opinion.

The judgment of the circuit court is reversed, and the defendant ordered to remain in the custody of the law to await a trial *de novo*.

INSANITY AS A DEFENSE IN CRIMINAL CASES—DUTY OF ACCUSED TO PROVE, BEYOND A REASONABLE DOUBT. — A reasonable doubt as to the sanity of the accused at the time the offense was committed entitles him to an acquittal: *Plake v. State*, 121 Ind. 433; 16 Am. St. Rep. 408, and note; *People v. McCann*, 16 N. Y. 58; 69 Am. Dec. 642, and note. For an extended discussion of this subject, see *Parsons v. State*, 60 Am. Rep. 212-225. Insanity need not be clearly proved, to entitle the defendant to an acquittal; *Giebel v. State*, 28 Tex. App. 153. A reasonable doubt as to the sanity of the accused does not entitle him to an acquittal: *People v. Bowden*, 90 Cal. 195.

PINDER v. STATE.

[21 FLORIDA, 370.]

VOIR DIRE, EXAMINATION OF JUROR UPON, SCOPE OF. — The examination of jurors upon their *voir dire* is not to be confined strictly to the questions formulated in the statute, but should be varied and elaborated as the circumstances surrounding the juror under examination in relation to the case on trial may seem to require, so as to obtain a fair and impartial jury whose minds are free and clear from all interest, bias, or prejudices that might prevent their finding a just and true verdict.

VOIR DIRE, PROPER QUESTION TO ASK JUROR UPON HIS, IN TRIAL OF NEGRO. — In testing a juror upon his *voir dire* as to his competency, etc., to serve upon the trial of a colored prisoner, it is pertinent and proper to ask him, "Could you give the defendant, who is a negro, as fair and impartial a trial as you could a white man, and give him the same advantage and protection as you would a white man, upon the same evidence?" and it is error for the trial court to refuse to allow such question to be propounded to the juror.

PRACTICE — EXAMINATION OF JUROR ON VOIR DIRE, BY WHOM TO BE CONDUCTED. — Although there is nothing in the statute to prohibit the court from exclusively conducting the examination of jurors on the *voir dire*, it is the most convenient and better practice, having the sanction of long and almost universal usage, to allow such examinations to be conducted by the counsel in the cause, the court judicially supervising and directing the same, and taking part therein either to supplement or to rectify.

MURDER OR MANSLAUGHTER, KILLING MUST BE UNLAWFUL TO CONSTITUTE. — To constitute the crime of either murder or manslaughter, the killing must have been unlawful, — that is, without authority of law, — and the trial court, in its instructions to the jury, in defining murder and manslaughter in the different degrees, should not fail to give to the defendant the benefit of the idea that the killing must have been unlawful or without legal excuse or justification.

MANSLAUGHTER IN FOURTH DEGREE, OMISSION TO MENTION, IN CHARGE ERRONEOUS WHEN. — Where a conviction for manslaughter in the fourth degree might have been warranted by the evidence in a cause, it is erroneous for the court to omit entirely any mention, in its charge to the jury, of the fourth degree of manslaughter, after instructing them that under the indictment they might convict the defendant of either murder in the first or second degree, or of manslaughter in the second or third degree, especially if it omits to intimate to the jury that they had the power to acquit the prisoner if the evidence warranted an acquittal. Such omissions tend to mislead the jury into a belief that they should not do otherwise than to convict of murder in the first or second degree, or of manslaughter in the second or third degree, and that they could not convict of manslaughter in the fourth degree.

JUSTIFIABLE HOMICIDE, DUTY OF COURT TO STATE TO JURY CIRCUMSTANCES WHICH SHOW KILLING TO BE. — When the court undertakes to instruct the jury as to the several degrees of homicide and the facts that constitute each as defined by statute, it should also give to them the circumstances that constitute the exceptions mentioned in the statute wherein the killing is declared to be justifiable or excusable.

HOMICIDE JUSTIFIABLE IN SELF-DEFENSE, THOUGH SLAYER'S FEAR NOT WELL FOUNDED. — To make a homicide excusable on the ground of self-defense,

it is not necessary that the accused should have done the killing under the well-grounded belief, justified by the surroundings, that it was necessary to take the life of the person slain in order to save his own life or to prevent great bodily harm to himself. All that is required of the slayer is, to show that, at the time of the killing, he was surrounded by such a condition of affairs as made it, from his stand-point, reasonable for a cautious and prudent man to believe that it was necessary to fire the fatal shot or to strike the fatal blow in order to save himself from death or great bodily harm, even though it may turn out afterwards that the surrounding appearances were deceptive, and that in reality his life or person was in no danger at the time.

DEFENSE THAT KILLING WAS ACCIDENTAL, RIGHT OF ACCUSED TO MAKE. —

Where the defense that the killing of the deceased by the defendant was unintentional, and accidentally brought about by the excusable or justifiable defense of himself against impending danger from a third party, is deducible from the evidence in the cause, it is error for the court to instruct the jury that in order to avail himself of the plea of self-defense, he must show that it was necessary to take the life of the person slain in order to save his life.

ACCIDENTAL KILLING OF BY-STANDER BY SHOT FIRED AT ANOTHER, WHEN

EXCUSABLE. — If the killing of the party intended to be hit would, under all the circumstances, have been excusable or justifiable upon the theory of self-defense, then the unintended killing of a by-stander by a random shot fired in the proper and prudent exercise of such self-defense is also excusable or justifiable. And if the killing of the intended victim would have been reduced by the circumstances to murder in the second or third degree, or to manslaughter in any of the degrees, then the unintended and accidental killing of the by-stander resulting from any act designed to take effect upon the intended victim would be likewise reduced to the same grade of offense as would have followed the death of the victim intended to be killed.

INDICTMENT for murder. The opinion states the facts.

S. Y. Finley, for the plaintiff in error.

The Attorney-General, for the defendant in error.

TAYLOR, J. At the spring term, 1890, of the circuit court for Clay County, Peter Pinder, the plaintiff in error, was indicted for the murder of one Joseph Tillman, on October 11, 1889, the alleged instrument of death used being a Winchester rifle. At the next ensuing fall term of said circuit court, Pinder was tried, convicted, and sentenced to death, and from such conviction and sentence the cause is brought to this court upon writ of error. It appears from the record that when the jury was being impaneled who tried the accused, and when the jurors were being tested upon the *voir dire* as to their competency, etc., the prisoner's counsel propounded to J. F. Geiger and to other jurors the following question: "Could you give the defendant, who is a negro, as fair and impartial

a trial as you could a white man, and give him the same advantage and protection as you would a white man, upon the same evidence?" which question the court below refused to allow to be propounded to the jurors upon their *voir dire*, and refused to allow counsel in the cause to propound any questions to the jurors upon the *voir dire*, the court itself insisting upon propounding all questions to the jurors touching their competency, and propounding only such questions to them as are in express terms provided for in section 10, page 446, McClellan's Digest. The refusal of the court below to allow the question quoted above to be propounded to the jurors upon the *voir dire* is assigned as error, and will be considered first. We think the court erred in refusing to permit this question to be propounded to the jurors. Though the question is not in express terms provided for in the statute above cited, yet it was a pertinent, and as we think proper, question to test fully the existence of bias or prejudice in the minds of the jurors. It sought to elicit a fact that was of the most vital import to the defendant, and a fact, too, that, if existent, was locked up entirely within the breasts of the jurors to whom the question was propounded, a knowledge of the existence of which could only be acquired by interrogating the juror himself. The answer to it if in the affirmative could have worked no harm to the juror or to any one else, but would have done credit to the humanity and intelligence of the juror, and would have satisfactorily exhibited to the court and to the defendant his entire competency, so far as the element of bias or prejudice was involved. But if the answer to it from the jurors had been in the negative, then we have no hesitancy in saying that it would have shown them to be wholly unfit and incompetent to sit upon the trial of a man of the negro race, whose right to a trial by a fair and impartial jury is as fully guaranteed to him under our constitution and laws as to the whitest man in Christendom. And such incompetency asserts itself with superadded force in such a case as this, where the life or death of the defendant was the issue to tip the scale in the jury's hands for adjustment.

The examination of jurors upon their *voir dire* is not necessary to be confined strictly to the questions formulated in the said section 10, page 446, McClellan's Digest, but should be so varied and elaborated as the circumstances surrounding the juror under examination in relation to the case on trial would seem to require, in order to obtain in every cause a fair and

impartial jury, whose minds were free and clear of all such interest, bias, or prejudice as would seriously tend to militate against the finding of such a verdict as the very right and justice of the cause would in every case demand. The provision of the law above referred to does not so expressly provide, but upon the *voir dire* it is the universal practice to propound to jurors questions as to their age, whether they are registered voters or not, where they reside, whether there exists any unusual relations of friendship between them and either of the parties litigant in the cause; and we think this practice correct and proper, and, as we think, fully sanctioned by that clause of the section of the statute quoted, which provides for the inquiry in general as to whether the juror "is otherwise incompetent": *State v. Madoil*, 12 Fla. 151; *Pierce v. State*, 13 N. H. 536; *People v. Reyes*, 5 Cal. 347; *People v. Car Soy*, 57 Cal. 102; *People v. Christie*, 2 Park. Cr. 579; *Jones v. State*, 2 Blackf. 475; *Lester v. State*, 2 Tex. App. 432; *Milan v. State*, 24 Ark. 346.

While section 10, page 446, McClellan's Digest, in enumerating the grounds of challenges to jurors for cause, uses the language, "The court shall, on the motion of each party in any suit, examine on oath any person who is called as a juror therein, to know whether he is related to either party," etc., yet there is nothing in the statute that inhibits the conducting of the examination of jurors on the *voir dire* by the counsel in the cause for the state, and for the defense, or that necessarily imposes upon the judge himself the burden of the conduct of such examination. It has been the universal practice in this state, so far as we know, for such examinations to be conducted by the counsel in the cause, the court, of course, judicially supervising and directing the same, and taking part therein either to supplement or rectify. And we think this is the most convenient and better practice, certainly having the sanction of long and almost universal usage. Still, there is nothing in the statute to prohibit the court from exclusively burdening itself with the entirety of such examinations if it sees proper to do so.

The next error assigned is, that the charge of the court to the jury was misleading and erroneous. While the exception to the charges of the court does not specifically point out any particular part or portion of the charges that are relied on for error by the defendant's counsel, and might, for that reason, be declined to be considered by this court, according to its

repeated rulings in other causes, yet, as human life is involved, and as the cause will have to go back for another trial, we think it proper, without intending to change or modify the former precedents of the court, to make some suggestions in reference to the instructions of the court below to the jury in this cause. And to a proper understanding on the applicability of these charges to the evidence adduced in the cause, we will give the evidence in full as disclosed by the record, as it is not voluminous. Ansel Gillison, for the state, testified: "I know Peter Pinder, the defendant, by sight; I knew Joseph Tillman, the deceased, by sight; I saw Tillman die; it was in Clay County, Florida, on the 11th of October, 1889. There was a big crowd, dozens of them, all there by my shanty, playing on a chicken-coop, gambling and standing around. The fuss was between Pinder, the defendant, and Dozier Paskell. Pinder said, 'Give me my fifty cents'; Paskell said, 'I'll give you nothing; I won it.' Pinder said, 'I will show that you will give it to me.' Press Coleman was there with a pistol when they were gambling. Paskell said to Press Coleman, 'Give me my aid, — my pistol'; he called it his aid. Then Pinder raised up on his feet, saying to Paskell, 'What are you going to do with it?' Then, backing off, he shot in the crowd three different times. Then Pinder started to run, and three men shot at Pinder where he was running. Pinder had a Winchester rifle lying across his lap when he was playing, and rose up with it. Don't know whether Coleman gave Paskell the pistol; could not see for the crowd. Heard Pinder ask Paskell, 'What are you going to do with it?' This was before the shooting, and Paskell was ten or fifteen feet away from Pinder. I was there when Tillman was examined after he was dead. Tillman fell over a log near my shanty, with the ace of diamonds in his hand; he was shot in his left side; saw the wound in Tillman's side; am satisfied that it was a bullet-hole. I did not notice them before the row commenced; don't know what time of day; it was in the forenoon of the day. Don't know whether Paskell got up or not, or whether he took the pistol; the crowd was around the players, and I could not see; neither do I know, and cannot say, who fell after the first shot; I saw a man tumble, but cannot say who it was. Don't know whether it was Tillman or Paskell who was shot first; saw Tillman tumble over a log in front of my shanty door. Can't say what space of time between the two shots, nor how soon after the shots the men fell. Three men

shot at Pinder when he was running; Pinder shot back when he got away down on the railroad. Pinder shot three times when he backed off. Don't know who was shot first. I saw the shooting through the crack of the house. The defendant is a colored person, and so were all the others."

Allen Franklin, for the state, testified: "I know Peter Pinder, the defendant; I knew Tillman; saw him dead; saw him alive about twenty minutes before his death; saw him playing cards with Pinder and a big crowd. The question arose between Pinder and Paskell about fifty cents over the game. Pinder asked for the fifty cents from Paskell; Paskell said, 'I will give you nothing.' Pinder had his rifle on his lap. When Paskell asked for his pistol, Pinder got up and asked once, twice, and three times, 'What are you going to do with it?' backing off all the time. Pinder then shot, and, backing back, Pinder shot three times into the crowd; saw Tillman fall where I cook, and Paskell fell against my shanty; saw Tillman fall dead. Did not hear Tillman say anything to Pinder, nor Pinder to Tillman. Tillman had no weapons on him at the time he was killed. Pinder was the only man that shot in the crowd. Pinder did not get up until after he asked Paskell what he was going to do with the pistol; he had his rifle in his hand when he rose. Paskell had already said, 'Press, give me my "thirty-eight,"' rising at the same time he asked for the pistol. I did not see Paskell get the pistol. There was a big crowd around."

With this testimony the state rested its case. The defendant introduced no evidence. The court then charged the jury as follows: "1. The prisoner stands indicted for murder in the first degree. In order to find the defendant guilty as charged, you must be satisfied from the evidence, beyond a reasonable doubt, that the defendant, Peter Pinder, killed Joseph Tillman in the county of Clay, and state of Florida, before the finding of this indictment, by shooting him with a Winchester rifle, and that he killed said Tillman willfully, and with malice aforethought, from a premeditated design to effect the death of said Tillman or some human being. 2. If the jury should find from the evidence, beyond a reasonable doubt, that the defendant had a premeditated design to kill some other human being, and in the effort to effect such premeditated design, he killed the deceased, he would be as guilty as if he had effected his purpose and killed the person intended. 3. To constitute excusable homicide by reason of

the defendant acting in self-defense, it is necessary that the defendant should have perpetrated the act under the well-grounded belief, justified by the surroundings, that it was necessary to take the life of the person slain in order to save his own life, or to prevent great bodily harm to himself, at the time he fired the fatal shot. 4. The premeditation which the law requires need not exist any particular length of time; it is sufficient if you are satisfied from the evidence, beyond a reasonable doubt, that he had deliberated, even if but a moment, before acting, and that his action was the result of such deliberation. 5. Murder in the second degree consists in the killing of a human being by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual. 6. Manslaughter in the second degree consists in the killing of a human being, without design to effect death, in the heat of passion, but in a cruel and unusual manner, unless the killing be under such circumstances as to constitute excusable or justifiable homicide. 7. Manslaughter in the third degree consists in the killing of another in the heat of passion, without a design to effect death, by a dangerous weapon, in any case, except where such killing is excusable or justifiable. 8. Under this indictment the jury may convict the defendant either of murder in the first degree, murder in the second degree, manslaughter in the second degree, or manslaughter in the third degree, according as they may think that the evidence proves the commission of such offense beyond a reasonable doubt."

These instructions, in defining murder in the different degrees, and manslaughter in the different degrees, wholly fail to give to the defendant the benefit of the idea that the killing must have been "unlawful," — that is, without "authority of law," — in order to constitute the crime of either murder or manslaughter: *McClellan's Digest*, p. 350, secs. 1, 2 et seq. And again, in these instructions, the statute definition of murder in the first and second degrees, and of manslaughter in the second and third degrees, is given (with the omission above pointed out), but there is a total absence of definition of manslaughter in the fourth degree, a conviction for which might have been warranted by the evidence; and in this connection we think the eighth charge confines the jury to too narrow a limit. In this charge they are instructed that, "under this indictment, they may convict the defendant of either murder

in the first or second degree, or of manslaughter in the second or third degree," omitting entirely, as in the other charges, any mention of the fourth degree of manslaughter; the effect of which might have tended to mislead the jury into the belief that, under the law, they could not in this case convict of the lesser offense of manslaughter in the fourth degree. Again, in this eighth charge, there is absent any intimation to the jury that they had the power to acquit the prisoner, if the evidence warranted an acquittal, and from its phraseology might have a tendency to mislead the jury into a belief that they should not do otherwise than to convict of murder in the first or second degrees, or of manslaughter in the second or third degree; and for this latter reason we think the eighth charge erroneous. We think, too, that there should have been to the jury instructions explanatory of the circumstances that constitute the exceptions mentioned in the statute wherein the killing is declared to be justifiable or excusable. We think it the correct and better practice in all such cases, when the court undertakes to instruct the jury as to the several degrees of homicide and the facts that constitute each as defined by statute, that he should also give to the jury the circumstances that constitute the exceptions mentioned in the statute wherein the killing is declared to be justifiable or excusable: *Cato v. State*, 9 Fla. 163; *Gladden v. State*, 12 Fla. 562; *Brown v. State*, 18 Fla. 472.

We do not wish it to be inferred from anything said in the preceding paragraph that we mean thereby to decide whether or not the omissions therein pointed out would of themselves cause us to reverse the judgment upon the evidence before us, but as the case goes back for a new trial upon other grounds, we think the views suggested should be called to the attention of the court, to be applied should they be warranted by the circumstances that may be developed on a new trial.

But the most serious error — the one that, we think, tended most to the prejudice of the prisoner — was the giving of the third charge, above quoted. When applied to the evidence in this case, this charge is erroneous from two stand-points. 1. It is erroneous because it misstates the law of excusable homicide upon the theory of self-defense, as defined by this court in *Smith v. State*, 25 Fla. 517. In this charge the jury are instructed that, in order to sustain the theory of self-defense, "it is necessary that the defendant should have perpetrated the act under the well-grounded belief, justified by the surround-

ings, that it was necessary to take the life of the person slain in order to save his own life, or to prevent great bodily harm to himself, at the time he fired the fatal shot." In the case last cited, this court has, in effect, defined the law to be, that the belief or fear of imminent danger to life or person need not in fact be "well grounded," but if the conduct, the actions, coupled with the threatening language of the prisoner's assailant, be such as to induce a reasonable, cautious man to believe from the circumstances by which he was surrounded that his life or person was in imminent danger unless he fires the fatal shot, then the killing would be excusable; and from these circumstances, as they appeared to the slayer, in the light of the evidence, must be deduced the excusing belief of the existence of imminent danger to life or person. All that could be required of the prisoner in such cases would be to show that he was surrounded by such a condition of affairs as made it, from his stand-point, reasonable for a cautious and prudent man to believe that it was necessary to fire the fatal shot or to strike the fatal blow in order to save himself from death or great bodily harm, even though it may turn out afterwards that the surrounding appearances were deceptive, and that in reality his life or person was in no danger at the time. The reasonableness of the belief or fear of the existence of such peril as will excuse the killing is for the jury to determine from all the facts and circumstances adduced in evidence. Though it may be proven at the trial, in the calm solemnity of the court-room, after the heat and excitement of the affray has long subsided, that in point of fact the prisoner was in no danger at the time, yet if the jury, after mentally putting themselves in the prisoner's shoes at the time of the killing, seeing from the evidence only as he then saw, and hearing from the evidence only as he then heard, believe from the whole evidence that a cautious and prudent man would, under like circumstances, have been led reasonably to believe his life or person in imminent danger unless he did the act that caused death, then they should, under the law, by their verdict excuse the killing. Under this view of the law, it was error to instruct the jury that the belief of danger must be "well grounded." 2. This third instruction is erroneous when applied to the facts in this case, because it deprived the defendant of the defense founded upon the theory that the killing of Joseph Tillman, the deceased, was unintentional, and accidentally brought about by the excusable or justifiable de-

fense of himself against impending danger from a third party. While we do not pretend to say that this defense was maintained by the evidence before us, yet we do think that such a defense was deducible from the evidence, and the prisoner should not have been shut off therefrom, as he was, by this third instruction, wherein the jury is told that in order to excuse the homicide upon the theory of self-defense, the defendant must show "that it was necessary to take the life of the person slain in order to save his own life," etc. It was for the jury to determine from the evidence whether the killing of Tillman, under the circumstances, was unintentional, and purely the result of a random shot fired by the defendant at another party, and whether the defendant fired that random shot with the degree of prudence, discretion, and care for the lives of others as the surrounding circumstances at the time would justify in the excusable or justifiable defense of his life or person from impending imminent peril at the hands of the party shot at but missed. If the killing of the party intended to be hit would, under all the circumstances, have been excusable or justifiable homicide upon the theory of self-defense, then the unintended killing of Tillman, a by-stander, by a random shot fired in the proper and prudent exercise of such self-defense, was also excusable or justifiable. We think further, that had the killing of the intended victim been reduced by the circumstances to murder in the second or third degree, or to manslaughter in any of the degrees, then, the unintended and accidental killing of a by-stander, resulting from any act designed to take effect upon the intended victim, would be likewise reduced to the same grade of offense as would have followed the death of the victim intended to be killed: 1 Bishop's Crim. Law, sec. 334; *Plummer v. State*, 4 Tex. App. 310; 30 Am. Rep. 165; *Aaron v. State*, 81 Ga. 167; *Kerr on Homicide*, secs. 154, 198.

From what has been said, under the circumstances of this case, the error of the third instruction becomes apparent; wherein it requires the defendant in a case like this to show that the killing of the person actually slain was necessary to save his own life, etc.

Upon the ground that the court below erred in not permitting the examination of the jurors upon the *voir dire* on the line herein pointed out, we think the judgment and sentence of the court below should be reversed, and a new trial granted, and it is so ordered.

JURY AND JUROR — EXAMINATION OF, ON VOIR DIRE — SCOPE OF. — Only statutory questions should be propounded to a juror on his examination on *voir dire*: *Monday v. State*, 32 Ga. 672; 79 Am. Dec. 314, and note. See extended note to *State v. Crank*, 23 Am. Dec. 128-131; *Woolfolk v. State*, 85 Ga. 71.

HOMICIDE — KILLING MUST BE UNLAWFUL, TO CONSTITUTE MURDER. — Homicide, without malice being shown, does not constitute murder: *Murray v. State*, 68 Miss. 605; 24 Am. St. Rep. 291, and note; note to *Dukes v. State*, 71 Am. Dec. 281.

HOMICIDE — SELF-DEFENSE — SIMULATED FEAR NOT WELL FOUNDED. — A defendant is excusable in acting according to surrounding circumstances as they appeared to him: *Patten v. People*, 18 Mich. 314; 100 Am. Dec. 173, and note; and it is not indispensable, to justify self-defense, that the danger was real: *Campbell v. People*, 16 Ill. 17; 41 Am. Dec. 49, and note; extended note to *Shorter v. People*, 51 Am. Dec. 293; *State v. Cosgrove*, 42 La. Ann. 753; *State v. Harrod*, 102 Mo. 591; *Perkins v. State*, 78 Wis. 551; *State v. Wye*, 33 S. C. 582.

HOMICIDE — ACCIDENTAL KILLING OF THIRD PERSON. — One who, in an attempt to kill one person, kills another by mistake, is guilty of murder or manslaughter: *Butler v. People*, 125 Ill. 641; 8 Am. St. Rep. 423, and note. One who, in self-defense against another, accidentally kills another is guilty of no crime: *Phummer v. State*, 4 Tex. App. 310; 30 Am. Rep. 165; extended note to *Barcus v. State*, 19 Am. Rep. 3.

MANSLAUGHTER IN THE FOURTH DEGREE. — As to what evidence will sustain a conviction for this crime, see *Schlect v. State*, 75 Wis. 486.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

HAZLETON v. REED.

[46 KANSAS, 72.]

WILLS — CONSTRUCTION OF INSTRUMENT IN FORM OF DEED. — An instrument in the form of a deed, or a contract for a deed, disclosing the intention of the maker respecting the posthumous destination of his property, and which is not to operate until after his death, is a will, and may be revoked.

Garver and Bond, for the plaintiffs in error.

W. E. Richards and R. R. Rees, for the defendants in error.

HORTON, C. J. This was an action brought in the court below by the widow and minor children of John Hazleton, deceased, against James G. Reed, executor of the last will of Henry Ricket, deceased, and other parties, to enforce an alleged contract for the conveyance of certain real estate, executed on the 9th of March, 1883, by John Hazleton and Henry Ricket. Henry Ricket died on the 15th of September, 1883. John Hazleton died on the 9th of April, 1888. Upon the part of the plaintiffs, it is claimed that, within the terms of the contract, Ricket was under obligation to make such provision by deed or will as would vest the title to the land in Hazleton; that the mere method or form adopted for this purpose cannot be held to be material, so that the intention of the parties is carried out; that it is the duty of the court to ascertain the intention of the parties with reference to the subject-matter of their agreement, when that can be done; that it was the intention of both Ricket and Hazleton that the land should become the property of the latter upon the former's death, and therefore that the district court erred in sustaining the demurrer of the

defendants upon the ground that the petition did not state sufficient facts to constitute a cause of action. The written memorandum of the alleged contract was under consideration by this court in the case of *Reed v. Hazleton*, 87 Kan. 321. The facts of this case, together with a copy of the memorandum, are recited in full in the foregoing case, and need not be repeated here. In the former opinion handed down, it was said: "Under the view which we take of this instrument, it will be unnecessary to examine the nature of a contract of bargain and sale, and a covenant to stand seised to the use of the grantee, which are discussed in the briefs filed in this action. We believe that it ought not to be placed in either of those classes of conveyances. . . . This article of agreement does not contain any of the usual operative words of a conveyance, with the possible exception of this clause: 'After the death of said Henry Ricket, of the first party, the right and title of the land in question shall vest in the said John Hazleton, of the second party.' That provision has no present operation, and could be revoked by the grantor at any time. It was testamentary. . . . The old man wisely kept possession and control of his home, to prepare for the possible change in the feelings of himself and Hazleton. Hazleton was not without recourse if he had performed services for which he had not been paid. He could have presented his claim against the estate, and the courts were open to aid him in obtaining his dues."

This disposes of the case. In *Turner v. Scott*, 51 Pa. St. 126, on the 22d of November, 1849, the father, John Scott, executed an instrument to his son, John W. Scott, purporting to convey his farm. The consideration for the execution of the instrument was the natural love and affection which the father had for his son, and also an agreement from the son that he was to live with the father, assist him in his work on the land, and maintain the mother during her natural life, if she survived her husband. The instrument contained the following provisions: "Excepting and reserving, nevertheless, the entire use and possession of said premises unto the said John Scott and his assigns for and during the term of his natural life, and this conveyance in no way to take effect until after the decease of the said John Scott, the grantor."

The son commenced to live with his father upon the land mentioned in the instrument, but after a time they quarreled. The father turned the son out, and on the 26th of February, 1861, made a will revoking the instrument executed to his son

which had been put upon record in the proper county. The chief justice of the court, in construing the written instrument from John Scott to his son, John W. Scott, said: "We see nothing in the covenant of warranty to change our construction of the operative words of the grant. As these words were expressly limited to take effect only after the death of the grantor, they were necessarily revocable words. The doctrine of the cases is, that whatever the form of the instrument, if it vest no present interest, but only appoints what is to be done after the death of the maker, it is a testamentary instrument. It signifies nothing that the parties meant to make a deed instead of a will. If they have used language which the law holds to be testamentary, their intention is to be gathered from the legal import of the words they have employed, for all parties must be judged by the legal meaning of their words."

In *Leaver v. Gauss*, 62 Iowa, 314, Leaver and wife executed to Gauss an instrument somewhat in the form of a deed, but it was provided therein that it should take effect only after the death of himself and wife. It is claimed that a valuable consideration was paid therefor by Gauss. One of the provisions of the written instrument was, "that the grantee is to take no estate during the lives of the grantors." In that case it was held that "a deed which recites as one of its express provisions that 'the grantee is to take no estate during the lives of the grantors' is testamentary in its character, and even if consideration was paid for it, may be revoked, no present estate subject to a life estate being created thereby."

In *Sperber v. Balster*, 66 Ga. 317, August Kohler executed a written instrument purporting to convey to Sophestina Sperber 650 acres of land, in consideration of services rendered him by Sophestina as a nurse. The instrument provided "that it should have full effect at his death."

The chief justice of the court said in that case: "It is wholly unnecessary to cite cases or invoke precedents in construing a paper like this, with a view to get at his meaning in respect to the time when he intended title, right, property, to pass out of himself into the object of his bounty. It is enough to lay down the universal principle embodied in our code, section 2395, which is in these words: 'No particular form of words is necessary to constitute a will; and in all cases, to determine the character of an instrument, whether it is testamentary or not, the test is the intention of the maker from the whole instrument, read in the light of the surrounding cir-

circumstances. If such intention be to convey a present estate, though the possession be postponed until after his death, the instrument is a deed; if the intention be to convey an interest accruing and having effect only after his death, it is a will." So reading this instrument, we construe it to be clearly a will; at all events, we all hold that such is the better legal view of it."

In *Kinnbrew v. Kinnbrew*, 35 Ala. 628, it was decided that "an instrument under seal, in form a deed of gift, by which the grantor, in consideration of the natural love and affection for the grantee, who was his grandson, and the present payment of five dollars by the grantee, conveys to the latter, by the words 'do by these presents give and grant,' a slave, 'and fifteen hundred dollars in cash, to be paid to him out of my [grantor's] estate at my death, by my executor or administrator,'—held, a deed of gift as to the slave, but as to the money, a purely voluntary executory trust, which a court of equity would not enforce as an instrument *inter vivos*, but which was valid and operative as a will."

On the part of the plaintiffs, counsel refer with great confidence to the case of *Sutton v. Hayden*, 62 Mo. 101. In that case an arrangement was made by Mrs. Green with her brother to take his daughter, her own niece and godchild, and make her her heir at her (Mrs. Green's) death. Subsequently, she promised that if the niece would come and live with her (Mrs. Green), and would be a daughter to her, and nurse and take care of her the remainder of her life, all that she had should be hers (the niece's) at her (Mrs. Green's) death. The niece, Nancy A. Sutton, accepted the offer, and relying upon the promises of her aunt, entered into her service, and continued with her about fifteen years. Mrs. Green failed to make any deed or will, and died intestate. In that case the court held that a specific performance of the agreement of Mrs. Green could be compelled in equity, and that case is followed in several other Missouri cases. This case, however, is quite different from them in many particulars, especially in this, that Hazleton did not care for Ricket but a comparatively short time,—from the 1st of April, 1882, until the 15th of September, 1883, when Ricket died. By the express provisions of the article of agreement, Ricket was to retain during his lifetime full and peaceable possession of all the land, and Hazleton was to live with Ricket,—not Ricket with Hazleton,—and Hazleton was to have no right or title in the land until

after the death of Ricket. The provision in the article of agreement concerning the land in dispute was held by us in the former opinion to be testamentary only. We adhere to this ruling.

"It may be laid down as a general rule that an instrument in the form of a deed, signed, sealed, and delivered as such, if it discloses the intention of the maker respecting the posthumous destination of his property, and is not to operate until after his death, is a will, and not a deed": 19 Cent. L. J. 47.

The difference between the cases cited in the former opinion and the case of *Sutton v. Hayden*, 62 Mo. 101, and other similar cases, is this: That in the former cases, the courts seem to think that the grantees could have recovered for any claim or service which they could establish without seeking relief in a court of equity. In the latter cases, the courts evidently proceeded upon the theory that the law furnishes no standard whereby the value of such services can be estimated, and equity can only make an approximation in that direction by decreeing the specific execution of the contract.

In *Sutton v. Hayden*, 62 Mo. 101, the niece gave for many years to the discharge of her manifold cares, down to the period of her aunt's death, an unhesitating and unwearied tenderness and attention, which are only bestowed where affection prompts them.

In *Barkweather v. Young*, 4 Drew. 1, A, on the marriage of his daughter with B, agreed to leave his daughter an equal portion with his other children. Of course, in such a case, no compensation could be agreed upon or established, and equity alone could afford relief.

In *Rhodes v. Rhodes*, 3 Sand. 279, the services therein contracted for could not and were not intended to be compensated with money, and were also incapable of computation by any pecuniary standard.

In this case, the services of Hazleton with Ricket were so brief—being only for about eighteen months—that the value of the same could easily be computed.

The judgment of the district court will be affirmed.

WILLS—INSTRUMENT, WHETHER WILL OR DEED—RULES FOR DETERMINING.—In determining whether an instrument, posthumous in its operation, is a will or a deed, the intention of the maker, to be gathered from the language and the attendant circumstances, should control: *Sharp v. Hall*, 86 Ala. 110; 11 Am. St. Rep. 23, and note; *Carlton v. Cameron*, 54

Tax. 72; 38 Am. Rep. 620, and note. For an extended discussion of this subject, see note to *Burlington University v. Barrett*, 92 Am. Dec. 386-389; note to *Singleton v. Bremar*, 17 Am. Dec. 702. An instrument, though in form a deed, which is to operate only after the death of the maker, is a will: *Estate of Lautenschlager*, 80 Mich. 285. Whether an instrument is a will or a contract must be determined from its contents, rather than from its form: *Estate of Cowley*, 136 Pa. St. 623.

HENTIG v. REDDEN.

(46 KANSAS, 281.)

JUDGMENT — RES JUDICATA. — A judgment or decree of a court of competent jurisdiction is final not only as to the subject-matter, but also as to every other matter which the parties might have litigated and had decided in the case.

JUDGMENT IN EJECTMENT — CONCLUSIVENESS OF, AS TO TITLE. — Judgment for plaintiff in ejectment is conclusive against defendant on the question of title, from whatever source derived, and forever estops him from asserting a claim of title which existed at the time of the rendition of the judgment.

JUDGMENT IN EJECTMENT AS ESTOPPEL — NEW TITLE, WHEN MUST BE ASSERTED. — Where defendant in ejectment acquires a new title during the pendency of the action, he must assert it therein before final judgment is rendered against him. Such judgment estops him from afterwards asserting it against the successful plaintiff therein.

F. G. Hentig, and Lloyd D. Simpson, for the plaintiff in error.

Redden and Schumacher, for the defendant in error.

HORTON, C. J. This was an action in the court below, brought on the eighteenth day of July, 1887, by Mrs. A. J. Hentig against J. W. Redden, asking that her title to four certain lots on Clay Street, in the city of Topeka, be quieted, and that the defendant be forever barred from asserting any claim or interest to said lots, or any part thereof. The defendant filed an answer containing a general denial, and also the plea of *res adjudicata*. The place of trial of the action was transferred from the district court of Shawnee County to the district court of Jackson County. Trial was there had before the court without a jury. No special findings were requested or made by the trial court, but the court, after hearing the evidence and the arguments, made a general finding in favor of the defendant and against the plaintiff. Of this judgment, plaintiff complains.

We need refer only to the plea of *res adjudicata*, and the

evidence offered in support thereof. Prior to March 1, 1878, J. J. Puterbaugh, of Logansport, Indiana, was the owner of the lots in controversy. On March 1, 1878, Puterbaugh, then residing in Logansport, Indiana, made an assignment of certain real and personal property to Thomas H. Bringhurst, in trust for the benefit of his creditors. The lots in dispute were not mentioned in the deed of assignment. On the 22d of August, 1883, J. J. Puterbaugh and wife sold and conveyed by quitclaim deed to J. W. Redden, for the consideration of \$120, the lots described in the petition. On the second day of August, 1878, Thomas H. Bringhurst sold and conveyed, by quitclaim deed to Charles S. Puterbaugh, of Cass County, Indiana, the lots, for the consideration of nine dollars. On the twenty-fifth day of September, 1883, Thomas H. Bringhurst sold and conveyed the same lots to Mrs. A. J. Hentig by quitclaim deed, for the consideration of one dollar. On the eighteenth day of May, 1887, Charles S. Puterbaugh sold and conveyed to Mrs. A. J. Hentig, the same lots by quitclaim deed, for the consideration of ten dollars. There is also evidence that he executed to Mrs. Hentig a prior deed, intending to convey these lots, in 1883. On October 1, 1883, J. W. Redden brought his action against Mrs. A. J. Hentig, in the district court of Shawnee County, in the nature of ejectment, to recover the possession of the same lots. Mrs. A. J. Hentig, in her answer in that case, alleged that J. J. Puterbaugh, prior to the execution of his deed of August 22, 1883, to J. W. Redden, had sold and assigned all of his real and personal property to James H. Bringhurst, in trust for the benefit of his creditors. She further answered that she was the owner and in the possession of the lots by virtue of a tax deed: *Hentig v. Redden*, 35 Kan. 471.

Upon the trial, Charles S. Puterbaugh testified as follows:—

“Q. Was it at public or private sale that you bought these lots? A. Public sale.

“Q. Was your father, Jacob J. Puterbaugh, present at that sale? A. If all his real estate was sold at one sale, he was present; if not, I am not sure.

“Q. What was the price at which the lots were sold to you by the assignee? A. One dollar each, I think.

“Q. Did you pay for them? A. Yes, sir. . . .

“Q. When did you make the first deed to Mrs. A. J. Hentig? A. I think it was in 1883 I made the first deed to Mrs. A. J. Hentig.

"Q. Did she pay you for those lots? A. Yes, sir; she gave me two hundred dollars, I believe.

"Q. Did you make her a deed for it? A. Yes, sir.

"Q. What became of that deed? A. Sent it to her. I have never seen it since, to the best of my knowledge.

"Q. Did you sell those lots and convey them in that deed by the same description as that used by the assignee in his conveyance to you? A. I believe I did, not knowing there was an error in the deed of assignment.

"Q. What became of that assignment? A. I sent it to her. . . .

"Q. Did you get any money for the second deed you made? A. Yes, sir; I did.

"Q. How much money did you get that time? A. Ten dollars.

"Q. How did you come to make this second deed? A. Some time in 1866, Hentig wrote me, claiming there was some error in the deed, and asked for a quitclaim deed, later, in 1887. He sent to Judge Nelson a quitclaim deed for me to execute, which I did."

J. W. Redden testified on the trial, among other things, as follows:—

"Q. Were you present in the court-room in Topeka, Shawnee County, Kansas, when the case of J. W. Redden v. Hentig was on trial, which involved the title to this same property? A. I was.

"Q. An action of ejectment of this same property? A. Yes, sir.

"Q. Did you see F. G. Hentig there? A. I did.

"Q. What statement did he make then in your presence or hearing relative to his wife then having a deed from Bringhurst or Charles Puterbaugh for the property in controversy? A. Mr. Hentig had in his hand a paper that he said, I think [he addressed the conversation to Mr. Harris], was a deed from Charles S. Puterbaugh to A. J. Hentig for these lots in controversy, but he did not propose to offer it in evidence at that time; he had thought of doing it, but he would not.

"Q. What was the first name of the Puterbaugh that he said the deed was from? A. Charles S. Puterbaugh, I think it was.

"Q. When was this conversation? A. My recollection now is, that it was in the trial of the case, in the spring of 1885.

"Q. At the time the case was being tried, and before the

trial was over with, and before judgment was rendered? A. Yes, sir; during the progress of the case."

H. H. Harris testified:—

"Q. Were you present at the trial of the case of J. W. Redden v. A. J. Hentig, in Shawnee County, when the title of this property was in dispute? Yes, sir.

"Q. When was that? A. February, 1885.

"Q. Did you see F. G. Hentig at that time? A. Yes; he appeared for himself and his wife.

"Q. He was also a witness? A. Yes, sir.

"What statement did he make about his wife having a deed from Charles S. Puterbaugh? A. After we had submitted the evidence upon each side, and submitted to the court (Judge Martin, who was trying it *pro tem.*), Mr. Hentig got up, and pulled a paper out of his pocket that looked like a deed, and said to me, 'There is a deed to my wife for those lots, but I do not propose to try that title now; I am trying the tax title.' I wondered why he did not offer it, and immediately turned around to Dr. Redden, and told him it was a surprise to me that he had such a deed. I did not know why he did not offer it.

"Q. If Mr. Hentig made any statement as to whom that deed was from, state what it was. A. He said it was a deed from Charles S. Puterbaugh to his wife, Mrs. A. J. Hentig, the plaintiff in this suit.

"Q. For what lots? A. For lots Nos. 408, 410, 412, and 414 Clay Street, Topeka, Kansas."

Upon rebuttal, F. G. Hentig testified that the statements of J. W. Redden and H. H. Harris were incorrect, and that he never had any deed from Charles S. Puterbaugh to his wife in his possession until long after the trial of Redden v. Hentig, referred to; that the only deed his wife ever had from Charles S. Puterbaugh was dated July 9, 1887.

The judgment of February 18, 1885, rendered in the case of J. W. Redden v. Mrs. A. J. Hentig, recites, among other things, as follows: "The court finds that at the commencement of this suit the plaintiff, J. W. Redden, was the owner in fee-simple of lots 408, 410, 412, and 414, on Clay Street, in the city of Topeka, Kansas, and is such owner now, and that all the material allegations in the petition are true; 2. The court further finds that Mrs. A. J. Hentig is in possession under two tax deeds, one recorded May 9, 1877, and the other September 30, 1882, both issued on the tax sale of 1874, for

the taxes of 1878; 3. That said tax sale was void, first, because there was an unlawful combination of bidders at the sale, which prevented competition; the sale was made for illegal costs charged against the lots."

Under the general finding of the trial court, we must assume that Mrs. A. J. Hentig had in her possession a deed from Charles S. Puterbaugh during the trial of the former case of J. W. Redden v. Mrs. A. J. Hentig, in the month of February, 1885. It is possible that Dr. Redden and Mr. Harris were mistaken as to what deed Mr. Hentig exhibited, and therefore that the trial court was led into error; but, upon the evidence presented, we cannot now interfere or disturb the finding. There was sufficient evidence to support it, and the trial court's finding is conclusive. Therefore, under the evidence and the general finding of the trial court, we think its judgment must be affirmed, as the plea of *res adjudicata* was fully sustained.

It has been said several times by this court, and also by many other courts, that "a judgment or decree of a court of competent jurisdiction is not only final as to the subject-matter, but also as to every other matter which the parties might have litigated in the case, and which they might have had decided."

Under the provisions of the civil code, an action in the nature of ejectment, like the former case of J. W. Redden v. Mrs. A. J. Hentig, settles the title between the parties in favor of the one recovering the judgment: *Hurd v. Comm'rs of Harvey Co.*, 40 Kan. 92; *Barrows v. Kindred*, 4 Wall. 403; *Mahoney v. Middleton*, 41 Cal. 41; *Marvin v. Dennison*, 1 Blatchf. 159; *Edwards v. Roys*, 18 Vt. 473; *Reed v. Douglas*, 74 Iowa, 244; 7 Am. St. Rep. 476. This court, in *Commissioners of Marion Co. v. Welch*, 40 Kan. 770, said "that a general finding of title in the plaintiff—consequently of no title in the defendant—is a conclusive and binding decision against the defendant on the question of title, from whatever source it may be derived, and forever estops him from asserting a claim of title which existed at the time of the decree."

If Mrs. Hentig had in her possession the deed from Charles S. Puterbaugh for the lots during the pendency of the former action of Redden against herself (as we are bound to assume she did have, from the finding of the trial court), she could have offered that deed in evidence for what it was worth, to sustain her title and her right of possession. If necessary,

she could have filed a supplemental answer. The law does not favor a multiplicity of suits, and where all matters in controversy between parties as to the title or possession of real estate might be finally ended in one action, the law requires that this should be done. Parties cannot try title to real estate by piecemeal, in separate and independent actions upon separate deeds or chains of title, when they have in their possession during the trial separate and different deeds. If the deed from Charles S. Puterbaugh to Mrs. Hentig executed in 1883 did not, on account of a mistake of the parties, contain a proper description of the lots, yet if Charles S. Puterbaugh had any title or interest therein, that title or interest was transferred to Mrs. Hentig in equity, if not in law, and therefore she ought to have asserted in the former action the deed which she first obtained from Puterbaugh. If Mrs. Hentig had obtained a new and distinct title to the lots after the final judgment in the former action, then that judgment would not have been *res adjudicata* against her. But that is not this case. Under the finding of the trial court, she obtained her new and distinct title to the lots pending the former action. It was not used in that action. It was too late to use this title after the final judgment in the former action.

The judgment of the district court will be affirmed.

JUDGMENTS — RES JUDICATA. — The estoppel of a former judgment extends to every material matter within the issues which was expressly litigated, and also to those matters which might have been litigated and determined: *Huntley v. Holt*, 59 Conn. 102; 21 Am. St. Rep. 71, and note; *Hobby v. Bunch*, 53 Ga. 1; 20 Am. St. Rep. 301, and note; *Tadlock v. Eccles*, 20 Tex. 782; 73 Am. Dec. 213, and note; extended note to *Lawrence v. Hunt*, 25 Am. Dec. 542; *McCullough v. Dashiell*, 85 Va. 37.

JUDGMENT IN EJECTMENT AS RES JUDICATA. — An exception to the rule of *res adjudicata* exists in an action of ejectment on a legal title, in which successive suits may be prosecuted until two concurring judgments are obtained: *Marsteller v. Marsteller*, 132 Pa. St. 517; 19 Am. St. Rep. 604. For an extended discussion of the conclusiveness judgments in ejectment, see note to *Caperton v. Schmidt*, 85 Am. Dec. 208. See *Johnson v. Vance*, 86 Cal. 110. Purchasers after a judgment in ejectment must yield to the process on such judgment awarding possession to the plaintiff: *Hawkins v. State*, 125 Ind. 571. A judgment in ejectment upon an equitable title is a bar to any subsequent ejectment for the same land, and includes all equitable titles: *Shive v. Fawcoid*, 137 Pa. St. 83.

JUDGMENTS — FAILURE TO SET UP DEFENSE — ESTOPPEL. — Where a party has had an opportunity to set up a defense, and neglects to do so, a judgment recovered against him will be binding: *Morrill v. Morrill*, 20 Or. 96; 23 Am. St. Rep. 95, and note. As to when a former judgment acts as an estoppel, see *Moore v. Williams*, 132 Ill. 589; 22 Am. St. Rep. 563, and note; *Caperton v. Schmidt*, 26 Cal. 479; 85 Am. Dec. 187, and note.

TITLE ACQUIRED PENDENTE LITE may generally be asserted, notwithstanding the judgment, unless it was pleaded by some supplemental plea, and thus brought within the issues before the court: *Freeman on Judgments*, sec. 329; *McLane v. Bovee*, 35 Wis. 27; *People's S. B. v. Hodgdon*, 64 Cal. 95; *People v. Holladay*, 68 Cal. 439; *Hemmingway v. Drew*, 47 Mich. 554; *contra*, *Eed v. Dingles*, 74 Iowa, 244; 7 Am. St. Rep. 476; and the principal case.

REDDEN v. METZGER.

[46 KANSAS, 285.]

JUDGMENTS — FINDINGS AFFIRMED BY JUDGMENT AS RES JUDICATA. — A finding of fact in a foreclosure suit in favor of a defendant therein, that he has a valid tax deed subsequent to the mortgage, and is the owner and in the possession of certain land described therein, which finding is affirmed by the judgment of foreclosure as to the other land described, specially excepting his land therefrom, is conclusive as to his title thereto, as to all the parties and those claiming under them, in a subsequent action of ejectment for the same land.

Redden and Schumacher, and H. H. Harris, for the plaintiff in error.

Johnson, Martin, and Keeler, and G. A. Huron, for the defendants in error.

GREEN, C. This was an action of ejectment brought by the plaintiff in error against the defendants in error, in the district court of Shawnee County, to recover the southeast quarter of section 11 in township 10 of range 18. The defendants set up a claim of title under a certain tax deed, and also alleged that the question of the defendants' title had been finally adjudicated in a suit commenced in the district court of Leavenworth County, and set up such decree and judgment as being *res adjudicata*. The case was tried by the court without a jury, and judgment rendered in favor of the defendants.

It seems that George R. Hines was the owner of the undivided half of this land on the first day of July, 1873. In October of the same year, he conveyed his interest to W. H. Carson, who deeded to Harrison C. Hines, and he sold the same to the plaintiff in error on the eighteenth day of August, 1884. The defendants' claim to the land is based upon the possession of Eli W. Metzger, on March 1, 1883, under a certain tax deed, and a foreclosure suit commenced by W. J. Buchan, as trustee, in the district court of Leavenworth County, on the seventh day of March, 1883, against George C. Hines, Harrison C. Hines, Eli W. Metzger *et al.*, to foreclose

a mortgage executed by George R. Hines and wife on the property in controversy, and several other tracts in Leavenworth, Shawnee, and other counties. In this foreclosure case, summons was served upon Harrison C. Hines and George R. Hines, in Jefferson County, on the thirteenth day of March, 1883, by the under-sheriff of the county, but in making his return, he signed it, "sheriff of Leavenworth County, Kansas, by W. S. Van Cleave, under-sheriff." The summons being from the latter county, the officer had doubtless neglected to erase the printed matter on the summons. On the twenty-fourth day of December, 1886, and upon proper notice to the plaintiff, but without the knowledge of the original defendants named, the sheriff's return, by leave of the court, was amended so as to conform to the facts, and was signed by George Davis, sheriff of Jefferson County, by W. S. Van Cleave, under-sheriff. The defendants Hines made default. Metzger by his answer alleged that he was the owner of this quarter-section of land in controversy by virtue of a tax deed made subsequent to the mortgage, and that therefore the land was not subject to the mortgage. In the trial of this case in the district court of Leavenworth County on the fifth day of July, 1884, the following finding of fact, with others, was made: "That the defendant Eli W. Metzger has a valid tax deed of the southeast quarter of section 11, township 10, range 16, in Shawnee County, Kansas, and is the owner and is in the actual possession thereof, and that no other party to this suit has any lien thereon. The contention of the plaintiff in error is, that the district court of Leavenworth County rendered no judgment whatever upon this finding, and therefore nothing was settled in that case, so far as the rights of the parties to this suit are concerned; that no person is bound by any litigation until there is a final judgment; that until a court renders a judgment upon a verdict of the jury or its own findings, it is always susceptible of further investigation and of further litigation. It is conceded by the defendants in error that plaintiff in error has shown such a title to the undivided half of this land sued for as would prevail but for the fact that it has been extinguished by the foreclosure proceedings in the district court of Leavenworth County, and that the tax deed through which the defendants in error obtained title is voidable, upon the evidence offered by the plaintiff in error, provided he is not estopped by a former adjudication from attacking the validity of this tax deed. This concession materially simpli-

fies the case, so that the question of a former adjudication becomes the controlling one here.

A final judgment and decree were rendered in the foreclosure proceedings in the district court of Leavenworth County. A personal judgment was rendered against George R. Hines, and in favor of W. J. Buchan as trustee, and certain lands were ordered sold to satisfy that judgment, but the land in controversy was not included in this decree. The question, then, which this case presents is this: Did the special finding in favor of Eli Metzger concerning this land become a part of and was it included in the judgment and decree finally rendered by the district court of Leavenworth County? If it did, the question must be answered in favor of the defendants; if it did not enter into the final determination of the case, nothing was settled by this finding. It is true, as counsel for plaintiff in error contend, that no man should be bound by any litigation until there is a final judgment; but in this case there was a final decree, and our judgment is, that the finding was considered in rendering this decree, for the reason that the land claimed by Metzger was not included with the other tracts of land to be sold. This land was described in the mortgage; the plaintiff in the foreclosure suit asked that it be sold with the other lands to satisfy the mortgage. The defendant Metzger answered that he was the owner by virtue of a tax deed. The ownership of this land thus became one of the issuable questions to be settled, and as the holder of such title, he had the right to make full defense: *Bradley v. Parkhurst*, 20 Kan. 462; *Pattis v. Wilson*, 25 Kan. 326. The record shows a trial and finding in favor of Metzger, and this finding was confirmed by the judgment of foreclosure of the mortgage as to the other tracts of land described in the plaintiff's petition, which excepted this land so found to belong to him. This decree, we think, necessarily affirmed the finding that Metzger had a valid tax deed; that he was the owner and in the actual possession of the land in controversy; and that no other parties to the foreclosure suit had any liens upon the same. The rule of *res adjudicata* applies as well to facts settled and adjudicated as to causes of action: *Whitaker v. Hawley*, 30 Kan. 326. The judgment of a court of competent jurisdiction is conclusive on the parties as to all points directly involved in it and necessarily determined: *Shirland v. Union Nat. Bank*, 65 Iowa, 96; *Freeman on Judgments*, sec. 249.

"When a fact has been once determined in the course of a

judicial proceeding, and a final judgment has been rendered in accordance therewith, it cannot be again litigated between the same parties without virtually impeaching the correctness of the former decision, which, from motives of public policy, the law does not permit to be done. The estoppel is not confined to the judgment, but extends to all facts involved in it as necessary steps, or the groundwork upon which it must have been founded. It is allowable to reason back from a judgment to the basis on which it stands, upon the obvious principle that where a conclusion is indisputable, and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion": *Burles v. Shannon*, 99 Mass. 200; 96 Am. Dec. 733; *Board etc. v. Mineral Point R. R. Co.*, 24 Wis. 124; Freeman on Judgments, sec. 257; Wells on Res Adjudicata, sec. 226; 1 Herman on Estoppel, sec. 111.

Counsel for plaintiff in error rely upon the case of *Auld v. Smith*, 23 Kan. 65, where this court said: "A thing contained in the findings or verdict, but not included in or confirmed by the judgment, cannot be considered as an adjudication or used as evidence, unless some other ground can be found for its use than merely that it is contained in such findings or verdict."

Our view of this case does not conflict with the principle there decided. We think the judgment rendered in the foreclosure suit in Leavenworth County was in accordance with the special finding in favor of Metzger; and the fact that the record affirmatively shows that the land that he set up a title to in his answer was not included in the decree of foreclosure is evidence that the special finding must have entered into and become a part of such decree.

We recommend an affirmance of the judgment.

The Court. It is so ordered.

JUDGMENTS IN EJECTMENT AS RES JUDICATA: See note to *Hentig v. Redden*, ante, p. 96; also note to *Burles v. Shannon*, 96 Am. Dec. 741.

SHERMAN CENTER TOWN COMPANY v. LEONARD.

[38 KANSAS, 354.]

DAMAGES — EVIDENCE — OPINIONS. — The testimony of a witness, not based on specific facts, but consisting of an opinion as to the lump amount of damages sustained by breach of a contract, is inadmissible as a basis for the estimation of damages.

MEASURE OF DAMAGES — BREACH OF CONTRACT — PROSPECTIVE PROFITS. — Where a breach of contract results in the loss of definite profits which are ascertainable and within the contemplation of the parties, they may generally be recovered; but when prospective profits are remote, conjectural, and speculative, they cannot be said to be the direct and unavoidable result of the breach, and cannot be recovered.

DAMAGES FOR BREACH OF CONTRACT — DUTY TO DIMINISH. — A party suing for breach of contract is required to do what he reasonably can, and improve all reasonable opportunity, to lessen the injury and reduce the damages caused by the breach.

MEASURE OF DAMAGES FOR BREACH OF CONTRACT TO MOVE HOTEL — PROFITS, LOSS OF. — Where a contract for the removal of a hotel from one town to another is broken by the contractor, after he has been paid for the removal, it is the duty of the owner to have the hotel removed at once, and he is then entitled to recover, as damages for the breach, the necessary expenses of removal and of avoiding the direct and unavoidable consequences of the breach of the contract, but he is not entitled to recover the prospective profits which he would have possibly gained if the building had been removed according to the contract.

Hardy and Sterling, for the plaintiff in error.

Bagley and Andrews, for the defendant in error.

JOHNSTON, J. Thomas P. Leonard recovered a judgment for six hundred dollars against the Sherman Center Town Company, as damage for the breach of a contract. Leonard owned a hotel in Itasca, and Sherman Center, which was three miles away, was a candidate for county seat of Sherman County. The town company, desiring to increase the population and influence of Sherman Center and strengthen its candidacy, held out inducements to the citizens of the surrounding towns to remove their buildings and establish themselves in business in Sherman Center, and unite in an effort to make that town the county seat of the county. Accordingly, they entered into an agreement with Leonard, by which Leonard was to join them in building up the town, and remove his hotel from Itasca, in consideration of which the company was to convey to him certain lots in Sherman Center, and provide, at its own expense, men and machinery to remove the hotel, and place it over a cellar of equal size and on a foundation of a similar kind as it was then resting upon in Itasca. The

plaintiff alleged that the company had failed and refused to remove the hotel in accordance with the terms of the contract; that the other buildings which were then situated in Itasca have been removed to Sherman Center, and the town of Itasca has become depopulated, and the business of hotel-keeping of no value, and that the hotel now stands alone, with no town nearer to it than Sherman Center, which is nearly three miles distant. He further alleged that it was a large and well-furnished hotel, and that the cost of its construction and the furniture contained therein was about four thousand five hundred dollars. It is alleged that the cost of removal would be about the sum of eight hundred dollars, and that he suffered damages by the refusal of the company to comply with the contract in the sum of twelve hundred dollars. He therefore asked judgment for two thousand dollars. The company, by its answer, denies the execution of the contract, or that it is authorized by its charter to enter into the contract alleged to have been made.

There are several errors assigned by the company, but only one of them requires attention. It appears that the company has conveyed the lots to Leonard, as stipulated in the contract, but the hotel has not been removed, and, according to plaintiff's testimony, the non-removal is owing to the refusal of the company to furnish the men and machinery for that purpose, although frequent demands have been made upon them. In the course of the trial, the plaintiff testified that, by reason of the removal of the people and their buildings from other towns, Sherman Center became a flourishing place of several hundred people, where he could have profitably carried on the hotel business, but that the town of Itasca was practically abandoned; so that he is without business, and simply remains at the hotel to protect the goods and furniture therein. In order to prove the extent of his injury, the following question was asked, and allowed by the court over the objection of the defendant: "State, as near as you can, what would have been your profits — or what your damages were, in other words — by reason of the non-fulfillment of this contract, not moving your hotel, and establishing your business at Sherman Center." Another question which was allowed over objection was: "State what the damage was by reason of them not moving your hotel to Sherman Center, as they agreed to, in money." He answered that the loss or profits would have been \$150 a month, and that the total damage

sustained by reason of not having the hotel located at Sherman Center, besides the cost of moving the building, was from \$1,200 to \$1,500, and that it would cost about \$800 to move the building.

The questions asked were objectionable, and the testimony given was inadmissible, upon two grounds: 1. The questions were objectionable because they did not call for specific facts, but permitted the witness to state a mere opinion, giving in the lump the amount of damages thought to be sustained. It is the function of the court or jury trying the case to determine, from evidence properly presented, what the amount of damages sustained is, and while it might be very convenient for the plaintiff to permit him and his witnesses to give the damages suffered in a lump, it would be a very unsafe practice to allow them to state the amount of damages supposed to be sustained, without regard to the facts or knowledge upon which their opinions were based. It is well settled that the practice is not permissible: *Roberts v. Comm'rs of Brown Co.*, 21 Kan. 248; *Wichita etc. R. R. Co. v. Kuhn*, 38 Kan. 675; *Sharon Town Co. v. Morris*, 39 Kan. 377; *Chicago etc. R'y Co. v. Neiman*, 45 Kan. 533.

Then, again, the prospective profits that he lost by the breach of the contract are too remote, uncertain, and speculative to be recoverable. Who can tell what the future gains of the hotel business would have been in Sherman Center, if he had moved there? His past profits in Itasca were not shown, and there is no testimony of the gains of others established in the same business at Sherman Center. How, then, does Leonard know that the profits would have been \$150 per month? The gains to be derived from the business depended upon many contingencies other than the mere removal of his hotel to that place. The growth of the town, the location of the county seat there, or at another town near by, the immigration and travel, the competition in the hotel business, the price of provisions and the cost of help, the general reputation of the house, and the popularity of the landlord with the traveling public and the people of that community are suggested as some of the considerations that would affect the anticipated benefits. Where the breach of a contract results in the loss of definite profits which are ascertainable, and were within the contemplation of the contracting parties, they may generally be recovered, but the prospective profits do not furnish the correct measure of damages in the present case. Aside from

the remote, conjectural, and speculative character of the anticipated benefits, it cannot be said that the loss of them is the direct and unavoidable consequence of the breach. The plaintiff could not sit idle an indefinite length of time and safely count on the recovery of \$150 per month as damages. If there was a breach of the contract, it was his duty, upon learning of it, to at once remove the building, or employ others to do so, and charge the cost of the removal to the town company. The law requires that the injured party shall do whatever he reasonably can, and improve all reasonable opportunities, to lessen the injury. From the testimony it appears that Leonard could have procured others to move the hotel; and in such a case, the ordinary measure of damages is the cost of removal and the reasonable expenses of avoiding the consequence of the defendant's wrong: *Kansas Pac. R'y Co. v. Muhlman*, 17 Kan. 224; *Loker v. Damon*, 17 Pick. 284; 1 Sedgwick on Damages, 165, and cases cited.

Counsel for plaintiff in error say that no more than the cost of removal was allowed by the court; but the admission of the objectionable evidence against the opposition of the plaintiff in error would indicate that the court adopted an incorrect measure of damages, and did not limit the recovery to the expense of the removal. The liability of the plaintiff in error for any loss is not conceded. It is shown in the testimony that soon after the time for the removal of the building the people of Sherman Center abandoned the attempt to obtain the county seat, and all or nearly all of them moved to another place. It is claimed by plaintiff in error that Leonard objected to the removal of his building until the question of the location of the county seat was settled. He testified at the trial that he did not intend to move the building to Sherman Center, and that he would not move the building at all until the county seat was permanently located. If the non-removal of the building was due to the fault of Leonard, he is not entitled to recover anything. This is a disputed question of fact, which must be settled on another trial.

For the error of the court in admitting testimony, the judgment of the court below will be reversed, and the cause remanded for a new trial.

DAMAGES — PROSPECTIVE PROFITS — WHETHER RECOVERABLE. — Prospective profits cannot be recovered as damages where, from the circumstances, there is no sufficient basis for estimating such profits: *Wright v. Mulvaney*, 78 Wis. 89; 23 Am. St. Rep. 393, and note. Prospective profits cannot be es-

minated in assessing damages for a breach of contract: *Cates v. Sparkman*, 73 Tex. 619; 15 Am. St. Rep. 806, and note; *Sitten v. McDonald*, 25 S. C. 66; 60 Am. Rep. 484, and extended note; extended note to *Hargreaves v. Kimberly*, 53 Am. Rep. 123-139; *Montgomery County etc. Society v. Harwood*, 126 Ind. 440; *Davis v. Davis*, 84 Mich. 325; *Florence etc. R. R. Co. v. Pember*, 45 Kan. 626.

DAMAGES FOR BREACH OF CONTRACT — DUTY OF PLAINTIFF TO DIMINISH. — One who suffers from a breach of contract must act so as to make his damages as small as he reasonably can: *Wright v. Bank of Metropolis*, 110 N. Y. 237; 6 Am. St. Rep. 356, and note; *Factors' etc. Ins. Co. v. Warlick*, 42 Ia. Ann. 1646; *Hainstead etc. Co. v. Sutton*, 45 Kan. 192.

STEWART v. BODLEY.

[46 KANSAS, 377.]

JURISDICTION — DEFECTIVE PROCESS. — Where the copy of a justice's original summons, served on defendant by leaving it at his usual place of business, is, by mistake, signed by the constable serving it instead of the justice issuing it, but it contains the name of the justice in the indorsement on the copy served, a judgment on such service is voidable on direct proceeding, but is not absolutely void.

Shepard, Grove, and Shepard, for the plaintiff in error.

George E. McMahon, for the defendant in error.

GREEN, C. On the twenty-first day of May, 1886, William M. Duncan sued E. J. Stewart, before A. R. Blackburn, a justice of the peace of Harper County, to recover the sum of fifty-eight dollars for services rendered. The justice of the peace issued a summons which was regular upon its face, and delivered it to C. M. Bodley, a constable. The summons was returned with the indorsement that service had been made by a copy left at the residence of the defendant. On the return day the defendant made no appearance, and judgment was rendered in favor of the plaintiff for the amount claimed. On the following day an execution was issued on said judgment, and delivered to Bodley, as constable, which was levied upon the property in controversy in this action. On the 12th of June, the plaintiff in error brought an action in replevin against Bodley and Stewart to recover the property taken on execution. The defendants in this replevin suit gave a redelivery bond, retained possession of the property, and it was sold under the execution. This replevin action was never tried, but was continued from term to term, until June, 1887, when it was dismissed by the plaintiff with-

out prejudice. This action was commenced in the district court of Harper County on the nineteenth day of July, 1887, to recover the value of the property sold upon execution by Bodley, as constable.

The defendant answered, and set up three defenses: 1. A general denial; 2. Justification under the execution; and 3. The replevin action. The plaintiff demurred to the third ground, which was sustained by the court. The plaintiff then filed a reply to the second defense, denying the judgment, and alleged that Bodley did not serve a copy of the summons upon the plaintiff, but made a false return; that the copy left at the residence of Stewart was signed by C. M. Bodley, justice of the peace; and that no appearance was made by Stewart. It was further alleged that Bodley knew that said return was false. At the January term, 1889, the case was tried by the court, and resulted in a finding and judgment for the defendant, and the plaintiff brings the case here for review.

The assignment of error is, that the court should not have overruled the plaintiff's demurrer to the evidence of the defendant; and this raises the question as to whether or not the judgment rendered in the case of *Duncan v. Stewart*, before A. R. Blackburn, justice of the peace, was void. This is the main question in the case. If the judgment was rendered without service, it was void. To determine the question of service, we must consider what was left at the usual place of residence of the defendant. The summons issued by the justice of the peace was regular. The copy served was signed by the constable instead of the justice of the peace. It was addressed to Bodley, as constable, and contained the indorsement that if the defendant failed to appear, judgment would be taken for the sum of fifty-eight dollars, with interest at the rate of seven per cent per annum from the twenty-first day of May, 1886, and costs of suit, and signed by A. R. Blackburn, justice of the peace. It could be seen at a glance that Bodley could not have been the justice of the peace and constable too; that his signature to the copy must have been a clerical error. The defendant served lived in the same township where the officers resided, and would be presumed to know who they were; and the fact that the name of the justice of the peace did appear in one place upon the copy, and that the process was addressed to Bodley, was sufficient to inform him that he had been sued. There is no question but

that the service would have been set aside if a motion had been made for that purpose; but we are not prepared to say that the judgment was absolutely void, but might have been set aside in a direct proceeding. We conclude, therefore, that the service made upon E. J. Stewart, in the original suit, was only voidable, and not void: See *Bassett v. Mitchell*, 40 Kan. 549; *Friend v. Green*, 43 Kan. 167.

Holding, as we do, that the judgment rendered in favor of Duncan and against Stewart was not void, but only voidable, there was no error in the trial of this action in the court below, and we therefore recommend an affirmance of the judgment.

The COURT. It is so ordered.

JUSTICES OF THE PEACE — DEFECTIVE SERVICE OF PROCESS. — A defective service of a summons in a justice's court renders a judgment thereon void for want of jurisdiction: *King v. Bates*, 80 Mich. 367; 20 Am. St. Rep. 518, and note. And a mere recital in the judgment that summons was duly served is not sufficient to show jurisdiction: *McDonald v. Prescott*, 2 Nev. 109; 90 Am. Dec. 517, and note; *Moore v. Hansen*, 75 Mich. 564.

PACIFIC EXPRESS COMPANY v. FOLEY.

[46 KANSAS, 457.]

COMMON CARRIERS — POWER TO LIMIT LIABILITY FOR NEGLIGENCE. —

Although a common carrier cannot stipulate for absolute exemption from responsibility for his negligence, he may limit his liability to an amount stated in a written receipt or special contract in the event of loss or injury to the goods or property through his ordinary negligence, provided such contract is freely, voluntarily, and fairly entered into by the parties, and is just and reasonable in its terms.

COMMON CARRIERS — LIMITATION OF LIABILITY BY CONTRACT. — Where a special contract, voluntarily entered into by the shipper, provides that the carrier "is not to be held liable for any loss or damage, except as forwarders only, nor for any loss or damage of any box, package, or thing for over fifty dollars, unless the just and true value thereof is stated therein," the contract is binding on the shipper, and is the limit and measure of his recovery when the true value of the goods shipped is not stated in the receipt, and they are lost through the ordinary negligence of the carrier.

COMMON CARRIERS — CONTRACT OF SHIPMENT — PRESUMPTION. — A shipper of goods who fills out a blank receipt contained in a book previously furnished by an express company for his use, and obtains the signature of the company's agent thereto upon delivering to him a package for transportation, will be presumed to know the contents of the receipt, and if he receives such receipt without objection, his assent to its conditions will, in the absence of fraud, be conclusively presumed.

A. L. Williams and Charles Monroe, for the plaintiff in error.

John Hutchings, for the defendant in error.

HORTON, C. J. The principal question in this case is, What effect is to be given to the following language of the receipt executed by the express company: "It is hereby expressly agreed that the said Pacific Express Company is not to be held liable for any loss or damage, except as forwarders only, nor for any loss or damage of any box, package, or thing for over fifty dollars, unless the just and true value thereof is herein stated"?

It appears that the type and electrotype plates were shipped from Kansas City to Lawrence by the A. N. Kellogg Newspaper Company, which, in making the shipment, acted for Peter T. Foley. It also appears that the newspaper company had a receipt-book, furnished by the express company, and in the heading to each page were printed conditions, and among others the one quoted. The newspaper company, having this book in its possession and control, and using it from day to day, must be presumed to have known of its conditions, and to have shipped with reference to it. In this the company acted for the plaintiff, and he must be presumed to have assented to the terms and conditions of the receipt. The jury made the following special findings in answer to questions submitted to them:—

"Q. Was not the box containing the type and electrotypes in controversy broken while it was still in the car in which it was brought from Kansas City? A. It was found broken in the car.

"Q. If you should find that said box was broken open by any negligence of the company, state what act or thing caused said box to be broken. A. We do not know.

"Q. Do the jury know where, on the journey, the box was broken open? If so, state where. A. We do not know.

"Q. Were not the agents of defendant negligent in taking the box out of the car? A. Yes.

"Q. Could they not have saved the contents of the box by handling the box carefully when it was taken out of the car? A. Yes, to the best of our knowledge and belief."

The district court, among other things, instructed the jury that "while a common carrier is generally, in the absence of any such limitation, liable absolutely as an insurer against all loss except that caused by the act of God and the public

enemy, it may limit such liability by special conditions such as contained in this receipt, but such special contract cannot relieve the company from its own negligence. It follows that in this case the company is liable, if at all, not as an insurer, but solely for negligence in the transportation of the property. Negligence is a negative term, implying the want or absence of ordinary care, — that is, that care and caution that men of ordinary prudence usually exercise under like circumstances. Whether the defendant company was so negligent, and if so, whether such negligence caused the injuries complained of, are questions of fact for the jury, to be determined from all the evidence. You should consider the condition of the material when delivered to them, the manner in which it was boxed, the nature of the articles so far as they could be seen and known by the shipper, the manner in which such property is handled, the condition and circumstances in which it was found at the place of destination, and taking into consideration all the surrounding circumstances and facts proven, and using that ordinary knowledge, observation, and experience in life that men generally possess, you must say whether the loss and injury were attributable to the want of ordinary care and diligence on the part of the express company. If they were, the plaintiff may recover his actual loss; otherwise he cannot recover beyond the sum of fifty dollars."

The express company asked the court to instruct the jury as follows: "1. The jury are instructed to return a verdict in favor of the plaintiff for the sum of fifty dollars; 2. The agreement in the receipt that defendant will not be liable for more than fifty dollars for any shipment unless the true value of such shipment is stated in the receipt, is a valid agreement, and relieves the defendant of liability as insurer for all amounts over fifty dollars, leaving it liable in excess of fifty dollars only for gross negligence, and the burden of proving gross negligence is upon the plaintiff."

1. It is settled by the decisions of this court, and by the great weight of authority, that a common carrier cannot stipulate for exemption from responsibility for the negligence of himself or his servants, on grounds of public policy, even by express contract: *Kansas City etc. R. R. Co. v. Simpson*, 30 Kan. 645; 48 Am. Rep. 104; *Railroad Co. v. Lockwood*, 17 Wall. 357, and the cases therein cited; 2 Am. & Eng. Ency. of Law, § 822. But this is not the question presented by the record in this case. The receipt executed by the express com-

pany, and knowingly and voluntarily accepted by the shipper through his agent, expressly provided "that the express company was not to be liable for any loss or damage to the box for over fifty dollars, if the just and true value thereof was not stated." The true and just value of the box was not stated in the receipt, or to the company by the shipper. The trial court very properly instructed the jury "that the shipper must be presumed to have assented to the terms and conditions of the receipt." Two questions are therefore presented for our determination: 1. May a common carrier limit his liability to an amount stated in a written receipt or special contract, in the event of loss or injury to the goods or property through ordinary negligence, if such special contract is freely, voluntarily, and fairly entered into by the parties, and such contract is just and reasonable in its terms? 2. Did the written receipt or special contract between the shipper and express company in this case limit the liability of the company for loss or injury to the amount of fifty dollars?

The better authorities declare the law to be, that the value of the property transported may be agreed upon, and the damage or loss to the property occasioned by the negligence of the company or its servants will be limited to the agreed valuation. *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331, may now be called the leading case in America. Mr. Justice Blatchford, delivering the opinion of the court in that case, said, among other things, that "it is the law of this court that a common carrier may, by special contract, limit his common-law liability, but that he cannot stipulate for exemption from the consequences of his own negligence or that of his servants. . . . There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight, on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. . . . The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based upon that value. The shipper is estopped from saying that the value is greater. The articles have no greater value for the purpose of the contract of transporta-

tion between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss." See also *Harvey v. Terre Haute etc. R. R. Co.*, 74 Mo. 539; *Brehms v. Dinsmore*, 25 Md. 329; *Louisville etc. R. R. Co. v. Sherrod*, 84 Ala. 178; *Dunlley v. Boston etc. R. R. Co.*, Sup. Ct. N. H., 1890; *Magnin v. Dinsmore*, 62 N. Y. 35; 20 Am. Rep. 442; *Squire v. New York Cent. R. R. Co.*, 98 Mass. 239-245; 93 Am. Dec. 162; *Graves v. Lake Shore etc. R. R. Co.*, 137 Mass. 33; 50 Am. Rep. 282; *Hill v. Boston etc. R. R. Co.*, 144 Mass. 284; *Falkenau v. Fargo*, 3 Jones & S. 332; 55 N. Y. 642; *Ghormley v. Dinsmore*, 21 Jones & S. 36; *Westcott v. Fargo*, 6 Lans. 328; *Grace v. Adams*, 100 Mass. 505; 97 Am. Dec. 117; 1 Am. Rep. 131; *Pemberton Co. v. New York Cent. R. R. Co.*, 104 Mass. 144. See also *Breeze v. United States Tel. Co.*, 48 N. Y. 132, 139, 141, 142; 8 Am. Rep. 526; 23 Am. & Eng. R. R. Cas. 703; 42 Am. & Eng. R. R. Cas. 366 (Va., 1879).

2. As to the second question proposed, we think that the limitation in the written receipt or special contract not to be liable for any loss or damage over fifty dollars, in this case, stands as if the carrier had asked the value of the box and its contents, and had been told by the shipper "that the value was fifty dollars only," or, which is the same thing, had been told by the shipper "that if loss or damage occurred to the box or its contents, he would not demand over fifty dollars." In *Kallman v. United States Exp. Co.*, 3 Kan. 205, it was said that "no value was given in the bill of lading which was delivered to the shipper by the express company, and received by him without objection, thus consenting and agreeing that the plaintiffs should be bound by its terms. If he had desired to make the company responsible for the full value of the goods, he had only to furnish them with the amount and have it inserted in the bill. But it may be said that the company were bound to make inquiry as to the value of the goods if they desired to obtain the benefit of this limitation upon their liability. We confess that we are not able to see any

good reason for making such a requirement a condition precedent in such case. The company exhibits to the employer the exact condition upon which they will receive his property for carriage, to which he may assent or not, as he may choose. If he assent, we think he should be bound thereby. As in this case, if the real value of the property was \$592.53, the employer, in case of loss, would be as much, nay more, interested in having such value truly stated in the bill of lading or receipt as the company could possibly be in having the value understated. He ought, then, to have made known to the company the true value of the goods, and more especially as the limitation upon the liability of the company was so plainly stated in the receipt."

We do not quote this part of the opinion in the above case because it is necessarily conclusive or binding as a prior decision of this court, as in that case the trial court granted a new trial. This court affirmed the action of the court below. Much said in the former opinion, outside of affirming the action of the court in granting a new trial, we consider *obiter dictum*. The trial court in that case, in granting the new trial, did not pass upon a pure, simple, and unmixed question of law. This court has decided time and again that "the granting of a new trial is largely in the discretion of the trial court; and where a new trial is given, and the record does not show upon what grounds the court granted such new trial, but the record does show errors upon which the trial court might have granted a new trial, the order granting such trial will not be disturbed": *Barney v. Dudley*, 40 Kan. 247; *Howell v. Pugh*, 25 Kan. 96; *City of Sedan v. Church*, 29 Kan. 190; see *Betz v. Williams et al. Land Co.*, 46 Kan. 45. "It is a maxim, not to be disregarded, that general expressions in every opinion are not to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious": *Coke v. Virginia*, 6 Wheat. 264-399, 400.

But we have referred to that part of the Kallman opinion because the court below charged the jury "that the Kellogg Newspaper Company, having this receipt-book in its possession and control, and using it from day to day, must be presumed to have known of such conditions, and to have shipped with reference to it. In this it acted for the plaintiff, and he

must be presumed to have assented to the terms and conditions of the receipt"; and because this part of the charge of the trial court and the part of the opinion quoted from the Kallman case are in accordance with reason, fairness, and justice. This part of the opinion also answers the objection "that the value of the property transported was not agreed upon."

As is forcibly argued by counsel, "The express company took the property, and signed a receipt presented to it by plaintiff's agent. It is true that it was one of a book of receipts furnished by the express company, but the receipts were all in blank, the printed part containing all the regulations that the express company required the shipper to comply with. The blanks were all left for the shipper to fill in any way he pleased; and in whatever way he filled the blanks, the express company was bound to receipt for the property covered by the receipt. When the shipper had filled the blank and presented it to the express company for its signature, he was in the attitude of proposing an agreement to the express company for acceptance. The signature of the express company was the completion of the agreement, and the agreement as completed, so far as it related to the value of the property, was not a limitation of liability for negligence in any way, but a square agreement that the property presented for carriage and covered by the receipt was worth only fifty dollars."

In *Oppenheimer v. United States Express Co.*, 69 Ill. 62, 18 Am. Rep. 596, the facts were about as follows: May and Stern shipped by the United States Express Company a box weighing twenty-five pounds from New York City to Oppenheimer & Co. at Chicago, Illinois. It contained jewelry of the value of three thousand eight hundred dollars. The receipt given by the express company was similar in that case to the receipt given by the Pacific Express Company in this case. The blank for the value of the box and contents was not filled in. But the limitation of fifty dollars was in the receipt in that case, as in this. The box and its contents were destroyed by fire in the office of the express company at Chicago. Oppenheimer & Co. brought an action to recover for the value of the contents of the box. Judgment was rendered in their favor for fifty dollars only. They appealed. The judgment of the lower court was affirmed by the supreme court of Illinois. In rendering its opinion, that court said: "The terms and conditions on which the company received the property for

transportation were clearly expressed in the body of the receipt, and in a way not calculated to escape attention. It must be supposed that these men paid some attention to the transaction of their business, and were reasonably well informed in regard to the nature of their contracts. That they should have been so doing business with this company for years, handling, filling out, and procuring the execution of these shipping receipts, without a knowledge of their general character and effect, it is difficult to believe. They must be held to have had such knowledge. . . . A distinction exists between the effect of those notices by a carrier which seek to discharge him from duties which the law has annexed to his employment, and those, like the one in question, designed simply to insure good faith and fair dealing on the part of his employer, — in the former case, notice alone not being effectual without an assent to the attempted restriction, while in the latter case, notice alone, if brought home to the knowledge of the owner of the property delivered for carriage, will be sufficient."

A part of the *syllabus* of that case reads: "An express company has the right to demand from a consignor such information as will enable it to decide on the proper compensation to charge for the risk, and the degree of care to bestow in discharging its trust; and a limitation of its liability not to exceed fifty dollars, unless the value of the goods forwarded is truly stated, if brought to the knowledge of the consignor, is reasonable and consistent with public policy."

The court finally disposed of the above case upon the ground that there was a "designed suppression of the value of the goods." It was said in the opinion, among other things, that "there was an actual attempt here by the agent of the shippers to fill in this blank space, but instead of inserting three thousand eight hundred dollars (the value), a mark or character was inserted inexpressive of any value. This shows that there was a designed suppression of the value of the goods. That was unfair conduct on the part of the shipper of the goods. The effect of such conduct to relieve the carrier from his liability as insurer is asserted in many cases [here decisions are given]. Had the true value of the goods been disclosed, there would have been an extra charge of \$9.50, increased precautions would have been taken for the safety of the goods, and, as the evidence shows, they would have been saved."

It may be said in every case, that where a shipper fixes an agreed valuation upon his goods to be transported, or enters into a special contract with the carrier that if his goods are lost or injured he will not demand over fifty dollars, and thereby obtains cheaper rates; that he is guilty of fraud, or attempted fraud, if his goods are lost or injured, and he demands for his damages an amount above the valuation or limitation agreed to. If it be true, as the trial court charged the jury, that "the plaintiff must be presumed, under the facts of this case, to have assented to the terms and conditions of the receipt," then, within the better authorities, the limitation of the carrier's liability not to exceed fifty dollars was the same as fixing the value of the property transported at fifty dollars only, and the limitation of the express company's liability not to exceed the fifty dollars stated in the receipt was reasonable and just. *Boorman v. American Exp. Co.*, 21 Wis. 152, is a case like this. A limitation of fifty dollars was contained in the receipt. Chief Justice Dixon, writing the opinion, held that "an express company may exempt itself by special contract from liability as insurer; or for the default or negligence of any person to whom the property may be delivered by it for the performance of any act or duty in respect thereto, off its own routes; or for loss or damage of any package for over fifty dollars, unless the just and true value thereof is stated in the receipt."

In *Duntley v. Boston etc. R. R. Co.*, Sup. Ct. N. H., 1890, it was decided that "a regulation of a carrier with respect to the transportation of live animals, which fixes the ordinary value of horses for which it will hold itself responsible in case of loss at two hundred dollars each, and requires extra compensation for transporting animals of greater value, is reasonable and valid."

In *Durgin v. Express Co.*, Supt. Ct. N. H., 1890, the receipt was like the one in this case, and limited the liability to fifty dollars. It was held that "a shipper of goods who fills out one of the blank receipts contained in a book previously furnished by an express company for his use, and obtains the signature of the company's agent thereto upon delivering to him a package for transportation, will be presumed to know the contents of the receipt; and if he receives such receipt without objection, his assent as to its conditions will, in the absence of fraud, be conclusively presumed." Clark, J., in delivering the opinion in that case, said: "The receipt signed by

the defendants' agent and servant at the time of the delivery of the package was taken by the plaintiff as evidence of the fact and purpose of its delivery, and of the terms and conditions on which the defendants received it. The receipt was contained in a book of blank receipts previously furnished by the defendants for the use of the plaintiff, and the written portions were in his handwriting, and the law presumes that the contents were known to him. The plaintiff understood it to be the shipping contract, and in the absence of fraud, by receiving it without objection, he was conclusively presumed to assent to its conditions: *Merrill v. American Exp. Co.*, 62 N. H. 514; *Grace v. Adams*, 100 Mass. 505; 97 Am. Dec. 117; 1 Am. Rep. 131. It is now generally held that the responsibility imposed on the carrier of goods by the common law may be restricted and qualified by express stipulation, where such stipulation is just and reasonable; and a stipulation that the carrier shall be informed as to the value of the goods delivered to him for carriage, as affecting the risk and the degree of care required, is clearly reasonable. . . . The plaintiff understood that he was securing transportation of the box to New York at a reduced rate (in fact, at one fifth of the regular rate) by calling the value fifty dollars, and assuming a portion of the risk of carriage himself; and having agreed upon a valuation for the purpose of fixing the express charges, he cannot insist that the goods are of greater value for the purpose of increasing his claim for damages for the loss. Nor is it material whether the loss arose from the negligence of the defendants, or some other cause. The defendants agreed to respond in a sum not exceeding fifty dollars in case of loss; and for the purpose of the contract of transportation between the parties to the contract, the goods had no greater value." See also, to the same effect, *Squire v. New York Cent. R. R. Co.*, 98 Mass. 239; 93 Am. Dec. 162; *South and North Ala. R. R. Co. v. Hanlien*, 52 Ala. 615; 23 Am. Rep. 578; *Magnin v. Dinsmore*, 56 N. Y. 168; *St. Louis etc. R'y Co. v. Weakly*, 50 Ark. 397; 7 Am. St. Rep. 104.

In *Louisville etc. R. R. Co. v. Wynn*, 88 Tenn. 320, special contracts for a limitation of the liability of a carrier are not sustained. It is said in that case, among other things, that, "to our minds, it is perfectly clear that the two kinds of stipulation — that providing for total, and that providing for partial, exemption from liability for the consequences of the carrier's negligence — stand upon the same ground, and must

be tested by the same principles. If one can be enforced, the other can; if either be invalid, both must be held to be so, the same considerations of public policy operating in each case."

In our opinion, the reasons stated are wholly untenable. They proceed upon false premises. That court overlooks the power of the shipper to freely and fairly fix a valuation upon his own property. The carrier has the right to make reasonable rates for carriage. A total exemption from the liability on the part of a carrier would not be just or reasonable, and no person having reason would willingly and freely contract with a carrier that the property which he wished to have transported was absolutely worthless. The carrier is bound to receive and transport the property of the shipper. The shipper can place his own valuation upon the property delivered by him to the carrier to be transported. The carrier cannot arbitrarily fix any valuation on the property received from the shipper, but may reasonably insist on proper information as to the value of the property which he receives. He ought to have a right to know what it is that he undertakes to carry, and the amount and extent of his risk. Upon the value of the property, the risk incurred, and the distance the property is to be transported, the charges for carriage are fixed. Therefore, it would seem to us that a contract fixing the value of the goods delivered to the carrier, or fixing a limitation of damage in case of loss or injury, is clearly reasonable, as affecting the risk and the degree of care required concerning the property to be transported. With the above and foregoing limitations, we cannot conceive how the carrier can evade his duty or nullify the law. Upon the authorities cited, the instructions of the trial court were erroneous, and the instruction prayed for by the express company for limitation as to damages should have been given.

There is nothing appearing in the evidence or the findings of the jury that shows, or tends to show, gross negligence, fraud, or intentional wrong upon the part of the express company. In the case of *Kansas City etc. R. R. Co. v. Simpson*, 30 Kan. 645, 46 Am. Rep. 104, the limitation was arbitrarily fixed by the carrier without the consent of the shipper. That contract was not just or reasonable, or freely or fairly entered into. It was in violation of public policy. It is unlike this case, because, when the box in controversy was shipped, the shipping clerk of the Kellogg Newspaper Company filled out a receipt, and a man by the name of Glass, a driver for the Pacific Ex-

press Company, signed it. No deceit or unfairness was practiced by the express company.

In the case of *Western U. Tel. Co. v. Orall*, 38 Kan. 679, 5 Am. St. Rep. 795, gross negligence was involved. Whether a telegraph company could exempt itself by contract from ordinary negligence was not passed upon. That question was reserved. We do not think it is necessary to follow all that was stated in *Kallman v. United States Exp. Co.*, 3 Kan. 205, because, although that decision was made nearly twenty-five years ago, the question now at issue was not necessarily embraced in that decision, for the reasons heretofore named. The case of *Kansas City etc. R. R. Co. v. Simpson*, 30 Kan. 645, 46 Am. Rep. 104, followed *Railroad Co. v. Lockwood*, 17 Wall. 357. This case is referred to and clearly distinguished in the later case of *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331. Again the box containing the type and plates was shipped from, Kansas City, Missouri. The receipt executed by the express company was executed and delivered at Kansas City, Missouri, to the Kellogg Newspaper Company for P. T. Foley, the plaintiff below. In that state the law declared by the supreme court is, that a "contract fairly entered into between carrier and shipper, specifying a fixed sum as the value of the property, and limiting the recovery in case of loss to that sum, is binding on the shipper": *Harvey v. Terre Haute etc. R. R. Co.*, 74 Mo. 538.

We must assume, so far as this case is concerned, that the parties, including the shipper and the express company, contracted with reference to the law of Missouri. The receipt was signed there, the box was delivered there, and was shipped from Missouri to Kansas. It seems to us that the shipper ought not to complain. If he had desired to insert in the receipt which the express company was asked to sign \$144.55 as the full value of the box, or if he had desired to insert any larger amount, he had the option so to do; and if he had inserted the full value of the box and its contents, he could have recovered the value. But as the shipper voluntarily limited his loss or damage to the sum of fifty dollars only, why should he refuse to receive the sum of fifty dollars, which was tendered him by the superintendent of the express company when he presented his claim for damages? The receipt, as executed, was just as he desired and wished it. The damage in case of loss or injury to the box or its contents was liquidated in advance by the voluntary action of the parties.

"The limitation as to the damages or value has no tendency, in such a case as this, to exempt from liability for negligence": *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 831. Generally, the charges for transporting a box or package valued at \$144.50, \$500, or \$1,000 are more than when the value is \$50 only; and if the shipper wishes to pay full charges and recover full value in case of loss or injury from negligence, why should he not state to the carrier, or write in the receipt to be signed by the carrier, the full value?

We now repeat what was said upon this point in *Kallman v. United States Express Co.*, 3 Kan. 205, where the receipt was left blank as to the value, as in this case, but where a limitation was inserted in the receipt in case of loss or damage: "The company exhibits to the employer the exact conditions upon which it will receive his property for carriage, to which he may assent or not, as he may choose. If he assents, we think he should be bound thereby. As in this case, if the real value of the property was \$592.53, the employer, in case of loss, would be as much, nay more, interested in having such value truly stated in the bill of lading or receipt as the company could possibly be in having the value understated. He ought, then, to have made known to the company the true value of the goods, and more especially as the limitation upon the liability of the company was so plainly stated in the receipt."

The judgment of the district court will be reversed, and the cause remanded for a new trial.

VALENTINE, J., dissented from the view expressed by the majority of the court concerning the construction to be placed upon the contract of shipment mentioned in the foregoing opinion, and in rendering his dissent said: "The stipulation contained in the receipt given by the express company in the present case, limiting its liability for loss or damage, does not limit its liability, except with respect to an amount in excess of fifty dollars. Up to that amount, the express company's liability remains precisely the same as it would be at common law, or as it would be if no contract limiting its liability had ever been made. But for the excess above fifty dollars, the express company claims that it has obtained a boundless immunity from liability; that it has not only obtained an absolute exemption from all liability for all loss or damage above that amount, where the loss or damage has occurred without fault or negligence on its part, but that it has also obtained such an exemption where the loss or damage has been occasioned by its own negligence, or by its own fraud or willful wrongs, including the willful destruction of the property, or the greater wrong of feloniously stealing it. This cannot be correct. The stipulation in such receipt ought to be so construed as to exempt the company from liability for only such loss or damage in excess of fifty dollars as might be occasioned by the fault or negligence of others, or as

might result from some accident, casualty, or misfortune over which the company could have no control. I think the weight of authority sustains this view. While a common carrier may make a valid contract exempting himself from his common-law liability as an insurer, and for losses occasioned by the acts of others without his fault, or occasioned by such of his own acts only as do not involve any kind of wrong, or occasioned by circumstances over which he has no control, yet he cannot make a valid contract exempting himself from liability for losses occasioned by his own carelessness or negligence or improper acts. Such a contract would be against public policy, and void. I think the contract in the present case should be construed precisely as though it did not attempt to limit the express company's liability at all for losses occasioned by its own negligence or improper conduct, and I would refer to the following authorities in support of this view: *Kallman v. United States Exp. Co.*, 3 Kan. 205; *Kansas City etc. R. R. Co. v. Simpson*, 30 Kan. 645; 46 Am. Rep. 104; *Kansas Pac. R'y Co. v. Peavry*, 29 Kan. 166; 44 Am. Rep. 630; *Western Union Tel. Co. v. Crall*, 38 Kan. 679; 5 Am. St. Rep. 795; *Farnham v. Camden etc. R. R. Co.*, 55 Pa. St. 58; *American Exp. Co. v. Sunda*, 55 Pa. St. 140; *Grogan v. Adams Exp. Co.*, 114 Pa. St. 523; 60 Am. Rep. 360; *Weiller v. Pennsylvania R. R. Co.*, 134 Pa. St. 310; 19 Am. St. Rep. 700; *Southern Exp. Co. v. Moon*, 39 Miss. 822; *Chicago etc. R. R. Co. v. Abels*, 60 Miss. 1017; *Southern Exp. Co. v. Seide*, 67 Miss. 609; *Kirby v. Adams Exp. Co.*, 2 Mo. App. 370; *McFadden v. Missouri Pac. R'y Co.*, 92 Mo. 343; 1 Am. St. Rep. 721; *Moulton v. St. Paul etc. R. R. Co.*, 34 Minn. 85; 47 Am. Rep. 781; *The City of Norwich*, 4 Ben. 271; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Liverpool etc. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397; *Rosenfeld v. Peoria etc. R. R. Co.*, 103 Ind. 121; 53 Am. Rep. 500; *Adams Exp. Co. v. Harris*, 120 Ind. 73; 16 Am. St. Rep. 315; *Missouri Pac. R. R. Co. v. Harris*, 67 Tex. 166; *Southern Pac. R. R. Co. v. Muddox*, 75 Tex. 300; *Missouri Pac. R. R. Co. v. China Manufacturing Co.*, 79 Tex. 26; *Erie Dispatch v. Johnson*, 87 Tenn. 490; *Louisville etc. R. R. Co. v. Wynn*, 88 Tenn. 320; *Louisville etc. R. R. Co. v. Gilbert*, 88 Tenn. 430; *Black v. Goodrich Transp. Co.*, 55 Wis. 319; 42 Am. Rep. 713; *Mobile etc. R. R. Co. v. Hopkins*, 41 Ala. 486; 94 Am. Dec. 607; *Adams Exp. Co. v. Stettaners*, 61 Ill. 184; 14 Am. Rep. 57; *Chicago etc. R. R. Co. v. Chayman*, 133 Ill. 96; 23 Am. St. Rep. 587; *Judson v. Western R. R. Co.*, 6 Allen, 486; 83 Am. Dec. 646; *Orndorff v. Adams Exp. Co.*, 3 Bush, 194; 96 Am. Dec. 207; *United States Exp. Co. v. Backman*, 28 Ohio St. 144; *Lamb v. Camden etc. R. R. etc. Co.*, 46 N. Y. 271; 7 Am. Rep. 327." Judge Valentine then expressed the opinion that, under the contract in suit, the express company was bound, at its peril, to exercise reasonable care and diligence with respect to the goods. "There was ample evidence to show negligence on the part of the express company, if not gross negligence. The goods were shipped from Kansas City in good order. When they arrived at their destination at Lawrence, the box containing them was found broken. With due care, however, they might still have been saved, as is fairly inferable from the evidence, and as was the opinion of the jury, according to their findings. The box, however, was turned over by one of the express company's agents, and a piece came out. Afterward, the company's agent attempted to take the box and contents from the express-car in which they were transported, and to put the same on a truck, and in doing so some of the type and some of the electrotypes plates fell down between the car and the platform. Afterward, they gathered them up, and put them into a coal-scuttle, and took them to a house belonging to the express company, where they remained for some time, and were afterward removed to the express

company's office, where they still remain, so far as is shown. This seems like gross negligence. It was not necessary, however, that gross negligence should have been shown. Ordinary negligence only, or in other words, a want of ordinary care, was all that was necessary." He was therefore in favor of affirming the judgment of the court below, which was for the full value of the goods shipped and lost.

CARRIERS — POWER TO LIMIT LIABILITY FOR NEGLIGENCE. — While a carrier cannot exempt himself from liability for loss resulting from his gross negligence, still he may, by express contract, limit his common-law liability: *Chicago etc. R'y Co. v. Chapman*, 133 Ill. 96; 23 Am. St. Rep. 597, and extended note discussing this subject; *Bissell v. New York Cent. R. R. Co.*, 25 N. Y. 442; 82 Am. Dec. 369, and extended note; extended note to *Cole v. Goodwin*, 32 Am. Dec. 495-507; *Central R. R. etc. Co. v. Avant*, 80 Ga. 195; *Louisville etc. R. R. Co. v. Gilbert*, 88 Tenn. 430; *Merrill v. American Exp. Co.*, 62 N. H. 514. A carrier cannot limit his liability for his own negligence by contract: *Boehl v. Chicago etc. R'y Co.*, 44 Minn. 191.

CARRIERS — SHIPPER PRESUMED TO KNOW AND ASSENT TO CONDITIONS IN CONTRACT OF SHIPMENT. — A shipper, in the absence of fraud, is deemed to have assented to and is bound by the terms of the contract of shipment, whether he has read it or not: *St. Louis etc. R'y Co. v. Weakly*, 50 Ark. 397; 7 Am. St. Rep. 104, and note; *Hill v. Syracuse etc. R. R. Co.*, 73 N. Y. 351; 39 Am. Rep. 163, and extended note; note to *Morrison v. Phillips etc. Constructors Co.*, 44 Wis. 405; 28 Am. Rep. 599; *Betha v. Northeastern R. R. Co.*, 26 S. C. 91; *Jones v. Cincinnati etc. R. R. Co.*, 89 Ala. 376.

STUMBAUGH v. ANDERSON.

[46 KANSAS, 541.]

FRAUDULENT CONVEYANCE FROM PARENT TO CHILD. — A deed or conveyance of property made by a parent to his minor child, in consideration of services performed by the latter, is voluntary, without legal consideration, and void as against the creditors of the parent, if made when his remaining property is insufficient to pay his debts.

Stumbaugh, Arnold, and Hilton, for the plaintiffs in error.

M. E. Matthews, for the defendants in error.

GREEN, C. This action was brought by the plaintiffs in error to set aside a deed made by Beverly Anderson and wife for two lots on Clay Street, in the city of Topeka, to their two sons, William Mack and Jones Anderson, on the twentieth day of January, 1885. On the twenty-ninth day of December, 1884, the plaintiffs recovered a judgment against Beverly Anderson, before a justice of the peace in Shawnee County, and caused an abstract of such judgment to be filed in the office of the clerk of the district court on the thirtieth day of July, 1886. An execution was issued thereon, which was re-

turned, "No property found." The plaintiffs then commenced this suit, and a trial was had, and special findings of fact returned by the jury, and judgment was rendered for the defendants, and the plaintiffs ask a review of the record by which such judgment was obtained.

It seems from the evidence upon the trial that Beverly Anderson had agreed to give his two sons \$150 if they would go ahead and do the best they could in working on the homestead farm owned by the father; that the sons, one of whom was twenty-two and the other nineteen, resided with their parents, except at such times as they worked out for themselves; that instead of paying them the \$150, the father deeded to them the two lots in question, and the jury found this consideration in support of the deed. Was this consideration sufficient to uphold the deed as to Jones Anderson? The evidence clearly established the fact of his minority when the promise was made by the father, and there was no evidence that he had reached his majority when the deed was executed. The jury found that when the deed was signed by Beverly Anderson and wife, he was indebted to his two sons in the sum of \$150. Now, this indebtedness, so far as it related to the minor son, was created by the promise of the father to pay the son for doing that which the law says it was his duty to do. The father had not relinquished the right he had to the son's services until he reached his majority. He was entitled to the very labor the son was to perform, without compensation; and it is difficult to see how any debt or obligation could be created which would support a consideration for the deed, so far as it related to this minor, as against existing and *bona fide* creditors of the father. The obligation rested upon the father to support the son, who in turn owed the father his services until he became of age. The conveyance was voluntary so far as it related to the minor son, and was without consideration. A promise to do what one is already bound to do is not a consideration: 8 Am. & Eng. Ency. of Law, 834, and authorities there cited. While a voluntary conveyance of land from a parent to his infant would be valid where the claims of creditors do not intervene, yet if creditors are prejudiced by such conveyance, they would have an equitable right to set it aside, or to avoid it to the extent at least of the debts due them: Field on Infants, sec. 51; Reeve on Domestic Relations, 422; Bump on Fraudulent Conveyances, 232; *Swartz v. Hazlett*, 8 Cal. 118. In the latter

case, the court said: "Where a parent executes to his infant son a conveyance of property in consideration of services performed, it must be considered as a voluntary conveyance, without legal consideration, as he is not legally bound to pay for his son's services. Such a deed is therefore void against the creditors of the parent, if made when his remaining property is insufficient to pay his debts."

We think there was no evidence to support a consideration in the deed for the lots in question from Beverly Anderson and wife to their minor son. We do not deem it necessary at this time to pass upon the sufficiency of the consideration of the conveyance as to William Mack Anderson.

We recommend a reversal of the judgment, and that a new trial be granted.

The COURT. It is so ordered.

FRAUDULENT CONVEYANCES BETWEEN PARENT AND CHILD. — A conveyance by an insolvent father to his son of property, the consideration for which is that the son should support him during his life, is fraudulent and void as to his existing creditors: *Woodall v. Kelly*, 85 Ala. 368; 7 Am. St. Rep. 57; *Johnston v. Harvey*, 2 Penr. & W. 82; 21 Am. Dec. 426, and note; and the same rule exists where the consideration for the conveyance was the earnings of a minor unemancipated son: *Holliday v. Miller*, 29 W. Va. 424; 6 Am. St. Rep. 653, and note; *Ionia Savings Bank v. McLenn*, 84 Mich. 625.

ROSS v. HIXON.

[46 KANSAS, 560.]

MALICIOUS PROSECUTION — PROBABLE CAUSE — FINDING AS EVIDENCE —

The finding of a committing magistrate that an offense has been committed, and that there is probable cause to believe the defendant guilty thereof, is only *prima facie* and not conclusive evidence of probable cause, in an action for malicious prosecution, brought by such defendant after his discharge, against the complaining witness.

MALICIOUS PROSECUTION — PROBABLE CAUSE. — **CONVICTION** is generally conclusive of probable cause in actions for malicious prosecution, yet it may be overcome by showing that it was procured by fraud, undue means, or the false testimony of the prosecution.

Hullett and Fletcher, for the plaintiff in error.

Hill and Chenault, for the defendant in error.

SIMPSON, C. On the seventeenth day of January, 1887, Hixon filed an affidavit before a justice of the peace in Bourbon County, charging Ross with having mixed certain poison

with a quantity of flour, with the intent and for the purpose of causing the death of certain persons. Upon said complaint a warrant was issued, and Ross was arrested. A preliminary trial was had on the 4th of February, before the justice who issued the warrant. At the preliminary examination, twelve witnesses were examined for the state and seven for the defendant. After the hearing of all the evidence, the justice bound Ross to appear at the district court and answer the charge. He failed to give bond, and was committed to jail. The finding of the justice was as follows: "After hearing the evidence, I find that said offense has been committed, and that there is probable cause to believe the defendant guilty thereof."

Ross was in jail from the seventeenth day of January, 1887, until May 2, 1887. On the latter date, the district court of Bourbon County being in session, the county attorney filed a statement showing cause for non-prosecution, and Ross was discharged. On the eighth day of August, 1887, he commenced this action for malicious prosecution against James Hixon, the prosecuting witness. A trial was had at the May term, 1888. The plaintiff in error offered evidence showing the proceedings before the justice of the peace on the criminal charge, and tending to prove every material allegation in such an action. When the plaintiff rested, the defendant, Hixon, introduced a large number of witnesses, when he was interrupted by the court, the trial was stopped, and a verdict was ordered for the defendant. The jury returned a verdict for the defendant, and a motion for a new trial was overruled. The record itself discloses no reason for the ruling of the court, but counsel agree that the reason assigned by the trial court was, that the examining magistrate had made a finding of probable cause, and that such finding was conclusive upon that question. It is further claimed by counsel for the defendant in error that the trial court made the further statement: "That as the petition does not charge fraud or undue means in obtaining the finding of probable cause by the magistrate, the same cannot be attacked."

The sole question discussed in the oral argument of counsel for defendant in error and the briefs on both sides is as to the weight to be given to the finding of the examining magistrate; as to whether it is *prima facie* or conclusive on the question of probable cause; and whether or not, in either case, the finding must be attacked for fraud or undue means by proper allegations in the petition. In the case of *Sweeney v. Perney*, 40

Kan. 102, this court incidentally noticed the conflict in authorities as to whether or not proof of arrest, committal, and indictment is *prima facie* proof of probable cause; and the case of *Ricord v. Central Pac. R. R. Co.*, 15 Nev. 167, was cited on one side, and that of *Womack v. Circle*, 29 Gratt. 192, on the other. The question in this case is closely allied to this controversy, but authorities can be found on both sides of this question. In the case of *Bauer v. Clay*, 8 Kan. 580, Mr. Justice Valentine says: "The proof showing that the justice ordered that Clay should be bound over for his appearance at court, or in default of bail, that he should be committed to the county jail, is only *prima facie* and not conclusive evidence of probable cause."

The cases of *Ash v. Marlow*, 20 Ohio, 119, and *Ewing v. Sanford*, 19 Ala. 605, are cited in support. The force of this decision is sought to be destroyed by counsel for defendant in error by an assertion that it is a *dictum*. It is sometimes difficult to draw the line between what is authoritative and what is not in a judicial opinion. The report of the case does not give either the pleadings, the assignment of errors, or the briefs, but it is evident that the question was necessarily involved in the rulings of the trial court, and this court thought it necessary to give this as one of the reasons for affirmance of the judgment below, because, if counsel for defendant in error are now right in their contention, Clay had no cause of action, and the case was decided wrongfully in both the trial and the appellate courts. However the rule may be in cases in which the magistrates have jurisdiction to hear and pass judgment, we are satisfied that the case of *Bauer v. Clay*, 8 Kan. 580, states the true rule in cases in which the magistrates have only power to bind over. This rule is upheld by the cases of *Ash v. Marlow*, 20 Ohio, 119; *Ewing v. Sanford*, 19 Ala. 605; *Raleigh v. Cook*, 60 Tex. 438; *Ricord v. Central Pac. R. R. Co.*, 15 Nev. 167; *Hale v. Boylen*, 22 W. Va. 234; *Bacon v. Towne*, 4 Cush. 217; *Spalding v. Lowe*, 56 Mich. 366; *Ganea v. Southern Pac. R. R. Co.*, 51 Cal. 140; *Diemer v. Herber*, 75 Cal. 287. These are all express adjudications on that particular question. In one of these cases, decided in 1885, being that of *Spalding v. Lowe*, 56 Mich. 366, the defendant requested the trial court to instruct the jury as follows: "It appears from the proofs in this case that an examination was had upon the charge made against Spalding, and that the justice, upon such examination, determined that this of-

fense charged against Spalding had been committed, and that there was probable cause to believe said Spalding guilty thereof. This was a judicial determination the justice was authorized to make, and unless such action and determination of the justice was corrupt or collusive, or was wrongfully procured by the defendant herein, it is final as to the question of probable cause, and your verdict should be for the defendant."

The trial court refused to so instruct the jury, and this refusal was assigned as error in the supreme court; but that court say (page 372): "No authority has been produced in support of it, and we think none exists." We have been unable to find a reported case in which the rule is held as claimed by counsel for defendant in error. There are cases that so hold when the magistrate has power to render a judgment of conviction.

How much weight as proof of probable cause shall be attributed to the judgment of a court in an original action when subsequently reversed for error is elaborately discussed by the supreme court of the United States in the case of *Crescent City Live Stock Co. v. Butchers' Union etc. Co.*, 120 U. S. 141,—a case much relied on by counsel for defendant in error. To our mind, however, the distinction between that case and the one at bar is plain and distinct. If the magistrate in Bourbon County had possessed the statutory power to hear the evidence and determine the guilt or innocence of the defendant, and to punish by fine and imprisonment if guilt was found, then his finding and judgment would come within the rule established by that case to be the law of the land. The question in this case is, How much weight, as proof of probable cause, shall be attributed to the finding of an examining magistrate that "an offense has been committed, and that there is probable cause to believe the defendant guilty thereof," when the defendant is subsequently discharged, the prosecution against him confessedly ended, and he has instituted a suit for malicious prosecution against the complaining witness? In the one case, there is a solemn judgment, rendered by a court having full and complete jurisdiction both of the parties and subject-matter, binding on all until reversed on appeal or error. In the other case, there is a finding in effect that sufficient facts have been developed that justifies a magistrate in sending the parties before a court competent to ultimately deal with the question of guilt or innocence.

Again, while a conviction is generally conclusive of prob-

able cause, yet it may be overcome by a showing that it was procured by fraud, undue means, or the false testimony of the prosecution: *Womack v. Circle*, 29 Gratt. 192; *Olsen v. Neal*, 63 Iowa, 214; *Cloon v. Gerry*, 13 Gray, 201; *Whitney v. Peckham*, 15 Mass. 243; *Peck v. Choteau*, 91 Mo. 138; 60 Am. Rep. 236; *Bowman v. Brown*, 52 Iowa, 437; *Palmer v. Avery*, 41 Barb. 290; *Richey v. McBean*, 17 Ill. 63; *Payson v. Caswell*, 22 Me. 212; *Herman v. Brookerhoff*, 8 Watts, 240; *Jones v. Kirksey*, 10 Ala. 839. In such a case the petition in the action for malicious prosecution must directly attack the judgment of conviction, or it will be suicidal. It is therefore unimportant whether the words used by the court in *Bauer v. Clay*, 8 Kan. 580, are *dicta* or authoritative in that case, as they express the law as universally held by all courts of last resort that have spoken on this subject. It follows that the other suggestion of counsel, that the finding of the magistrate must be directly attacked in the petition for fraud or undue means, is without force; because, as that finding is only *prima facie*, all that is necessary for the plaintiff to do to win is to overthrow it by a preponderance of evidence. It can be fairly said that there was evidence submitted at the trial by the plaintiff in error, other than the transcript of the proceedings before the examining magistrate, bearing upon the question of probable cause, which the court below permitted to go to the jury, from which they might have found that the *prima facie* case made by the magistrate's finding was overcome.

It is recommended that the judgment of the district court be reversed, and the cause remanded, with instructions to grant a new trial.

The COURT. It is so ordered.

Malicious Prosecution of Criminal Charges.*

SCOPE OF THIS NOTE. — In Texas, and perhaps in other states, the institution of a criminal prosecution by one person against another for the purpose of extorting money, or the payment or security of a debt, or with intent to vex, harass, or injure such person, is made an offense by the Penal Code, punishable by fine or imprisonment: *Dempsey v. State*, 27 Tex. App. 269; 11 Am. St. Rep. 193. It is not the purpose of this note to treat of malicious prosecution as a crime, nor to show what acts may constitute the offense de-

* REFERENCE TO MONOGRAPHIC NOTES.

Malicious prosecution of civil actions: 14 Am. Dec. 509-508; 44 Am. Rep. 346-343.
Malicious prosecution, where the indictment does not charge a crime: 22 Am. Rep. 529-511.

Malicious prosecution, liability of corporations for: 34 Am. Rep. 495-499.
Malicious prosecution, judgment in, as a bar to subsequent action for libel or slander: 55 Am. Dec. 303, 304.

False imprisonment, liabilities and remedies for: 54 Am. Dec. 255-271.

announced by the penal codes of any of the states. Our attention will be confined to the consideration of the malicious prosecution of criminal proceedings as grounds for the maintenance of civil actions to redress injuries suffered thereby, including the pleadings and evidence in such actions and the measure of damages applicable thereto.

NATURE AND ESSENTIALS OF THE ACTION. — To maintain a civil action for the malicious prosecution of a criminal charge, the plaintiff must show, — 1. A prosecution of him such as may support a recovery; 2. That it was instigated or procured by the defendant, or where there are two or more defendants, by the co-operation of all of them; 3. That the prosecution was terminated in the final acquittal or discharge of the plaintiff; 4. That it was without probable cause; and 5. That it was malicious: *Vind v. Core*, 18 W. Va. 1; *Scott v. Shelor*, 28 Gratt. 891; *Wheeler v. Nesbitt*, 24 How. 544.

The essential difference between an action for malicious prosecution and one for false imprisonment is, that in the former the imprisonment must have been under legal process issued as the result of a prosecution commenced or continued maliciously and without probable cause, while the latter lies for an imprisonment which is extrajudicial and without legal process, and from which the prosecutor cannot escape liability by proving that he acted upon probable cause and without malice: *Boeger v. Langenberg*, 97 Mo. 390; 16 Am. St. Rep. 322; *Murphy v. Martin*, 58 Wis. 276; *Mitchell v. State*, 12 Ark. 56; 54 Am. Dec. 253; *Collier v. Lower*, 35 Ind. 235; 9 Am. Rep. 735; *Sutton v. Johnstone*, 1 Term Rep. 493, 784; *Floyd v. State*, 12 Ark. 43; 54 Am. Dec. 250. What are the elements of damages arising out of a malicious prosecution which may properly be considered by the jury in determining the compensation to be awarded the injured party will be treated in the latter part of this note.

Whether an action be for malicious prosecution, false imprisonment, slander, or libel, injury to the plaintiff's reputation is one of the elements, and ordinarily the chief element, of his damages; and where two or more of these causes of action exist in favor of the plaintiff, and against the defendant, they may generally be united: *Haskins v. Ralston*, 69 Mich. 43; 13 Am. St. Rep. 376; *Shore v. Smith*, 15 Ohio St. 173; *Miles v. Oldfield*, 4 Yeates, 423; 2 Am. Dec. 412. When they all arise out of the same transaction, it is evident that all may be considered by the jury and recompensed by a single verdict: *Williams v. Planters' Ins. Co.*, 57 Miss. 759; *Neil v. Thorn*, 88 N. Y. 270; and that one recovery in favor of the accused must preclude any further action by him: *Boeger v. Langenberg*, 97 Mo. 390; 10 Am. St. Rep. 322; *Jarnigan v. Fleming*, 43 Miss. 710; 5 Am. Rep. 514; *Shekton v. Carpenter*, 4 N. Y. 578; 55 Am. Dec. 301.

WHAT PROSECUTIONS WILL SUPPORT THE ACTION. — With respect to the crime alleged against the plaintiff in the prosecution of which he complains, we apprehend that it will sustain an action if it appears to have been a prosecution for any act or offense for which, had he been convicted, he might lawfully have been punished. As already indicated, the subject of the malicious prosecution of civil actions is not within the purview of this note. There are proceedings for which, though not strictly civil actions nor criminal prosecutions, redress may be obtained by actions for malicious prosecution, as where one is arrested or prosecuted on the suggestion of his lunacy: *Lockenow v. Sides*, 57 Ind. 360; 28 Am. Rep. 58; *Look v. Dein*, 103 Mass. 116; 11 Am. Rep. 323; *Turner v. Turner*, Gow, 50; or a search-warrant is maliciously or without probable cause obtained, authorizing the searching of his premises on the allegation that stolen goods are concealed therein: *Wain*

son v. May, 71 Ind. 269; *Carey v. Sheets*, 67 Ind. 375; *Boeger v. Langenberg*, 97 Mo. 390; 10 Am. St. Rep. 322; *Miller v. Brown*, 3 Mo. 127; 23 Am. Dec. 693; *Olson v. Tuite*, 46 Minn. 225; *Boot v. Cooper*, 1 Term Rep. 535.

Defects in the Accusation or Proceedings.—It may be that the charge as made does not constitute a public offense, or that for some other reason no conviction can be had under it, or though constituting some offense, it does not justify the proceeding taken or warrant issued by the magistrate, and cannot for that reason result in a conviction. In each of the instances supposed, there cannot, if the law is properly construed and applied, be any conviction, and on that account it has been insisted that there is no prosecution such as will sustain an action, though it is shown to be malicious and without probable cause. As we shall hereafter show, it is necessary, to maintain an action for malicious prosecution, that the defendant was guilty of malice and acted without probable cause in preferring the charge which he made. If both of these elements are shown to have been present, it is not material that the prosecutor, in the complaint which he made, did not state facts sufficient to constitute a crime, or that some irregularity of proceeding after the complaint was preferred made the arrest under it improper and unauthorized. Hence if the charge as made was false, malicious, and without probable cause, the person prosecuted cannot be deprived of compensation for such injury as may have resulted to him from it, by proving that the affidavit or complaint was defective in not charging a criminal offense or that the proceedings were otherwise irregular: *Bell v. Krepers*, 37 Kan. 64; *Shmul v. Brown*, 28 Iowa, 37; 4 Am. Rep. 151; *Potter v. Gjertsen*, 37 Minn. 386; *Forrest v. Collier*, 20 Ala. 175; 56 Am. Dec. 190; *Ward v. Sutor*, 70 Tex. 343; 3 Am. St. Rep. 606; *Parli v. Reed*, 30 Kan. 534; *Farley v. Dank*, 4 El. & B. 493; *Barton v. Kavanaugh*, 12 La. Ann. 332; *Dennis v. Ryan*, 65 N. Y. 385; 22 Am. Rep. 636; *Kline v. Shuler*, 8 Ired. 484; 49 Am. Dec. 402; *Streight v. Bell*, 37 Ind. 550; *Stocking v. Howard*, 73 Mo. 25. There are cases, however, which, without denying the liability of the prosecutor, insist that it can be enforced only by an action of trespass, as though the arrest were not justified by legal process: *Maher v. Ashmead*, 30 Pa. St. 344; 72 Am. Dec. 708; *Kramer v. Lotz*, 50 Pa. St. 495; 88 Am. Dec. 556; *Krause v. Sptegel*, 94 Cal. 370; 28 Am. Rep.

If the Charge Made by the Prosecutor is True, but the legal conclusion drawn from it is erroneous and cannot be sustained, and the prosecution must therefore fail, no action against him can be maintained, as where he correctly stated the facts upon which he relied, and the magistrate erroneously regarded them as criminal and issued his warrant thereon: *Cohen v. Morgan*, 6 Dowl. & R. 8; *Carraik v. Morley*, 1 Gale & D. 45; 1 Q. B. 18; *Huhn v. Schmidt*, 64 Cal. 284; *Newman v. Davis*, 58 Iowa, 447; *McNeely v. Drinkill*, 2 Blackf. 259; *Leigh v. Webb*, 3 Esp. 165; *Boeger v. Langenberg*, 97 Mo. 390; 10 Am. St. Rep. 322; or the grand jury found an indictment for a crime different from that supported by the prosecutor's testimony: *Leidig v. Ramsey*, 1 Seam. 272; 29 Am. Dec. 354; and whenever the facts are truly stated in the prosecutor's complaint or affidavit, he cannot be held liable, on the failure of the prosecution, because he drew wrong inferences from those facts, and his affidavit named a particular crime as the result of the acts, when they did not, as he supposed, lead to such result, as where the prosecutor charged the commission of larceny, but showed by his affidavit that the property taken was such that larceny could not be committed by taking it: *Bartlett v. Brown*, 6 B. L. 37; 75 Am. Dec. 675; *Thaule v. Krekeler*, 81 N. Y. 423.

Want of Jurisdiction in the Court in Which the Prosecution was Commenced.—Whether a prosecutor may in all cases shield himself by showing that the

court or tribunal in which he maintained, or attempted to maintain, his prosecution was without jurisdiction to entertain it, is a question upon which the courts are almost equally divided. Certainly, if a complaint were made to a person neither possessing, nor assuming to possess, authority to entertain it, or to cause the person charged to be apprehended or punished, there is, in the eye of the law, no criminal prosecution, and this has been held to be equally true when the charge was made before or to a magistrate possessing some judicial functions, but having no authority over the subject-matter contained in the charge preferred: *Bixby v. Brunlige*, 2 Gray, 129; 61 Am. Dec. 443; *Bodwell v. Osgood*, 3 Pick. 379; 15 Am. Dec. 228; *Whiting v. Johnson*, 6 Gray, 246; *Marshall v. Betner*, 17 Ala. 832; *Turpin v. Remy*, 3 Blackf. 210; *Painter v. Ives*, 4 Neb. 122. The majority of the cases upon the subject, in our judgment, sustain the proposition, that though the court in which the prosecution took place did not have jurisdiction over it, yet if it was malicious and without probable cause, and its prosecution inflicted injury upon the person thus prosecuted, he may recover: *Morris v. Scott*, 21 Wend. 281; 34 Am. Dec. 236; *Smith v. Cattel*, 2 Wils. 376; *Stone v. Stevens*, 12 Conn. 219; 30 Am. Dec. 611; *Elree v. Smith*, 1 Dowl. & R. 97; *Boon v. Maul*, 3 N. J. L. 863; *Hays v. Younglove*, 7 B. Mon. 545. If the court had jurisdiction over the subject-matter, and its alleged want of authority to proceed with the prosecution rested upon some irregularity or omission, but the warrant issued was valid upon its face, and the want of jurisdiction must be established by extrinsic evidence, the courts will, we think, agree that such want of jurisdiction will not defeat the action for malicious prosecution: *Sweet v. Noyes*, 30 Mich. 406; *Gibbs v. Ames*, 119 Mass. 60; *Ward v. Sutor*, 70 Tex. 343; 8 Am. St. Rep. 606.

Arrest of Person Prosecuted, whether Essential. — When we come to the inquiry, What stage must the criminal prosecution reach before the prosecutor becomes answerable? and consult the authorities upon the subject, we find that they "speak a varied language." The majority seem to affirm that it is not until an arrest has been made that a cause of action arises in favor of the person accused, and furthermore, that the arrest must be made under a warrant which is at least valid on its face, so as to constitute a justification to the officer in what he did under it: *Cockfield v. Braveboy*, 2 McMull. 270; 39 Am. Dec. 123; *Vinal v. Core*, 18 W. Va. 1; *Levin v. Uzuher*, 65 Md. 341; *Cooper v. Armour*, 42 Fed. Rep. 215; *Bartlett v. Christilf*, 69 Md. 219. On the other hand, it is said, apparently with the better reason, that the person accused is injured by the mere fact that a criminal charge is maliciously and wantonly preferred against him, whereby his reputation is injuriously affected and he is exposed to disgrace and infamy; that after the charge has been made, and the person accused is thereby injured in his reputation, its dismissal without making any arrest does not absolve the prosecutor from liability: *Coffey v. Myers*, 84 Ind. 105; and some of them go so far as to assert that the mere making of the charge before a magistrate for the purpose of inducing him to entertain it as a charge of felony creates a liability against the accuser, though it is not taken down in writing: *Clarke v. Postan*, 6 Car. & P. 423. None of the authorities insist that any actual imprisonment is essential to support the action. It is sufficient that the officer having the warrant of arrest notifies the person to be arrested of that fact, reads the warrant, and proclaims the arrest, to which the accused submits, and then procures sureties for his appearance before the proper magistrate to answer the charge against him: *Malone v. Huston*, 17 Neb. 107. Nor is it necessary to show that the prosecutor directly procured or assented to the issuing of the warrant on which

the arrest was made, if he preferred the charge in such a way that it thereupon became the duty of some public official to issue a warrant thereon requiring the apprehension of the person accused to answer the accusation made against him: *McLeod v. McLeod*, 75 Ala. 483.

WHO MAY BE HELD LIABLE. — The question who may be held answerable for the malicious prosecution of a criminal charge may be considered, — 1. With reference to the persons who may be guilty of or chargeable with such prosecution; and 2. What acts on the part of persons who have capacity to be thus guilty and chargeable fix upon them responsibility for the injury suffered by the person prosecuted. Upon principle, it would seem that all persons, whether natural or artificial, capable of instituting, or causing to be instituted, a malicious prosecution without probable cause, must respond in damages for their unlawful and malicious act.

The Liability of Private Corporations for malicious prosecutions has been denied in a few cases, partly on the ground that they are incapable of entertaining malice or acting from malicious motives, and partly for the reason that to prosecute any person maliciously and without probable cause is not within the scope of the powers conferred upon them by law or by their charters, and such prosecution must therefore be *ultra vires*: *Owsley v. Montgomery etc. R. R. Co.*, 37 Ala. 560; overruled in *Jordan v. Alabama etc. R. R. Co.*, 74 Ala. 85; 49 Am. Rep. 800; and *Gillett v. Missouri etc. R. R. Co.*, 55 Mo. 315; 17 Am. Rep. 653; *Childs v. Bank of Missouri*, 17 Mo. 213; overruled in *Beogher v. Life Ass'n*, 75 Mo. 319; 42 Am. Rep. 413. Probably no law or charter ever authorized a corporation to do any kind of a wrong, or even to neglect or omit to do any duty devolving upon it, and if it may not be held liable for doing things not authorized by law or its charter, it cannot be held liable for anything whatever; for certainly it ought not to be responsible in damages for doing anything authorized by its charter, for in thus doing it must be acting not only by the warrant, but under the protection of the law. The American courts, and perhaps the English also, at the present time, will not exonerate a corporation from responding in damages for a wrong done by it, on the ground that it had no authority or power to do it; and will therefore hold it liable for a malicious prosecution under substantially the same rules of law as apply against private persons: *Fenton v. Wilson Sewing-machine Co.*, 9 Phila. 189; *Williams v. Planter's etc. Co.*, 57 Miss. 759; 34 Am. Rep. 494; *Wheless v. Second Nat. Bank*, 1 Baxt. 469; 25 Am. Rep. 783; *Godspeed v. East Hudson Bank*, 22 Conn. 530; 58 Am. Dec. 439; *Ricord v. Central P. R. R. Co.*, 15 Nev. 167; *Woodward v. St. Louis etc. R. R. Co.*, 85 Mo. 142; *Carter v. Howe Machine Co.*, 51 Md. 290; 34 Am. Rep. 311; *Reed v. Home Savings Bank*, 130 Mass. 443; 39 Am. Rep. 468; *Vance v. Erie R. R. Co.*, 32 N. J. L. 334; 90 Am. Dec. 665; *Morton v. Metropolitan I. Co.*, 34 Hun, 366; 103 N. Y. 645; *Gulf etc. R. R. Co. v. James*, 73 Tex. 12; 15 Am. St. Rep. 743; *Hussey v. Norfolk etc. R. R. Co.*, 98 N. C. 34; 2 Am. St. Rep. 312; *National Bank v. Graham*, 100 U. S. 699; *Denver etc. R. R. Co. v. Harris*, 122 U. S. 597; *Jordan v. Alabama etc. R. R. Co.*, 74 Ala. 85; 49 Am. Rep. 800; *Henderson v. Midland R. R. Co.*, 20 Week. Rep. 23; 25 L. T., N. S., 881; *Edwards v. Midland R. R. Co.*, L. R. 6 Q. B. D. 287; 50 L. J. Q. B. 281; 43 L. T., N. S., 694; 29 Week. Rep. 669.

Corporations, when Liable. — The difficulty now is, not in showing that private corporations may be answerable for a malicious prosecution, whatever be the nature of their powers, but as they can act only through agents, and as their agents, like those of natural persons, may act in matters over which authority has not been delegated to them, it is often questionable

whether a particular prosecution instituted or carried on by an agent of a corporation is a corporate act or not. Of course, the fact that a prosecution was instituted by an agent of a corporation, even though in what he did he claimed to be acting as such agent, does not subject it to responsibility if he acted without its knowledge, and not within the scope of the authority committed to him: *Stevens v. Millard etc. R. R. Co.*, 2 Com. L. Rep. 1300; 10 Ex. 352; 18 Jur. 932; 23 L. J. Ex. 323; *Springfield etc. Co. v. Green*, 25 Ill. App. 106. Formal action on the part of the board of directors of a corporation need not be established: *Ricord v. Central P. R. R. Co.*, 15 Nev. 176. If the entire business affairs of the corporation are under the control of a general manager who has authority to institute criminal prosecutions arising out of alleged violations of its rights of property, the corporation is liable if he exercises his authority in such manner and under such circumstances as would support an action against a private person: *Gulf etc. R'y Co. v. James*, 73 Tex. 12; 15 Am. St. Rep. 743. Perhaps a majority of the great transportation companies have special agents or detectives whose duties include the apprehension of all persons who have committed crimes by which the property of the corporation has been embezzled, stolen, or destroyed, or its interests otherwise prejudiced; and while it may be said that the delegation of authority to do these things does not imply that an agent thus constituted shall in any event act maliciously and without probable cause, to this the unanswerable reply has been made by the courts, that one of the consequences liable to attend the delegation of the authority is that of the malicious prosecution of persons who are not offenders, and that when this consequence does result, the corporation must be held answerable: *American Exp. Co. v. Patterson*, 73 Ind. 430; *Evansville etc. R. R. Co. v. McKee*, 99 Ind. 519; 50 Am. Rep. 103; *Goff v. Great Northern R'y Co.*, 3 El. & E. 672; 30 L. J. Q. B. 138; *Pennsylvania Co. v. Weddle*, 100 Ind. 138.

A Prosecution Instituted by a Partner for an alleged crime relating to the property of the firm cannot impose any liability on another partner who did not assent to nor have any knowledge of the prosecution at its commencement, and especially if he repudiates it as soon as known to him: *Rosenkrans v. Barker*, 115 Ill. 331; 56 Am. Rep. 169; *Gilbert v. Enmons*, 42 Ill. 143; 39 Am. Dec. 412.

Sometimes Associations are Formed for the purpose of contributing money and otherwise aiding in the prosecution of alleged criminals or of persons suspected of being guilty of crimes of a specified class, and as the result of this arises the question whether all the members of the association are answerable for prosecutions incited or aided by it, whether they participate therein or not. So far as we can ascertain, this question has not yet been adequately considered. In one instance, where the organization of an association of this character was proved, and that those of its members who were assembled on one occasion voted to prosecute a particular charge and to raise money for that purpose, members who were not present when this vote was taken, and who did not contribute, by money or otherwise, to the prosecution of the charge, were held not to be answerable, though they made contributions to the general purposes of the association: *Johnson v. Miller*, 63 Iowa, 535; 50 Am. Rep. 758; 69 Iowa, 562; 58 Am. Rep. 231.

Whether Infancy or Coverture Necessarily Relieves from liability for a malicious prosecution is a question which has been but little considered. Both infants and married women are, in general, answerable for their torts: Note to *Humphrey v. Douglas*, 33 Am. Dec. 178-185; note to *Craig v. Van Bebbler*, 16 Am. St. Rep. 720-724; *Cooley on Torts*, 116; except that a wife may, in

some instances, escape liability on the presumption, when the wrongful act was done in the presence of her husband; that it is to be imputed to him, rather than to her; and when a tort involves some element of design or of guilty intent or purpose not imputable to an infant on account of his tender age or his want of capacity, he cannot, unless his capacity is affirmatively shown, be adjudged guilty of its commission, and if very young, the presumption of his incapacity is indisputable. The court of appeals of New York appears, in *Cassin v. Delany*, 38 N. Y. 178, to have proceeded on the assumption that when a husband and wife prosecute a charge of embezzlement, she may be held liable in damages, though she acted in his presence, upon proof that she acted upon her own motion, and not by his direction. If a civil action is brought in the name of a minor, without his authority or knowledge, by a *prochein ami*, the infant, though he subsequently assents to the suit upon being informed of it, cannot be held liable for its prosecution, for the reason that he had no power to discontinue it during his minority: *Burnham v. Scavens*, 101 Mass. 360; 100 Am. Dec. 123. His prosecution of an action after coming of age would undoubtedly make him liable: *Sterling v. Adams*, 3 Day, 411. A criminal charge may be preferred by a minor, and if unfounded and malicious, the wrong done is not less than if it were preferred by a person of more advanced years. If the age of the minor, and his manifest capacity and discrimination, and the circumstances accompanying the making of the charge, are such as to demonstrate that his act was malicious and without probable cause, we know of no reason in the law, or elsewhere, for not obliging him to respond in damages for the injury maliciously inflicted by him.

Real Prosecutor, Evidence to Show Who was. — The person sued for malicious prosecution is generally the one who made the affidavit or complaint, or preferred the charge, or otherwise set the machinery of the law in motion, and thereby brought about the arrest of the accused. The person who makes the affidavit upon which the arrest is effected may undoubtedly be regarded as the prosecutor, and held liable as such: *Weil v. Israel*, 42 La. Ann. 955; *Walseer v. Thies*, 56 Mo. 89. Nor is it essential to the character and liability of the prosecutor that he should have made the affidavit for the purpose of procuring the arrest. Thus it has been decided that he who by means of his perjured evidence leads a judge to believe that another witness has been guilty of perjury, and to hold the latter to answer and be tried therefor, is liable in damages as for a malicious prosecution: *Fitzjohn v. Mackinder*, 9 Com. B., N. S., 505; 7 Jur., N. S., 1283; 30 L. J. Com. P. 257; 9 Week. Rep. 477; 4 L. T., N. S., 149. But liability does not attach to one who fairly discloses to a magistrate or a prosecuting officer all the information in his possession, and leaves him to judge of the propriety of proceeding with the charge: *Smith v. Austin*, 49 Mich. 286; *Teal v. Fissel*, 28 Fed. Rep. 351. When one has set the machinery of the law in motion, so that in the regular and ordinary course of its action an arrest must be made, or will probably follow, it need not be shown that he ordered or directed the warrant or other process to issue, or participated in its execution: *Walseer v. Thies*, 56 Mo. 89; *McLeod v. McLeod*, 75 Ala. 483. On the other hand, he is not answerable for acts which do not properly result from this charge, and were not intended by him, as for a wrongful and unauthorized proceeding of the officer in serving the warrant: *Bartlett v. Hawley*, 38 Minn. 308. The liability of a person for the prosecution of a criminal case need not appear from the record therein. The question is, not whether it proceeded in his name, but whether it proceeded by virtue of his authority or procurement. If he was the real, or one

of the real, prosecutors, he cannot escape liability by keeping some other person in the position of apparent prosecutor. Hence evidence outside of the record is always admissible to show who was in fact prosecutor: *Kramer v. Morrow*, 23 Kan. 360. For he who conducts a prosecution in the name of another is not less liable than if he conducted it in his own name: *Cotterell v. Jones*, 11 Com. B. 713; 16 Jur. 88; 21 L. J. Com. P. 2; *Clements v. Oakly*, 2 Car. & K. 868. If the defendant is the person, or one of the persons, who caused the prosecution, he is liable, whatever may be the means he employed. He may have incited some other person to present and verify the complaint, or have procured the action of some prosecuting officer, or have acted by his servant or agent. In employing either of these supposed means of action, he is equally culpable and equally liable: *Stansbury v. Fogle*, 37 Md. 369; *Kline v. Shuler*, 8 Ired. 484; 49 Am. Dec. 402; *Wells v. Parsons*, 3 Harr. (Del.) 506; *Grant v. Deuel*, 3 Rob. (La.) 17; 38 Am. Dec. 228.

A Principal Acting by or through his Agent may be answerable for a malicious prosecution. If he directs the agent in what the latter does, there can be no question that his liability must be the same as if he had acted without the aid or intervention of an agent. But where he did not direct the agent, and the latter acted without his knowledge, then the questions most likely to arise are: 1. Was the act of the agent within the limits of his powers? and 2. If so, can the principal be subjected to exemplary damages, where, from his ignorance of what was done in his name, it is not possible to impute to him actual malice, desire to injure the accused, or reckless and wanton disregard of the latter's rights or feelings? With respect to the first question, it is clear that the agent must have been acting in the business of his principal and within the power delegated to him, either expressly or by implication. Hence where the ticket-seller of a railway corporation, acting at the suggestion of a police-officer, and with a view of aiding in the apprehension of persons engaged in passing counterfeit money, sold tickets and received payment in a bank bill which the agent believed to be counterfeit and worthless, and then caused the arrest of the ticket-buyer while he was yet in the station waiting for his train, it was held, by a divided court, that in what he did the ticket-seller was not transacting the business committed to him, and his principal was not answerable: *Mulligan v. New York etc. R. R. Co.*, 129 N. Y. 506; 27 Am. St. Rep. A principal is not, in an action for a malicious prosecution, necessarily chargeable with whatever knowledge his agents may have had. "Actual malice implies a wrongful purpose or intent in the mind of the person whose conduct is in question. It is not to be conclusively presumed or legally imputed to him merely because of the mental condition or the knowledge of another person, however related to him": *Reissan v. Mott*, 42 Minn. 49; 18 Am. St. Rep. 489. To render one liable for a criminal prosecution, where he acts by his agent, it is not necessary that he know of or contemplate the action taken by the agent, if it was within the power delegated to him, or though not within that power, was ratified after being done: *Kinsey v. Wallace*, 36 Cal. 462; *Forbes v. Hagman*, 75 Va. 168; in each of which events both the principal and the agent are liable, and may be joined as defendants in the same action: *Hussey v. Norfolk etc. R. R. Co.*, 98 N. C. 34; 2 Am. St. Rep. 312; unless the agent, in what he did, either had probable cause or acted without malice. Therefore, an attorney at law is liable as well as his client when he aided in a prosecution which he knew to be unfounded and malicious: *Staley v. Turner*, 21 Mo. App. 244; *Warfield v. Campbell*, 35 Ala. 349; *Burnap v. Marsh*, 13 Ill. 538. On the other hand, an attorney is not liable who does not know that the action is groundless, even

though he is aware that his client is actuated by malice. He may act upon the statement of facts made to him by his client, and is not under a duty to institute an inquiry for the purpose of verifying his statement before giving advice thereon. Therefore, an instruction to a jury that an attorney is liable if he, "by the exercise of reasonable diligence, might have known that there were no facts sufficient to constitute probable cause" is erroneous: *Peck v. Chouteau*, 91 Mo. 138; 60 Am. Rep. 236; *Bicknell v. Dorion*, 16 Pick. 478.

TERMINATION OF PROSECUTION. — The prosecution on which the action is based must have terminated without resulting in the conviction of the plaintiff. It is sometimes said that it must have terminated in his acquittal, but this is not true. A trial on the merits or otherwise is not essential. It is sufficient that the prosecution has ended so that it cannot be reinstated nor further maintained without commencing a new proceeding, but it must have terminated in some of the several modes in which it is possible for a criminal proceeding to reach a stage beyond which the accused cannot be further prosecuted therein: *Ousebeer v. Drabole*, 13 Neb. 465; *McWilliams v. Hoban*, 42 Md. 56; *Blalock v. Randall*, 76 Ill. 224; *Gillespie v. Hudson*, 11 Kan. 163; *Schippel v. Norton*, 38 Kan. 567. The propriety of this rule is obvious, for if the civil action could be maintained before the termination of the criminal prosecution, it might happen that, after the defendant had been called upon to respond in damages as a malicious prosecutor acting without probable cause, the good faith of his prosecution would be vindicated by a verdict of the jury convicting the accused. In Texas, as we have already shown, the malicious prosecution of criminal cases for certain purposes has been made criminal. As the Penal Code of the state did not expressly require the termination of the malicious prosecution before the prosecution of the prosecutor for instituting it, an information against the defendant for instituting a malicious criminal prosecution need not aver that it has terminated: *Dempsey v. State*, 27 Tex. App. 269; 11 Am. St. Rep. 193. We shall now refer to the different means, other than by a trial on the merits, by which a criminal prosecution may so terminate as to support a civil action.

Discharge by Committing Magistrate. — The criminal practice in most of the states requires the accused, if the offense charged is of a serious nature, to be brought before a magistrate for a preliminary examination for the purpose of determining whether the evidence against him is such as to warrant his being held to answer before the grand jury, or before some court having jurisdiction to try him after the information shall have been filed by the proper prosecuting officer. If the examining magistrate finds that there is not sufficient cause to hold the accused to answer, and therefore discharges him, that prosecution is thereby ended; and the consideration that other prosecutions may be brought against the same person on the same charge, and that the grand jury, on its presentation to them, may find an indictment thereon, cannot prevent the action of the magistrate from having its effect as a termination of the prosecution before him, sufficient to support the civil action: *Moyle v. Drake*, 141 Mass. 238; *Costello v. Knight*, 4 Mackey, 65; *Fay v. O'Neill*, 36 N. Y. 11; *Jouru v. Finch*, 84 Va. 204.

Failure of Grand Jury to Find Indictment. — If the grand jury considers the charge against the accused, whether after he has been held to answer or otherwise, and refuses to indict, this is also generally regarded as a final termination of a prosecution authorizing an action to be maintained thereon, if it was malicious and without probable cause: *Morgan v. Hughes*, 2 Term Rep. 225; *Potter v. Casterline*, 41 N. J. L. 22; *Graves v. Dawson*, 130 Mass. 78; 39 Am. Rep. 429; *Appar v. Woolston*, 43 N. J. L. 57; *Stuncliff v. Palmeter*,

18 Ind. 321; *Howe v. Lewton*, 18 Fla. 323; *Mitchell v. Williams*, 11 Mees. & W. 205; 12 L. J. Ex. 193; though in some of the states the action of the grand jury must be supplemented by an order of court discharging the accused from custody or from the duty of further appearing to answer the charge against him: *Thomas v. De Graffenreid*, 2 Nott & McC. 143; *O'Driscoll v. McBurney*, 2 Nott & McC. 54; *Knott v. Sargent*, 125 Mass. 95. Whether an order of court is necessary or not depends upon the practice in the particular state in which the question arises. It is not the mere failure of the grand jury to indict at any particular time which terminates the prosecution; for their non-action, instead of proceeding from their judgment that no cause for prosecution exists, may be the result of their not being able to secure the attendance of the requisite witnesses, and their consequent postponement of the investigation to some later day, in which event it is clear that the prosecution is not yet at an end: *Knott v. Sargent*, 125 Mass. 95; and whenever, by the practice in the state, the court, notwithstanding no indictment has been made, retains the right to refer the charge to another grand jury, it is probable that a formal order discharging the accused is a condition precedent to the maintenance of an action for his malicious prosecution.

Entry of Nolle Prosequi. — There has been a disinclination to admit that the termination of a prosecution by the entry of *nolle prosequi* will support an action for malicious prosecution, and some cases have affirmed in general terms that it cannot be so supported: *Garing v. Fraser*, 76 Me. 37; *Parker v. Farley*, 10 Cush. 279; *Perker v. Huntington*, 2 Gray, 123; *Brown v. Lakeman*, 12 Cush. 482. But we think they must all, as to this extreme view, be regarded as *dicta*. If some action or proceeding on the part of the court, or otherwise, is required to make an entry of *nolle prosequi* operative as a final termination of a prosecution, then, of course, such action or proceeding must supplement such entry; but when it is manifest that the prosecution is at an end, and cannot be revived, it is not material how it came to its end, and the right of the party injured by it to seek redress is complete: *Kennedy v. Holaday*, 25 Mo. App. 603; *Lowe v. Wartman*, 47 N. J. L. 413; *Brown v. Randall*, 36 Conn. 56; 4 Am. Rep. 35; *Yocum v. Polly*, 1 B. Mon. 358; 36 Am. Dec. 583; *Hutch v. Cohen*, 84 N. C. 602; 37 Am. Rep. 630; *Briggs v. Burton*, 44 Vt. 124; *Graves v. Dawson*, 130 Mass. 78; 39 Am. Rep. 429; 133 Mass. 419; *Woodworth v. Mills*, 61 Wis. 44; 51 Am. Rep. 135; *Richler v. Koster*, 45 Ind. 440. Perhaps if the accused procures or assents to the entry of a *nolle prosequi*, he thereby waives his right to redress by civil action against his prosecutor: *Langford v. Boston etc. R. R. Co.*, 144 Mass. 431; *Parker v. Farley*, 10 Cush. 279; *Coupal v. Ward*, 106 Mass. 289.

Other Means of Terminating Prosecution. — The only reasonable ground for denying that the termination of a prosecution by the entry of a *nolle prosequi* will support an action for malicious prosecution was, that there had been no trial on the merits, and therefore no acquittal of the accused; but it is settled, as we think, beyond dissent that a trial on the merits is not essential: *Schipfel v. Norton*, 38 Kan. 567; *Bell v. Mathews*, 37 Kan. 686; *Gilbert v. Emmons*, 42 Ill. 143; 89 Am. Dec. 412. To hold it essential would be to permit a prosecutor to do all the damage which a malicious prosecution can possibly effect, and then deny the accused the opportunity to vindicate himself by a trial, by having the proceeding quashed or dismissed, and thus escaping all liability for the wrong unlawfully inflicted. Therefore, any mode by which a prosecution may be dismissed or ended, though without a trial, is sufficient. The indictment may be insufficient, and for that reason may be quashed before trial, or upon trial may require the jury to return a verdict of acquittal.

In either event, if the accused is discharged by the court, the prosecution is finally terminated in the sense that an action for malicious prosecution may be instituted and sustained, though there is nothing to prevent the finding of another indictment, sufficient in form: *Hays v. Blizzard*, 30 Ind. 457; *Lytton v. Baird*, 95 Ind. 349; *Wicks v. Fentum*, 4 Term Rep. 247; *Pipert v. Hearn*, 1 Dowl. & R. 266; 5 Barn. & Adol. 634. A prisoner may be discharged from custody after a hearing upon a writ of *habeas corpus*. If the legal effect of his discharge is such that the prosecution against him can be carried no further, it must necessarily be such a termination as will justify the commencement of a civil action for redress: *Zebbley v. Storey*, 117 Pa. St. 478. If, on the other hand, the prosecution may still go on and the accused may possibly be convicted, his discharge on *habeas corpus*, because it does not relieve him from the duty of further defending himself, cannot support his action for malicious prosecution: *Walker v. Martin*, 43 Ill. 508; *Merriman v. Morgan*, 7 Or. 68. If, before a trial, the prosecution is terminated in any way, as by the failure of the prosecutor to appear, or by the entry of a dismissal by competent authority, the civil action may be at once begun: *Leever v. Hamill*, 57 Ind. 423; *Kelley v. Sage*, 12 Kan. 109; *Clegg v. Waterbury*, 88 Ind. 21; *Svensen v. Davis*, 33 Minn. 308; *Brown v. Randall*, 36 Conn. 56; 4 Am. Rep. 35; *Fay v. O'Neill*, 36 N. Y. 11. But if the prosecutor dismisses his prosecution for the purpose of recommencing it in another court, and proceeds without delay to execute such purpose, it is said that the action for malicious prosecution cannot be maintained until the second prosecution has been disposed of: *Schippel v. Norton*, 38 Kan. 567. Whether the fact that the judgment has been appealed from will destroy its effect, so that the action for malicious prosecution cannot be maintained while the appeal is pending, is unsettled; some of the courts conceding this effect to an appeal: *Reynolds v. De Gerr*, 13 Ill. App. 113; and others denying it: *Marks v. Townsend*, 97 N. Y. 590.

Prosecutions Resulting in Convictions. — The reason already suggested for requiring a final disposition of a criminal charge before permitting any civil action to be maintained for having instituted the prosecution implied that if such prosecution should not result in favor of the person accused he could under no circumstances recover damages on the ground that it was unfounded and malicious. His conviction, in all cases where he had an opportunity to be heard in his defense, is, while it remains in force, conclusive against him that his prosecution was not without probable cause, and that he cannot recover damages from his prosecution: *Severance v. Jenkins*, 73 Me. 376; *Griffis v. Sellers*, 2 Dev. & B. 492; 31 Am. Dec. 422. If, however, the proceeding of which plaintiff complains was *ex parte*, or one in which the court was obliged to act upon the accusation alone, as where an affidavit is filed to require a party to give sureties to keep the peace, upon the filing of which it is the duty of the magistrate to exact such sureties, the fact that they were exacted, and the accused required to furnish them, is not conclusive against him that his prosecutor did not proceed without probable cause: *Stewart v. Gromett*, 29 L. J. Com. P. 170; 7 Com. B., N. S., 191; 6 Jur., N. S., 776; *Hyde v. Greuch*, 62 Md. 577. Commitments to an insane asylum, though not necessarily *ex parte*, do not rank as final adjudications of probable cause, nor preclude the person committed from sustaining an action against the person procuring his commitment: *Kellogg v. Cochran*, 67 Cal. 192. In civil actions the defendant may be arrested and imprisoned, maliciously and without probable cause, and yet the plaintiff have a right to judgment on the cause of action upon which he sued. If such judgment when rendered does not necessarily

affirm the existence of facts sustaining and warranting the arrest, it cannot estop the defendant from showing that his arrest and detention were malicious and without probable cause, nor from recovering damages therefor: *Fortman v. Rottier*, 8 Ohio St. 548; 72 Am. Dec. 606; *Bump v. Betts*, 19 Wend. 421.

Guilty Person cannot Recover. — No judgment in favor of the plaintiff is sustainable if it appears that there was probable cause for his prosecution. Before proceeding to consider what may be regarded as probable cause on the part of a prosecutor, we wish to remark that the plaintiff, notwithstanding his acquittal, must always be regarded as tendering the issue of his innocence, and must fail in his action if that innocence can be disproved, whether the prosecutor acted from malicious motives or not, and whether or not he knew of the facts establishing plaintiff's guilt. An action for malicious prosecution will never lie in favor of a guilty man: *Newton v. Weaver*, 13 R. I. 616; *Parkhurst v. Masteller*, 57 Iowa, 474; *Whitehurst v. Ward*, 12 Ala. 264; *Threefoot v. Nuckols*, 68 Miss. 117; *Johnson v. Chambers*, 10 Ired. 287; *Burber v. Gould*, 20 Hun, 446; *Plummer v. Gheen*, 3 Hawks, 66; 14 Am. Dec. 572; *Adams v. Linher*, 3 Blackf. 241; 25 Am. Dec. 102; except that one prosecuted on two or more charges, of one of which he was convicted, may recover for his prosecution on the other charge, by proving that, as to it, his prosecution was without probable cause and malicious: *Reed v. Taylor*, 4 Taunt. 616; *Ellis v. Abraham*, 8 Q. B. 709; 10 Jur. 593; 15 L. J. Q. B. 221. Sometimes the courts have incautiously said that probable cause did not depend on the guilt or innocence of the accused: *Lytton v. Baird*, 95 Ind. 349; *King v. Cairns*, 11 R. I. 582; *Hazzard v. Flury*, 120 N. Y. 223; *Carl v. Ayers*, 53 N. Y. 14; but when they have so said, they have been referring to the fact that the plaintiff had urged his innocence as conclusive in favor of his right to recover, and have merely intended to affirm that, notwithstanding such innocence, the action of the prosecutor may have been justified because of inorimatory circumstances known to him, and not that the guilt of the accused could co-exist with a right on his part to recover for being prosecuted for a criminal act of which he was guilty.

PROBABLE CAUSE, WHAT IS. — Numerous definitions of probable cause have been given, some of which will be here quoted: "A definition of probable cause sufficiently exact to meet satisfactorily every possible test would be difficult, if not impossible, to furnish. The complete legal idea expressed by that term is not to be gathered from a mere definition. But, perhaps, with reference to many practical cases, it may be nearly accurate to say that probable cause consists of a belief in the charge or facts alleged, based on sufficient circumstances to reasonably induce such belief in a person of ordinary prudence in the same situation": *Boeyer v. Langenberg*, 97 Mo. 390; 10 Am. St. Rep. 322. Probable cause is "the existence of such facts and circumstances as would excite belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the offense for which he was prosecuted": *Dempsey v. State*, 27 Tex. App. 269; 11 Am. St. Rep. 193; *Ramsey v. Arrott*, 64 Tex. 320; *Glasgow v. Owen*, 69 Tex. 167; *Wheeler v. Nesbitt*, 24 How. 544; *Scott v. Shelor*, 23 Gratt. 906; *Thompson v. Beacon Valley Rubber Co.*, 56 Conn. 493. "A reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing that the person charged is guilty of the offense charged": *Ames v. Snider*, 69 Ill. 376; *Davis v. Wisner*, 72 Ill. 292. "Probable cause may be defined to be that apparent state of facts found to exist upon reasonable inquiry, — that is, such inquiry as the given case rendered

convenient and proper, — which would induce a reasonably intelligent and prudent man to believe the accused person had committed, in a criminal case, the crime charged, and in a civil case, that a cause of action existed": *Lory v. Mitchell*, 23 Ind. 67. "Where the facts known to the prosecutor, or the information received by him from sources entitled to credit, are such as to justify the belief, in the mind of a person of reasonable intelligence and caution, that the accused is guilty of the crime charged, and the prosecution is induced thereby, such a state of facts constitutes probable cause, though it may subsequently appear that the accused is innocent": *Hays v. Blizard*, 30 Ind. 467. "Probable cause is such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe, or entertain an honest and strong suspicion, that the person arrested is guilty": *Muns v. Dupont*, 3 Wash. C. O. 31; *Bacon v. Towne*, 4 Oush. 238; *Cole v. Curtis*, 16 Minn. 195; *Casry v. Sevaton*, 30 Minn. 516. "If the apparent facts are such that a discreet and prudent person would be led to believe that a crime has been committed by the person charged, he will be justified, though it turns out that he was deceived, and that the party accused was innocent": *Carl v. Ayers*, 53 N. Y. 14; *Hazard v. Flury*, 120 N. Y. 223. "What is probable cause? It is constituted by such facts and circumstances as, when communicated to the generality of men of ordinary and impartial minds, are sufficient to raise in them a belief or grave suspicion of the guilt of the person": *Griffis v. Sellars*, 2 Dev. & B. 492; 31 Am. Dec. 422. To constitute probable cause, "the facts must be such as would reasonably persuade an impartial and reasonable mind not merely to suspect or conjecture, but to believe, the plaintiff guilty. We cannot readily perceive how there can be a well-grounded or reasonable suspicion of the existence of a fact, without there is also a belief of it": *Stone v. Stevens*, 12 Conn. 219; 30 Am. Dec. 611. By the code of Georgia it is declared that want of probable cause "shall exist when the circumstances are such as to satisfy a reasonable man that the accuser had no ground for his proceeding but his desire to injure the accused." The illustration thus given by the code has not been treated by the courts of the state as excluding other cases of want of probable cause, and a prosecutor is still liable in that state for acting without probable cause, if he did not act with ordinary care, nor as a man of ordinary prudence would under like circumstances: *Coleman v. Allen*, 79 Ga. 637; 11 Am. St. Rep. 449.

Prejudice or Partiality of the Accuser. — There are definitions of probable cause which seem to exact a high degree of impartiality and freedom from prejudice on the part of the prosecutor, but the circumstances under which a prosecution is instituted are often such as to require an injured person to act promptly, and while smarting from loss or personal injury, and therefore when it is too much to expect of him that he can free himself from all prejudice and partiality. Perhaps a definition or instruction exacting of him freedom from partiality and prejudice may be mitigated so as to do him no wrong, if the jury is properly reminded that he cannot be held answerable unless he acts with malice. The more prudent courts have, however, eliminated from their definition "impartiality and freedom from prejudice," and have permitted juries, in determining the question of probable cause, to take into consideration the circumstances under which the defendant was called upon to act, and considering that these circumstances might be such as to unavoidably affect the judgment, have said that "some allowance may be made when the prosecutor is so injured by the offense that he could not likely draw his conclusions with the same impartiality and absence of prejudice that a person entirely disinterested would deliberately do. All that can be

required of him is, that he shall act as a reasonable and prudent man would be likely to do in like circumstances"; *Spear v. Hiles*, 67 Wis. 350; *Cole v. Curtis*, 16 Minn. 182; *Carter v. Sutherland*, 52 Mich. 597; *Casey v. Severson*, 30 Minn. 516.

Belief of the Accuser. — Some of the definitions seem to make the question of probable cause depend entirely upon the facts and information upon which the accuser acted, irrespective of the effect which they had upon his mind, and to give no weight to his belief, or want of belief, in the guilt of the person prosecuted. It is doubtless true that the mere belief on the part of the prosecutor in the truth of the charge made by him does not constitute probable cause, for it may be engendered by facts and circumstances which would not produce belief of guilt in the mind of a reasonable and prudent person, and which would, on the contrary, satisfy a reasonable person of the innocence of the accused: *Mowry v. Whipple*, 8 R. L. 360; *Hall v. Hawkins*, 5 Humph. 359; *Barron v. Mason*, 31 Vt. 189; *Spear v. Hiles*, 67 Wis. 361; *Lawrence v. Lanning*, 4 Ind. 194; *Hays v. Blizzard*, 30 Ind. 457; *Graciter v. Williams*, 55 Ind. 461; *Turner v. Walker*, 3 Gill & J. 377; 22 Am. Dec. 329; *Spalding v. Lowe*, 56 Mich. 366. "While it is not necessary to show that the crime has in fact been committed, it is necessary to show, not only that the defendant had reasonable ground to believe, but that he did in fact believe, that the crime had been committed, and that the plaintiff had committed the crime": *Ball v. Rawles*, 93 Cal. 222; 27 Am. St. Rep. "It is claimed by appellant's counsel that the defendant is not liable to this action if the jury found that he honestly believed the plaintiff guilty of the offense when he commenced the prosecution against him. This cannot be the law. No man's liberties or rights can thus be measured by even the honest belief of another. The honest belief of a person commencing a criminal prosecution against another in the guilt of the accused is an essential element or fact for him in showing probable cause, or in disproving the want of it; but he must also show such reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in that belief, before his belief can become his vindication or shield. If he should show such ground and circumstances, and yet it was apparent that he did not himself believe in the guilt of the accused, they would not protect him. Nor, on the other hand, would he be liable, if, unknown to him, and beyond the range of inquiry by such cautious man, there were facts which would negative or destroy that belief. The belief, therefore, of the defendant, is a proper matter for inquiry in making out his defense, but does not of itself constitute a defense": *Shaw v. Brown*, 28 Iowa, 37; 4 Am. Rep. 151. His belief is also admissible to rebut the idea that he was actuated by malice: *Lunsford v. Detrich*, 86 Ala. 250; 11 Am. St. Rep. 37. That the prosecutor did not believe the accused was guilty, or did not believe there was probable cause for his prosecution, is certainly a very material circumstance, whether it necessarily negatives the defense of probable cause or not. Whether circumstances sufficient to create a belief in the mind of a reasonable man that the accused was guilty of the crime charged, and which, if believed by the prosecutor, would sustain the defense of probable cause, lose their power to shield him upon proof being made that they did not generate that belief in his mind, is not clearly settled, some of the cases indicating that his want of belief is admissible merely to disprove the existence of probable cause, and others that such want of belief is conclusive against this defense: *Bell v. Percy*, 5 Ired. 83; *Broad v. Ham*, 5 Bing. 722; 8 Scott, 40; *James v. Phelps*, 11 Ad. & E. 483; 3 Perry & D. 231; *Haddrick v. Heslop*, 12 Q. B. 267; 12 Jur. 600; 17 L. J. Q. B. 313; *Shaw*

v. Brown, 23 Iowa, 37; 4 Am. Rep. 151; Stone v. Stevens, 12 Conn. 219; 30 Am. Dec. 611; Ball v. Rawles, 93 Cal. 222; 27 Am. St. Rep.

Probable Cause, to What Extent a Question for the Jury. — Undoubtedly, when the evidence bearing upon the question of probable cause is conflicting, it is the province of the jury to determine which of the witnesses speak the truth. In actions for malicious prosecution, as in other civil cases, the jury must decide all questions of fact and the court all questions of law, but the mode of submitting the question of fact to the jury may be somewhat different from that employed in other causes. The authorities agree that if there is no dispute concerning the facts, the court must determine the law, and therefore decide whether such undisputed facts do or do not constitute probable cause, and that, on the other hand, to the extent that there is any dispute upon the facts arising from the evidence, such dispute must be submitted to the jury: *Walbridge v. Pruden*, 102 Pa. St. 1; *Stewart v. Sonneborn*, 98 U. S. 187; *Stone v. Crocker*, 24 Pick. 81; *Speck v. Judson*, 63 Me. 207; *Center v. Spring*, 2 Iowa, 393; *Kidder v. Parkhurst*, 3 Allen, 393; *Thaule v. Kreckler*, 81 N. Y. 428; *Burton v. St. Paul etc. R'y Co.*, 33 Minn. 189; *Donnelly v. Daggett*, 145 Mass. 314; *Gulf etc. R'y Co. v. James*, 73 Tex. 12; 15 Am. St. Rep. 743; *Johnson v. Miller*, 69 Iowa, 562; 58 Am. Rep. 231; *McNulty v. Walker*, 64 Miss. 198; *Medicals v. Brooklyn etc. Ins. Co.*, 45 Md. 198; *Johnstone v. Sutton*, 1 Term Rep. 545; 1 Brown Parl. C. 76; *James v. Phelps*, 11 Ad. & E. 483; *Panton v. Williams*, 1 Gale & D. 504; 2 Q. B. 169; *Turner v. Ambler*, 10 Q. B. 252; 6 Jur. 346; 11 L. J. Q. B. 158; *Caldwell v. Bennett*, 22 S. C. 1; *French v. Smith*, 4 Vt. 363; 24 Am. Dec. 616; *Ulmer v. Leland*, 1 Greenl. 135; 10 Am. Dec. 48; *Nash v. Orr*, 3 Brev. 94; 5 Am. Dec. 547; *Plummer v. Gheen*, 3 Hawks, 66; 14 Am. Dec. 572; *Cockfield v. Braveboy*, 2 McMull. 70; 39 Am. Dec. 123; *Coleman v. Heurich*, 2 Mackay, 189; *Heldt v. Webster*, 60 Tex. 207. In some of the states, the practice sanctioned by the decisions of their highest courts is, when the evidence is conflicting, to instruct the jurors as to what constitutes probable cause, and to leave them to decide, in the light of such instruction, whether probable cause for the prosecution existed or not: *Landa v. Obert*, 45 Tex. 539; *Gulf etc. R'y Co. v. James*, 73 Tex. 12; 15 Am. St. Rep. 743; *Ash v. Marlino*, 20 Ohio, 119; *Cole v. Curtis*, 16 Minn. 182. In other states, the judgment of the jurors is sought in a different mode, with a view to obtaining, if possible, their conclusions on the facts, disconnected from their conclusions of law. They are there required to make special findings of fact, or the cause is submitted to them upon hypothetical instructions in which the evidence is stated, and they are told that if they believe certain evidence, then that probable causes existed or not, as the case may be, or instructed "that if they find the facts in a designated way, then that such facts, when so found, do or do not constitute probable cause": *Eastin v. Stockton Bank*, 66 Cal. 123; 56 Am. Rep. 77; *Fulton v. Onesti*, 68 Cal. 575; *Greenwade v. Mills*, 31 Miss. 468; *Leggett v. Blount*, N. C. Term Rep. 123; 7 Am. Dec. 702; *Panton v. Williams*, 1 Gale & D. 504; 2 Q. B. 169; *Bulkeley v. Keteltas*, 6 N. Y. 387; *Bulkeley v. Smith*, 2 Duer, 281; *Grant v. Moore*, 29 Cal. 644; *Chapman v. Heslop*, 2 Com. L. Rep. 139; 18 Jur. 348; 23 L. J. Q. B. 49; *Lister v. Perryman*, 39 L. J. Ex. 177; L. R. 4 H. L. 521; 19 Week. Rep. 9; 23 L. T., N. S., 269. And in some of the states, the giving to the jury of any definitions or instructions upon abstract propositions relating to probable cause is discouraged, on the ground that they "are apt to lead the jury away from their function of passing upon the effect of the evidence in support of the probative facts which the court may direct them to find in order to determine in which way their general verdict

shall be rendered": *Ball v. Rawles*, 93 Cal. 222; 27 Am. St. Rep. It is well known that there are many instances in which, though evidence is accepted, or conceded to be true, different persons may honestly draw diverse conclusions from it. The definitions of probable cause are such as to require the prosecutor to act as a reasonable and prudent man would under like circumstances. They do not impose liability upon him for mistaken conclusions drawn by him, if they were such as a reasonable and prudent man would draw if placed in the same situation as the prosecutor. The evidence may be without substantial conflict, and the witnesses by whom it was given not only entitled to credit, but in fact implicitly believed, and yet one jury or court might reach the conclusion that the prosecutor acted as a reasonable and prudent man, and another that he did not so act. In such a contingency, is the jury or the court to draw the inference from this undisputed evidence? We have seen but little discussion of this question, but the authorities which unqualifiedly assert that when the evidence is not conflicting the court must decide whether probable cause existed imply that the inference to which we have referred must be drawn by the court. Nevertheless, we think it should be submitted to the jury: *Heyne v. Blair*, 62 N. Y. 19; by some mode which will "leave the question of fact to the jury and the abstract question of law to the judge": *Panton v. Williams*, 1 Gale & D. 504; 2 Q. B. 192; *Ball v. Rawles*, 93 Cal. 222; 27 Am. St. Rep. If there is any substantial difference between the two modes of submitting the question of probable cause to the jury, the one which exacts special findings of fact or requires the case to be submitted to the jury hypothetically seems best adapted to enable the court to draw all inferences which are necessary to determine from the established facts whether the action of the prosecutor was that of a reasonable and prudent man or not. The prosecutor's belief or want of belief in the guilt of the accused, or in the information upon which his action was based, is often an issue in the case upon which the maintenance of his defense of probable cause must rest. It is clear that this issue must be submitted to the jury: *Stewart v. Sonneborn*, 98 U. S. 187.

If it be true that the question, What is probable cause? is always one of law for the court, then in every case in which the evidence is not conflicting it ought to be possible to state whether or not it establishes probable cause or the absence of it. We doubt the truth of the assertion that probable cause is always a question of law, even when there is no conflict in the evidence: *Cochran v. Toher*, 14 Minn. 385; *Anderson v. Keller*, 67 Ga. 58; *Stewart v. Sonneborn*, 98 U. S. 187; though there have been and must again be many cases in which it is perfectly clear that undisputed evidence does or does not establish probable cause. We shall now refer to cases of this class, showing many instances in which it has been possible for the court, from the evidence before it, and without the aid of the jury, to determine that the defense of probable cause had or had not been proved.

The Conviction of the Person Prosecuted, while it remains in force, is conclusive evidence of probable cause on the part of the person prosecuting him: Freeman on Judgments, secs. 319, 417; *Oriffs v. Sellars*, 3 Dev. & B. 492; 31 Am. Dec. 422; *Herman v. Brookerhoff*, 8 Watts, 240; though no remedy by appeal or otherwise could have been resorted to by the accused for the purpose of reviewing or setting aside the judgment against him as being contrary either to the law or to the evidence: *Busell v. Matthews*, 36 L. J. M. C. 93; L. R. 2 Com. P. 684; 15 Week. Rep. 839; 16 L. T. N. S., 417. If a conviction has been set aside upon appeal or by the granting of a new trial, either in the court in which the conviction was had or upon appeal to some higher

court, it is doubtful whether the judgment does not still continue in all cases to be conclusive evidence of probable cause. In ordinary circumstances, its effect as evidence of probable cause is not diminished by the granting of a new trial or the reversal upon appeal, though it be shown that the evidence on which the original conviction was procured was false and perjured: *Parker v. Huntington*, 7 Gray, 36; 66 Am. Dec. 455; *Whitney v. Peckham*, 15 Mass. 243; *Parker v. Farley*, 10 Cush. 279; *Cloon v. Gerry*, 13 Gray, 203; *Adams v. Bicknell*, 126 Ind. 210; *Griffis v. Sellars*, 3 Dev. & B. 492; 31 Am. Dec. 422; *Welch v. Boston etc. R. R. Co.*, 14 R. L. 609; *Reynolds v. Kennedy*, 1 Wils. 232; *Spring v. Beore*, 12 B. Mon. 551; *Phillips v. Kalamazoo*, 53 Mich. 23. There are cases, however, declaring that a conviction, after it has been set aside, no longer constitutes conclusive evidence of probable cause, though it is still receivable in evidence and entitled to great consideration if the trial appears to have been a fair one: *Goodrich v. Warner*, 21 Conn. 432; *Burt v. Place*, 4 Wend. 591; *Moffatt v. Fisher*, 47 Iowa, 474; *Bowman v. Brown*, 52 Iowa, 437. In our judgment, the conviction of the accused must be accepted as conclusive evidence of probable cause, unless the circumstances attending it are exceptional in their character, as where it appears to have been founded on evidence suborned by the prosecutor or known to him to be false, or where it appears that the proceedings in the court in which he was tried were such as to give him no opportunity to vindicate himself: *Womack v. Circle*, 29 Gratt. 192; 32 Gratt. 324; *Kaye v. Kean*, 18 B. Mon. 839; *Spring v. Beore*, 12 B. Mon. 555. If the charge was of a felony, and the accused was convicted of a lesser crime involved in the charge, and this conviction on appeal was reversed and a judgment of acquittal entered, the judgment of conviction is not evidence of probable cause in making the charge a felony: *Labar v. Crane*, 49 Mich. 561.

Indicting or Holding Accused to Answer. — If the examining magistrate decides that the evidence is such as to warrant the holding of the accused to answer, or the grand jury determines that it is sufficient to found an indictment upon, or the jury before which the trial takes place is unable to agree, it clearly appears that other persons than the prosecutor reached the same conclusion that he did respecting the guilt of the accused; and the fact that they did reach this same conclusion is admissible in favor of the prosecutor, and is generally treated as *prima facie* evidence of probable cause: *Johnson v. Miller*, 63 Iowa, 529; 50 Am. Rep. 758; *Sharpe v. Johnston*, 76 Mo. 660; *Hale v. Boylen*, 22 W. Va. 234; *Peck v. Chouteau*, 91 Mo. 138; 60 Am. Rep. 239; *Ricard v. Central Pac. R. R. Co.*, 15 Nev. 167; *Bell v. Percy*, 11 Ired. 233; *Brown v. Griffin*, 1 Cheves, 32; *Ross v. Hixon*, 46 Kan. 550; *ante*, p. 123. But this effect is not conceded to the finding of an indictment in Alabama: *Motes v. Bates*, 80 Ala. 282.

Advice of Counsel. — It has been said that the fact of the prosecutor's consulting counsel, and obtaining and acting upon his advice, should be considered rather as tending to rebut malice, than as bearing upon the issue of probable cause: *Brewer v. Jacobs*, 22 Fed. Rep. 217; and that there is a substantial difference between applying the evidence of such advice to the question of malice, and applying it to the issue of probable cause. For if it be regarded as tending merely to disprove malice, it must rest with the jurors to give it such effect as they believe proper; while if it be admissible as evidence of probable cause, it may require the court, as a matter of law, to determine that probable cause existed, from the fact that the prosecutor in good faith, and upon a full disclosure of the circumstances, sought, obtained, and acted upon the advice of disinterested counsel of unquestionable competency;

Paddock v. Watts, 116 Ind. 146; 9 Am. St. Rep. 882. Perhaps evidence of this character may properly be considered by the jury as tending to disprove malice as well as to establish probable cause, but, in our judgment, its chief purpose is to show the existence of probable cause, and, when entirely satisfactory, it must induce the court to decide, as a matter of law, that probable cause did exist, and therefore that the prosecutor cannot be liable for the prosecution. As we shall hereafter show, it is indispensable that the prosecutor act in good faith by not proceeding against one whom he supposes to be innocent, and that in seeking the advice of counsel he must make a full and fair disclosure of all the facts and circumstances within his knowledge, and, perhaps, of all which he might with reasonable diligence have discovered. If his counsel then advises him that there is sufficient cause for the prosecution, and he acts upon such advice, the majority of the courts will protect him in thus acting, though they may not agree as to whether such protection is to be extended to him because probable cause for his action is established, or malice in what he did disproved: *Ravegna v. Macintosh*, 4 Dowl. & R. 107; 2 Barn. & C. 693; 1 Car. & P. 204; *Paddock v. Watts*, 116 Ind. 146; 9 Am. St. Rep. 832; *Adams v. Bicknell*, 126 Ind. 210; 22 Am. St. Rep. 576; *Collins v. Hayte*, 50 Ill. 337; 99 Am. Dec. 521; *Ross v. Innis*, 26 Ill. 259; *Murphy v. Larson*, 77 Ill. 172; *Walter v. Sample*, 25 Pa. St. 275; *McLeod v. McLeod*, 78 Ala. 42; *Anderson v. Friend*, 71 Ill. 475; *Potter v. Canterline*, 41 N. J. L. 22; *Donnelly v. Daggett*, 145 Mass. 314; *Jones v. Jones*, 71 Cal. 89; *Schippel v. Norton*, 38 Kan. 567; *Meaher v. Idlings*, 72 Iowa, 553; *Stone v. Swift*, 4 Pick. 389; 16 Am. Dec. 349; *Bartlett v. Brown*, 6 R. I. 37; 75 Am. Dec. 675; *White v. Curr*, 71 Me. 555; 36 Am. Rep. 353; *Wick v. Hotchkiss*, 62 Ill. 107; 14 Am. Rep. 75; *Smith v. Austin*, 49 Mich. 286; *Emerson v. Cochran*, 111 Pa. St. 619; *Yocum v. Polly*, 1 B. Mon. 358; 36 Am. Dec. 583; *Coggswell v. Bohn*, 43 Fed. Rep. 411; *Dreyfus v. Aul*, 29 Neb. 191; *Motes v. Bates*, 80 Ala. 382; *Blunk v. Atchison etc. R. R. Co.*, 38 Fed. Rep. 311; *Smith v. Walter*, 125 Pa. St. 453; *Moore v. Northern P. R. R. Co.*, 37 Minn. 147; *Gilbertson v. Fuller*, 40 Minn. 413; *Jackson v. Linnington*, 47 Kan. 396; 27 Am. St. Rep.; *Ball v. Rawles*, 93 Cal. 222; 27 Am. St. Rep. As the question of malice is for the jury, if it be conceded that evidence of the advice of counsel is receivable merely to disprove malice or to prevent the jury from inferring malice from the absence of probable cause, it follows logically that the jury may disregard evidence of the advice of counsel, if, notwithstanding such evidence, they still believe the prosecutor to have been actuated by malice. Therefore, in those states in which this evidence is applied to the issue of malice, it does not necessarily, however satisfactory the proof, make out the defense, and the prosecutor may be liable if the jury think proper to so hold him, after hearing evidence showing that he in good faith sought, obtained, and acted upon the advice of competent counsel: *Lemay v. Williams*, 32 Ark. 166; *Glasgow v. Owen*, 69 Tex. 167; *Gulf etc. R'y Co. v. James*, 73 Tex. 12; 15 Am. St. Rep. 743; *Bamsey v. Arratt*, 64 Tex. 320; *Shannon v. Jones*, 76 Tex. 141; *Turner v. Walker*, 3 Gill & J. 377; 22 Am. Dec. 329; *Griffin v. Chubb*, 7 Tex. 603; 58 Am. Dec. 85. The decisions in Georgia upon this subject are governed by the code of that state, which, as construed by its courts, does not admit the advice of counsel as a defense to the action, but merely as a circumstance tending to show absence of malice and the existence of probable cause, to be weighed by the jury with other facts in the case, "as well as to mitigate damages": *Fox v. Davis*, 55 Ga. 298; *Philadelphia F. Ass'n v. Fleming*, 78 Ga. 733. A recent New York case seems to create an exception to the rule that the advice of counsel furnishes probable cause for the proceedings taken in reliance upon it, by declaring

that when the facts are known to the prosecutor, but do not constitute the crime charged by him, then that the advice of his counsel does not protect him absolutely, but must be treated as bearing only upon the issue of malice. "Probable cause," said the court, "may be founded on misinformation as to the facts, but not as to the law": *Hazard v. Flury*, 120 N. Y. 227. This decision proceeds upon the principle that to the prosecutor must be imputed knowledge of the law, and that he cannot be deemed to proceed upon probable cause, whatever be the advice of his counsel, when the facts as known by him would "not tend to cause a man with knowledge of the law to suspect or believe that it had been violated." But for what purpose are lawyers consulted more legitimate than that of obtaining their opinions upon questions of law? Certainly, if the prosecutor's conduct is to be considered upon the assumption that he knew the law, the advice of counsel can never protect him. For if the advice be correct, he is subject to no liability, and needs no protection; but if incorrect, he is by this decision charged with knowledge of its incorrectness, and denied the defense of probable cause.

Character of Attorney.—In some of the opinions, language is employed which indicates that the question of the competency of the attorney giving the advice must be established, or, at least, that it may be disproved. Where, however, certain persons are regularly licensed to practice law, we apprehend that their attainments in their profession can rarely or never be made an issue on a trial for malicious prosecution, for the purpose of showing that their professional skill was not such as to justify the prosecutor in taking or acting upon their advice: *Horne v. Sullivan*, 83 Ill. 30; though it may be that evidence is receivable for the purpose of showing that, by habits of intemperance and the like, known to the prosecutor, they had ceased to be regarded as reputable or reliable advisers: *Roy v. Goings*, 112 Ill. 656. On the other hand, if the person consulted is not a regular or licensed attorney, but a mere pettifogger, or other person practicing law or undertaking to give advice without any license or authority to do so, his advice is no protection: *Stanton v. Hart*, 27 Mich. 539; *Murphy v. Larson*, 77 Ill. 172; *Olmstead v. Partridge*, 16 Gray, 381; *Burgett v. Burgett*, 43 Ind. 78. If the person consulted was acting as an attorney at law, and his advice was sought in good faith, evidence of it may be "admitted, not in justification of the action, nor in reduction of any actual damage suffered, but in mitigation of any exemplary damages that might be visited upon defendant": *Murphy v. Larson*, 77 Ill. 172.

Advice of Interested or Prejudiced Attorney.—While it would be very unjust to require a person seeking a regularly licensed attorney in good faith, and acting upon his advice, to determine in advance, at his peril, the extent of the professional skill of such attorney, yet from the very necessity of acting in good faith the client must not disregard facts tending to bias the judgment of the attorney, or otherwise to make him an unfit adviser in that particular case. If the client and attorney are conspiring together for the purpose of instituting and maintaining a malicious prosecution, of course the former cannot be protected by the advice of the latter: *Hamilton v. Smith*, 30 Mich. 222. The prosecutor cannot be sure of protection if he acts upon the advice of an attorney whom he knows to be interested, and therefore probably biased by his self-interest: *White v. Carr*, 71 Me. 555; 26 Am. Rep. 353; and where the attorney consulted was also acting for the prosecutor in a civil action relating to the same transaction out of which the prosecution grew, the court may leave it to the jury to decide whether the attorney selected was a proper adviser under the circumstances: *Watt v. Corey*, 76 Me. 87.

Advice of Magistrate. — If a justice of the peace or other magistrate before whom the criminal charge was made is not an attorney at law, he is not a proper person to seek for advice, and the prosecutor is not protected by the fact that he in good faith fully stated all the facts to such magistrate, and was by him advised that the prosecution would be sustained, and acted in consequence of such advice: *Brobet v. Ruff*, 100 Pa. St. 91; 45 Am. Rep. 358; *Gee v. Culver*, 12 Or. 228; *Dolbe v. Norton*, 22 Kan. 101; *Coleman v. Hewrich*, 2 Mackey, 189; *Sutton v. McConnell*, 46 Wis. 269; *Straus v. Young*, 38 Md. 246. Whether, if the magistrate were also a licensed attorney, his advice would be sufficient to shield the prosecutor, is a question upon which we have been unable to discover any judicial opinion. If the facts are correctly stated to a magistrate, and he, through error of law, erroneously believes that they constitute a crime, and issues his warrant accordingly, the prosecutor is not liable: *Hahn v. Schmidt*, 64 Cal. 284; *Newman v. Davis*, 58 Iowa, 447. In a very recent case these authorities are cited as establishing the right of a prosecutor to rely on the advice of a magistrate to the same extent as if he were an attorney: *Ball v. Rawles*, 93 Cal. 235; 27 Am. St. Rep.; but the learned judge either misapprehended the effect of these decisions, or employed language which cannot be correctly understood, unless considered in connection with the peculiar facts of that case. The statements made by the prosecutor to the justice, orally and in the written accusation, were confessedly true. The justice, after examining the penal code of the state, reached the conclusion that the facts so stated to him constituted a crime; but the courts subsequently determined that the accusation did not charge the commission of any criminal act. In other words, the case belonged to the class to which we have referred, in which there was abundant cause for belief in the truth of the acts charged, but the magistrate, through his error of law, mistook innocent acts for crimes, and issued his warrant solely on account of such error. Doubtless, the advice of a magistrate is admissible, when obtained and followed in good faith, as tending to rebut the presumption of malice: *Sisk v. Hurst*, 1 W. Va. 53.

The Advice of Counsel must be Sought and Acted upon in Good Faith. — It appears to be essential to the existence of the good faith required by the authorities that the advice of the counsel, together with the facts known to the prosecutor, generate in his mind a belief in the guilt of the accused. When a client fully and fairly states the case to his attorney for the purpose of receiving his advice and acting upon it, we think he should be protected by the opinion given him, though it does not meet his concurrence. He consults the attorney because he supposes him to be learned in the law, and capable of forming a more correct opinion than himself, and therefore he ought to be protected while acting upon that opinion, though he does not comprehend it, and is still unable to surrender his own previously formed conclusion upon the same subject. The cases are infrequent, but so far as we have seen, they incline towards holding the prosecutor answerable if he acted upon the advice of an attorney, if he nevertheless believed that the prosecution would fail, or that the accused was innocent: *Johnson v. Miller*, 47 N. W. Rep. 903 (Iowa); especially if actuated by hostile feelings: *Sharpe Johnston*, 76 Mo. 660.

Failure to Disclose All the Facts to the Attorney. — A prosecutor cannot be acting in good faith when he proceeds upon the advice of an attorney taken without informing him of all the facts within the knowledge of the prosecutor which might reasonably be supposed to affect the opinion of the attorney. If he withheld any of such facts, the opinion obtained cannot protect him:

Coburn v. Cropper, 41 La. Ann. 303; *Cuthbert v. Galloway*, 35 Fed. Rep. 466; *Norrell v. Vogel*, 39 Minn. 107; *Roy v. Goings*, 112 Ill. 656; *Dreyfus v. Aul*, 29 Neb. 191; *Thurston v. Wright*, 77 Mich. 96; *Beidler v. Beirhaert*, 25 Ill. App. 422; *Mesher v. Iddings*, 72 Iowa, 553; *Forbes v. Hagman*, 75 Va. 168; *Decoux v. Lieux*, 23 La. Ann. 392; *Block v. Meyers*, 33 La. Ann. 776; *Logan v. Maytag*, 57 Iowa, 107; *Davis v. Wisner*, 72 Ill. 262; *Kimmel v. Henry*, 64 Ill. 506. The omission to state any material fact, though it resulted from an honest mistake of the prosecutor in supposing it not to be material, deprives him of the immunity otherwise obtainable by seeking the advice of counsel. If, after obtaining the advice of counsel, and before the delivery of the warrant of the arrest, new and material facts come to the knowledge of the prosecutor, tending to lessen the probability of the guilt of the accused, the prosecutor should communicate such facts to his counsel for his further opinion before proceeding to the execution of the warrant: *Ash v. Marlow*, 20 Ohio, 119.

Want of Diligence in not Ascertaining All the Facts.—A number of authorities declare that the prosecutor is not protected by the advice of his counsel unless, in addition to the facts known to him, he further stated all facts which he could have ascertained by reasonable diligence: *Sappington v. Watson*, 50 Mo. 83; *Cooper v. Utterbach*, 37 Md. 282; *Hill v. Palm*, 38 Mo. 13; *Pipkin v. Haucho*, 15 Mo. App. 373; *Sharpe v. Johnston*, 76 Mo. 660. This, however, is probably an inaccurate statement of the law, or, at least, one which is inapplicable when the prosecutor was acting in good faith, and without anything to indicate to him that further inquiry might reveal to him circumstances which, if disclosed to his counsel, would probably affect the advice given. Upon this subject we think the better opinion is that expressed by the supreme court of Iowa in *Johnson v. Miller*, 69 Iowa, 562, 58 Am. Rep. 231, as follows: "One who seeks the advice of counsel with reference to the commencement of a criminal prosecution is bound to act in good faith in the matter. Unless he does this, he will not be protected from liability on the ground that he acted upon the advice given him. He is required to make to counsel a full and fair statement of all the material facts known to him. If he has a reasonable ground for believing that facts exist which would tend to exculpate the accused from the charge, good faith requires that he shall either make further inquiry with reference to those facts, and communicate the information obtained to the counsel, or that he shall inform him of his belief of their existence, in order that he may investigate with reference to them, and take into account, in forming his opinion, the information attained with reference to them. But he is not required to do more than this. He is not required to institute a blind inquiry to ascertain whether facts exist which would tend to the exculpation of the party accused. But if he honestly believes that he is in possession of all the material facts, and makes a full and fair statement of those facts to the counsel, and acts in good faith on the advice given him, he ought to be protected." The mere statement of a prosecutor, in giving evidence in his defense, that he made a full and fair disclosure of all the facts to his counsel is not conclusive. What he stated should be proved by him or other competent evidence, and the jurors left to draw the conclusion whether the statement made was a full and fair one or not: *McLeod v. McLeod*, 73 Ala. 42.

Instances of Probable Cause.—The following facts have been held to constitute probable cause: The stealing of coal during the night, and the finding of it the next morning in a place where the accused kept his coal, though he denied all knowledge of the crime: *McDonald v. Atlantic etc. Ry Co.*, 21 Pac.

Rep. 338 (Ariz.); prosecution based upon statement, apparently truthful, made by a child eleven years of age, who claimed to have seen the offense committed by the accused: *Dwain v. Descales*, 66 Cal. 415; the intentional killing of one person by another, though the accused, on his trial, was acquitted on the ground that he acted in self-defense: *Glaze v. Whitley*, 5 Or. 164; *Diets v. Langfitt*, 63 Pa. St. 234; prosecution based upon information received from respectable persons believed to be credible: *Chaffield v. Comford*, 4 Post. & F. 1008; or upon facts and circumstances brought to the knowledge of the prosecutor through the usual and ordinary business channels, believed by him to be true, and of such a character and coming from such source that business men of ordinary care, prudence, and discretion would act upon them under similar circumstances: *Galloway v. Burr*, 32 Mich. 332; or upon the fact that the prosecutor's property was burned, and a woman who was in charge of it pointed out the accused as one of the persons by whom it was fired: *Angelo v. Faul*, 85 Ill. 106; or upon statements of a person made in the presence of the prosecuting attorney of the state, to which statements such person would not testify on the trial of the accused: *Ander-son v. Friend*, 85 Ill. 135; or upon the confession of a convict implicating himself and others, giving a detailed statement of the facts preceding, attending, and following the crime, when the party to whom the confession was made investigated the statements and found them to be substantially correct, and acted upon the confession thus fortified by personal investigation, though the persons suspected or accused were not notified of the accusation before taking proceedings against them: *Blunk v. Atchison etc. R. R. Co.*, 38 Fed. Rep. 311; or upon information that the accused was unlawfully selling lottery tickets, verified by the statement of a person sent to the office of the accused to buy such tickets, and who returned with one which he stated he had bought of the accused: *Plassen v. Louisiana Lottery Co.*, 34 La. Ann. 246; a prosecution of a mortgagor for secreting personal property with intent to defraud the mortgagee, where it appeared that such property had been removed to some place unknown to the mortgagee or his agents; that he was not informed of any intention to so remove it, nor of the place to which it had been taken; that the mortgagor was about to remove to another state, and refused to tell an agent of the mortgagee where such property was, though he professed a willingness to inform another agent, should he apply for such information: *Hooper v. Vernon*, Sup. Ct. Md., March, 1891. Where the plaintiff had for several years before January 1, 1869, been employed in an extensive mercantile business, and had received large shipments of goods during a large part of the month of December, 1868, through defendants as common carriers, without paying freight thereon, and he also received through them money packages of considerable value, and he gave defendants checks for freight, all of which were dishonored at the bank for want of funds, and on January 3d, demand being made upon plaintiff for payment of the freight bills, he told defendant's agents that he had no money, and since January had been doing business as agent, it was held that these facts furnished probable cause for swearing that the plaintiff had within two years fraudulently conveyed and assigned his property to hinder and defraud his creditors: *Burrott v. Spauld*, 70 Ill. 408. There is probable cause for a prosecution when property has been stolen and several persons have told the prosecutor that they had seen it at the house of the accused, and the prosecutor himself believed he had seen part of it there, and made an affidavit for a search-warrant, in which he charged the property to have been stolen, and he, at the time, believed his charge to be true: *Bailey v. Dodge*, 28 Kan. 72.

Instances of Want of Probable Cause. — If a tenant of premises, returning at night from a temporary absence, finds the entrance thereto barred, and removes the obstruction and enters, and thereupon the landlord appears, and in a menacing manner orders the tenant to leave, which he declines to do, and tells the landlord that if he interferes with him, he will kill him, and the landlord then makes an affidavit for the arrest of the defendant, charging him with breaking into the premises and threatening to kill, and requests the warrant to be served at night after the tenant had gone to bed, and compels him to be taken to jail without being given any opportunity to procure bail for his appearance, the action of the landlord is without probable cause, and the circumstances are such as to justify the jury in regarding it as malicious: *Chapman v. Cassey*, 50 Ill. 512. The following prosecutions were also adjudged to be without probable cause: A prosecution for taking and withholding a package from the United States mail, when the accused had not done anything to create a suspicion of his guilt, and the belief of the prosecutor was founded upon mistake of himself and his assistants in overlooking the package while it was in the mail-wagon: *Merritt v. Mitchell*, 13 Me. 439; 29 Am. Dec. 514; a prosecution for larceny in disposing of mortgaged chattels when the mortgagee, when the mortgage was being drawn, had assented that the mortgagor might sell them whenever fit for market: *Walker v. Camp*, 69 Iowa, 741; a prosecution for breaking into a store with intent to steal, when the property in the store had been attached as the property of the accused, and the prosecutor had reason to believe that the breaking into the store was done under a claim of right and without felonious intent, there being no attempt at secrecy or concealment, or to carry away goods: *Robin v. Kingsbury*, 138 Mass. 538.

MALICE. — To sustain an action for malicious prosecution, there must be a concurrence of malice and want of probable cause. Neither, however clearly established, will support an action, in the absence of the other: *Farmer v. Darling*, 4 Burr. 1971; *Kelton v. Bevins*, Cooke, 90; 5 Am. Dec. 670; *Turner v. Walker*, 3 Gill & J. 377; 22 Am. Dec. 329; *Leidig v. Rawson*, 1 Scam. 272; 29 Am. Dec. 354; *Maloney v. Doane*, 15 La. 278; 35 Am. Dec. 204; *Grant v. Desel*, 3 Rob. (La.) 17; 38 Am. Dec. 228; *Griffin v. Chubb*, 7 Tex. 603; 56 Am. Dec. 85; *Dickinson v. Maynard*, 20 La. Ann. 66; 96 Am. Dec. 379; *Dearmond v. St. Amant*, 40 La. Ann. 374; *Girou v. Graham*, 41 La. Ann. 511; *McGarry v. Missouri P. R. R. Co.*, 36 Mo. App. 340; *Evans v. Thompson*, 12 Heisk. 534; *Jordan v. Alabama etc. R. R. Co.*, 81 Ala. 220; *Deits v. Langatt*, 63 Pa. St. 234; *Turner v. O'Brien*, 11 Neb. 108; *Stacy v. Emery*, 97 U. S. 642; *Glass v. Whitley*, 5 Or. 164; *Murphy v. Martin*, 58 Wis. 276. We have heretofore shown that if the accused was guilty he cannot recover for his prosecution, however malicious the motives of the prosecutor. But his defense does not require proof of the actual guilt of the accused. It is sufficient that there was probable cause for the prosecution, and if that be found to have existed, it is not material that the prosecutor was also influenced by malice or other unlawful motive. Malice, however clearly proved, cannot support the action if there was probable cause for the prosecution, nor can it be so extreme in its character or manifestation as to create an inference or presumption that there was no probable cause: *Travis v. Smith*, 1 Pa. St. 234; 44 Am. Dec. 125; *Green v. Cochran*, 43 Iowa, 544; *Krug v. Ward*, 77 Ill. 603; *Kaufman v. Wicks*, 62 Tex. 234; *Meyenberg v. Engelke*, 18 Mo. App. 346; *Utner v. Leland*, 1 Greenl. 135; 10 Am. Dec. 48; *Smith v. Zent*, 59 Ind. 362; *Bartlett v. Brown*, 6 R. I. 37; 75 Am. Dec. 675; *Dempsey v. State*, 27 Tex. App. 269; 11 Am. St. Rep. 193; *Coleman v. Allen*, 79 Ga. 637; 11 Am. St. Rep. 449. On the other hand, while the absence of probable cause may jus-

ify the jury in inferring malice or in not exacting any other evidence of it, yet if the absence of probable cause, considered in connection with all the evidence in the case, does not satisfy the jury that the prosecution was actuated by malice, the verdict should be for the defendant: *Schofield v. Ferrera*, 47 Pa. St. 194; 86 Am. Dec. 532; *McGarry v. Missouri P. Ry Co.*, 36 Mo. App. 340; *Lunsford v. Deitrich*, 86 Ala. 250; 11 Am. St. Rep. 37.

Definitions of Malice. — It has been said that a satisfactory definition of the term "malice" "may not be easy." Of course, it includes all cases in which the prosecutor has ill-will against the accused, and because of such ill-will institutes or continues the prosecution against him; but it is not necessary to prove any actual ill-will or grudge, for one having no ill-will against another may notwithstanding be guilty of the malicious prosecution of him: *Blank v. Atchison etc. R. R. Co.*, 38 Fed. Rep. 311. "The malice necessary to sustain this action is not express malice or specific desire to vex or injure from malevolence or motives of ill-will, but the willful doing of an unlawful act to the prejudice of another": *Johnson v. Ebberts*, 6 Saw. 538; 11 Fed. Rep. 129. "Any other motive than a *bona fide* purpose to bring the accused to punishment as a violator of the criminal law, or associated with such *bona fide* purpose, is malicious. There need be no personal ill-will, hate, desire for revenge, or other base or malignant passion. Whatever is done willfully and purposely, whether the motive be to injure the accused, to gain some advantage to the prosecutor, or through mere wantonness or carelessness, if it be at the same time wrong and unlawful within the knowledge of the actor, is a legal contemplation maliciously done": *Lunsford v. Deitrich*, Ala., May, 1891; *Jordan v. Alabama etc. R. R. Co.*, 81 Ala. 220. "The malice necessary to be shown in order to maintain this action is not necessarily revenge or other base or malevolent passion. Whatever is done willfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, is malicious": *Wills v. Noyes*, 12 Pick. 324; *Pullen v. Glidden*, 66 Me. 202. A prosecution brought to aid in the collection of a debt or to obtain possession of property, and not to vindicate justice, is malicious: *Ross v. Langworthy*, 13 Neb. 492; *Krug v. Ward*, 77 Ill. 603; *Kelley v. Sage*, 12 Kan. 109; *Gabel v. Weisensee*, 49 Tex. 131. So it has been held that a prosecution with a view to frightening others, and thereby deterring them from committing depredations on the property of a corporation, is malicious: *Stevens v. Millland C. Ry Co.*, 2 Com. L. Rep. 1300; 10 Ex. 352; 18 Jur. 932; 23 L. J. Ex. 328; though it is obvious that this motive does not deprive the prosecutor of the protection of probable cause, nor expose him to liability when he had reasonable ground for believing, and did believe, in the guilt of the accused, for surely the deterring of others from the commission of crime is not a less laudable object than the punishment of those already guilty: *Coleman v. Allen*, 79 Ga. 637; 11 Am. St. Rep. 449. Malice, in its legal sense, is any improper and sinister motive not necessarily arising from spite or hatred, nor prompted by a corrupt design, towards the accused. Any act "done wrongfully, and without reasonable and probable cause in a wanton disregard of the rights of another, is malicious in law": *Mitchell v. Wall*, 111 Mass. 492; *Commonwealth v. Snelling*, 15 Pick. 337. "Malice means wickedness of purpose, or a wrongful or malevolent design against another, a purpose to injure another, a design of doing mischief, or any evil design or inclination to do a bad thing, or a reckless disregard of the rights of others, or an intent to do injury to another, or absence of legal excuse, or any other motive than that of bringing a party to justice": *Shannon v. Jones*, 76 Tex. 141; *Dempsey v. State*, 27 Tex. App. 269; 11 Am. St. Rep. 123. "Malice,

them, in the enlarged sense and meaning of the law, is not restricted only to actual anger, hatred, and revenge, but includes every other unlawful and unjustifiable motive. So that it may be said that any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice is a malicious motive on the part of the person who acts under the influence of it": *Gee v. Culver*, 13 Or. 598. In the light of the foregoing definitions, it clearly appears that the purposes of the prosecution, justly rendering it subject to the charge of being malicious and unlawful, may be infinite in variety, while there is one single purpose which always relieves it from this charge, and this is the purpose of bringing to justice one believed to be guilty of crime; and, therefore, that however numerous may be the instances or specifications of malice, they are all embraced within this definition: Malice in a criminal prosecution is merely the instituting or maintaining of such prosecution without being induced so to do by the desire to bring the accused to justice: *Spear v. Hiles*, 67 Wis. 350; *Vinal v. Core*, 18 W. Va. 1; *Stevens v. Midland C. R. Co.*, 2 Com. L. Rep. 1300; 10 Ex. 352; 18 Jur. 932; 33 L. J. Ex. 328; *Johns v. Marsh*, 52 Md. 323; *Alexander v. Harrison*, 38 Mo. 258; 90 Am. Dec. 431. If this design is present, and its influence controlling, the action of the prosecutor is not malicious, though influenced to some extent by other and forbidden considerations. "If the selfish element is only incidental, it cannot be regarded as evidence of malice, for it can hardly be expected that all selfish aims and desires can be eliminated from such prosecution": *Thompson v. Beacon Valley Rubber Co.*, 56 Conn. 493. Hence one who in good faith and upon probable cause prosecutes another for a malicious trespass is not rendered answerable for a malicious prosecution by the fact that one of his purposes in bringing the prosecution was to prevent the accused from building a house on the premises on which the trespass was alleged to have been committed: *Jackson v. Linnington*, 47 Kan. 396; 27 Am. St. Rep.

Malice is a Question for the Jury. — If the facts are such as to establish want of probable cause, then the issue of malice on the part of the prosecutor must be determined. There is no doubt that this is a question for the jury. The court is not permitted to determine it either by telling the jury that because of the absence of probable cause, they should find for the plaintiff, nor by instructing them that the evidence in the case created a presumption of malice, or made such presumption conclusive. Any action of the court tending to take the decision of this question from the jury is erroneous, and entitles the defeated party to a new trial: *Reison v. Mott*, 42 Minn. 49; 18 Am. St. Rep. 489; *Turner v. Walker*, 3 Gill & J. 377; 22 Am. Dec. 329; *Harkrader v. Moore*, 44 Cal. 144; *Levy v. Brannan*, 39 Cal. 485; *Potter v. Seale*, 8 Cal. 218; *Gee v. Culver*, 12 Or. 228; *Strickler v. Greer*, 95 Ind. 596; *Stewart v. Sonneborn*, 98 U. S. 187; *Mitchell v. Jenkins*, 2 Nev. & M. 301; 5 Barn. & Adol. 588; *Schofield v. Ferrera*, 47 Pa. St. 194; 86 Am. Dec. 532.

Inferring Malice. — The authorities all declare that malice must be proved: *Stone v. Stevens*, 12 Conn. 219; 30 Am. Dec. 611; *Flickinger v. Wagner*, 46 Md. 581; *George v. Radford*, 3 Car. & P. 464; *Turner v. Turner*, Gow, 50. By this is not meant that there must be any direct or specific proof of ill-will, or of a desire to injure the accused, or of any other wrongful motive. While the absence of probable cause does not render the prosecutor liable if his act was not malicious, still the same evidence which proves the absence of probable cause for the prosecution may satisfy the jury that it was malicious, and if it does so satisfy them, they should find for the plaintiff. Some of the authorities say that malice may be inferred from want of probable cause:

Mitchell v. Jenkins, 2 Nev. & M. 301; 5 Barn. & Adol. 588; *Williams v. Fannester*, 8 Mo. 339; 41 Am. Dec. 644; *Yocum v. Polly*, 1 B. Mon. 356; 36 Am. Dec. 583; *Griffin v. Chubb*, 7 Tex. 603; 58 Am. Dec. 85; *Ross v. Innis*, 35 Ill. 487; 85 Am. Dec. 373; *Bell v. Graham*, 1 Nott & McO. 278; 9 Am. Dec. 687; *Turner v. Walker*, 3 Gill & J. 377; 22 Am. Dec. 329; *Merriam v. Mitchell*, 13 Mo. 439; 29 Am. Dec. 514; *Murphy v. Hobbs*, 7 Col. 541; 49 Am. Rep. 366; *Heap v. Parrish*, 104 Ind. 36; *Roy v. Gotsge*, 112 Ill. 656; *Block v. Meyers*, 23 La. Ann. 776; *Decous v. Liden*, 23 La. Ann. 392; *Harpham v. Whitney*, 77 Ill. 32; and others that it may be inferred from the same facts which established the want of probable cause: *Sharpe v. Johnston*, 76 Mo. 660. The distinction is not material. What is meant by either form of expression is, that the jury may, without any evidence being offered, except that which tends to show that there was no probable cause for the prosecution, conclude that it was malicious; but that they are not bound to draw such conclusion as a matter of law, nor at all, unless it is generated in their minds from the evidence. They should not be instructed to draw it, but left free to infer it, or not, as from the evidence to them shall seem to be true: *Harkrader v. Moore*, 44 Cal. 144; *Closson v. Staples*, 42 Vt. 209; 1 Am. Rep. 316; *Carson v. Edgeworth*, 43 Mich. 241; *Strickler v. Greer*, 95 Ind. 596; *Griffin v. Chubb*, 7 Tex. 603; 58 Am. Dec. 85; *Oliver v. Pate*, 43 Ind. 132; *Greer v. Whitfield*, 4 Lea, 85.

PLAINTIFF'S PLEADINGS. — "Originally, an action of this character was an action on the case in the nature of a writ of conspiracy, in which the plaintiff, in the declaration, charged the defendant with having falsely and maliciously caused his arrest. The defendant in his plea set forth the grounds of his suspicion under which he caused the arrest, the sufficiency of which was determined by the court upon a demurrer to the plea: *Chambers v. Taylor*, Cro. Eliz. 900; *Coxe v. Wirrall*, Cro. Jac. 193; Com. Dig., tit. Pleading, 2, K; *Wear v. Wells*, 3 Bulst. 284. In process of time a change was effected in the manner of pleading the cause of action, by which the plaintiff anticipated this plea by averring in the declaration a want of probable cause: *Saill v. Roberts*, 1 Salk. 13; 1 Ld. Raym. 374; and the facts were presented under the general issue": *Ball v. Rawles*, 93 Cal. 229; 27 Am. St. Rep. In actions for malicious prosecution, as well as in other civil actions, the substantial elements of the plaintiff's complaint or declaration may be ascertained by considering what is essential to the maintenance of his action. These essentials have been heretofore stated, and each of them must appear from the complaint to have existed. The prosecution of the plaintiff must be shown. The proceedings need not be set out in full, but their substance must be stated: *Closson v. Staples*, 42 Vt. 209; 1 Am. Rep. 316. The jurisdiction of the court in which the prosecution took place need not be alleged in those states in which it is not regarded as essential to the maintenance of the action: *Morris v. Scott*, 21 Wend. 281; 34 Am. Dec. 236. It must also appear from the complaint not only that the prosecution has been terminated, but that its termination was such as to entitle the plaintiff to maintain the action, as that he has been acquitted, or discharged from custody, so that no further prosecution can take place without making a new accusation: *Fisher v. Bristol*, 1 Doug. 215; *Morgan v. Hughes*, 2 Term Rep. 225; *Johnson v. Finch*, 93 N. C. 205; *Haich v. Cohen*, 84 N. C. 602; 37 Am. Rep. 630; *Wall v. Toomey*, 52 Conn. 35; *Gorrell v. Snow*, 31 Ind. 215; *Hayes v. Blizard*, 30 Ind. 457; *Whitworth v. Hall*, 2 Barn. & Adol. 695; *Turner v. Walker*, 3 Gill & J. 377; 22 Am. Dec. 329.

The Existence of Probable Cause for the Prosecution must be Denied in the Complaint: Deanehey v. Woodson, 100 Mass. 195; *Turner v. Turner*, 85 Tenn. 367. The usual form of making this denial is to allege that the prosecution was without reasonable or probable cause: *Adams v. Lisher*, 3 Blackf. 241; 25 Am. Dec. 102; *Scotten v. Longfellow*, 40 Ind. 23; and there appears to be no doubt of the sufficiency of this general allegation, and that there is no necessity of stating the facts or evidence by which the plaintiff will support it: *Benson v. Bacon*, 99 Ind. 156; though if such facts are so fully stated as to show that the prosecution was without probable cause, the general allegation of its absence may be omitted: *Wall v. Toomey*, 52 Conn. 35. As it is not the innocence of the accused or the failure of the prosecution which subjects the prosecutor to liability, but his having proceeded in the absence of probable cause, any allegation which falls short of showing this absence is insufficient. Hence a complaint is defective in this respect which merely alleges that the charge made was false and malicious: *Scotten v. Longfellow*, 40 Ind. 23; *Kirtley v. Deck*, 2 Munf. 10; 5 Am. Dec. 445; *Young v. Gregorie*, 3 Call, 446; 2 Am. Dec. 556; *Ziegler v. Powell*, 54 Ind. 173. The complaint must also allege that the charge against the plaintiff was made maliciously, as well as without probable cause: *Turner v. Walker*, 3 Gill & J. 377; 22 Am. Dec. 329; and if the recovery of special damages is sought, they should be stated with particularity: *Stanfield v. Phillips*, 78 Pa. St. 73; as where plaintiff wishes to enhance damages by showing his mistreatment while in prison: *Miles v. Weston*, 60 Ill. 361; or his losses in his business: *Horne v. Sullivan*, 83 Ill. 30.

ANSWER. — In an early South Carolina case it was erroneously stated that the defense of probable cause presents new matter, and therefore is not admissible under the general issue: *Pant v. McDaniel*, 1 Brev. 172; 2 Am. Dec. 600. The absence of probable cause is one of the grounds of action necessarily alleged in the plaintiff's complaint, and anything which merely disproves the necessary allegations of the plaintiff's complaint is not new matter, and need not be specially alleged. With reference to the various matters which we have shown must be stated in the complaint, there is no doubt that they may be put in issue by a general denial, and that all evidence tending to counteract or contradict the evidence required to be offered by plaintiff in support of his complaint is admissible under the general issue, and therefore need not be specially pleaded. Hence, under the general issue, the defendant is entitled to prove, if he can, that the plaintiff was guilty of the crime charged against him: *Bruley v. Rose*, 57 Iowa, 651; or that the prosecution was not malicious: *Hitchcock v. North*, 5 Rob. (La.) 328; 39 Am. Dec. 540; *Sparling v. Conway*, 75 Mo. 510; or was upon probable cause: *Trogden v. Deckard*, 45 Ind. 572; *Brigham v. Aldrich*, 105 Mass. 212; *Hitchcock v. North*, 5 Rob. (La.) 328; 39 Am. Dec. 540; *Griffin v. Chubb*, 7 Tex. 603; 58 Am. Dec. 85; and as part of his defense of probable cause, the advice which he received from his counsel, and that it was made after a full and fair disclosure of the facts: *Sparling v. Conway*, 5 Mo. App. 283; 75 Mo. 510; *Lery v. Brannan*, 39 Cal. 485; *Folger v. Washburn*, 137 Mass. 60.

EVIDENCE — Burden of Proof. — As it is essential that the plaintiff in his complaint affirmatively allege all the facts necessary to support his action, it follows that he must assume the burden of proof in respect to each of these allegations, and by his evidence establish to the satisfaction of the court and jury that he has been prosecuted by the defendant, that the prosecution has terminated in his favor, that it was malicious, and without probable cause; and if by his evidence he does not make out a *prima facie* case upon all of

these issues, he must fail: *Purcell v. MacNamara*, 9 East, 361; 1 Camp. 199; *Lavender v. Hudgens*, 32 Ark. 763; *Mitchinson v. Cross*, 58 Ill. 366; *Ross v. Inzie*, 35 Ill. 487; 85 Am. Dec. 375; *Morton v. Young*, 55 Me. 24; 92 Am. Dec. 565; *Jones v. Jones*, 71 Cal. 89; *McNulty v. Walker*, 64 Miss. 198; *Sutton v. Anderson*, 103 Pa. St. 151; *McFarland v. Washburn*, 14 Ill. App. 369; *Palmer v. Richardson*, 70 Ill. 544; *Davis v. Wisner*, 72 Ill. 282; *Calef v. Thomas*, 81 Ill. 478; *Scott v. Shelor*, 28 Gratt. 891; *Boeger v. Langenberg*, 97 Mo. 390; 10 Am. St. Rep. 322. It has been said, however, that after proof of malice, slight evidence of want of probable cause is sufficient: *Grant v. Dewel*, 3 Rob. (La.) 17; 38 Am. Dec. 228; and because it involves a negative, that only such proof of want of probable cause is required in any case: *Williams v. Vanmeter*, 8 Mo. 339; 41 Am. Dec. 644. We shall first refer to the evidence admissible on behalf of the plaintiff to make out his case, and next to the evidence receivable on behalf of the defendant to rebut the case of the plaintiff.

Evidence of the Proceedings in Court.—A judicial record is always admissible to prove itself, and as the plaintiff's cause of action is based upon the commencement and termination of the prosecution against him in a court of justice, he must necessarily be both allowed and required to prove such commencement and termination by the best evidence. In one case it was very strangely said that the record of the plaintiff's acquittal is not admissible in evidence in his favor: *Skidmore v. Bricker*, 77 Ill. 164; but the argument used against its admission demonstrates that what the court meant was, that it was not admissible for the purpose of proving that his prosecution was malicious or without probable cause. It is not within the purpose of this note to consider when or how the judicial record shall be authenticated or proved. When desired as a part of the evidence in an action for malicious prosecution, it must doubtless be proved, as in other cases, or it will be rejected: *Lunsford v. Dietrich*, 86 Ala. 250; 11 Am. St. Rep. 37; though if the original record cannot be had, its contents may be established by secondary evidence: *Brown v. Randall*, 36 Conn. 56; 4 Am. Rep. 35; and when proved either by secondary or original evidence, so that it would be admissible in any other action in which it is material, it must necessarily be admitted in an action for malicious prosecution for the purpose of proving that there was a prosecution and when and how it ended: *Olmstead v. Partridge*, 16 Gray, 381; *Winn v. Peckham*, 42 Wis. 493; *Mass v. Meire*, 37 Iowa, 97; *Ames v. Snider*, 69 Ill. 376; *Sweeney v. Perney*, 40 Kan. 102; *Cooper v. Uterbach*, 37 Md. 282. Its effect when it proves a conviction as well as a prosecution has been considered at page 142.

Failure to Indict or to Hold the Accused to Answer.—Whether the acquittal or discharge of the accused may be considered as evidence bearing upon the question of probable cause for his prosecution or not, is a question upon which the courts are not in entire harmony. The majority of the decisions upon the subject affirm that the failure of the examining magistrate to commit or the grand jury to indict the accused is admissible, not merely as evidence that there was no sufficient proof to warrant indicting him or holding him to answer, but further, that the prosecutor did not have probable cause for his prosecution: *Sharpe v. Johnston*, 76 Mo. 660; *Bornholdt v. Souillard*, 36 La. Ann. 103; *Bigelow v. Sickles*, 80 Wis. 98; *Frost v. Holland*, 75 Me. 108; *Vinal v. Core*, 18 W. Va. 42; *Jones v. Finch*, 84 Va. 204; *Nicholson v. Coghill*, 9 Dowl. & R. 13; *Johnson v. Chambers*, 10 Ired. 287; *Griffin v. Chubb*, 7 Tex. 603; 58 Am. Dec. 85; *Sappington v. Watson*, 50 Mo. 83; *Cooper v. Uterbach*, 37 Md. 282; *Strauss v. Young*, 36 Md. 254; *Casperoon*

v. *Sprule*, 39 Mo. 39. When we remember that the commencement of the prosecution must precede the examination before the magistrate or the grand jury, and that at the latter the accused has the benefit of all explanatory circumstances which have been discovered since the charge was preferred against him, and sometimes of such evidence as he can procure either to explain or contradict that upon which the prosecutor was authorized to act, it seems remarkable that the finding of the examining magistrate or of the grand jury, even though it be conceded to be evidence of the want of probable cause for holding the accused to answer, should have ever been received as evidence of want of probable cause on the part of the prosecutor when he instituted the prosecution. It is not disputed that the jury may infer the existence of malice from the want of probable cause. If the absence of probable cause may be inferred from the failure of the prosecution, then the final result is, or may be, that the prosecutor may be held liable for a malicious prosecution without any other evidence than that of his having caused a prosecution, or, at least, that the burden of proof must be assumed by the defendant after the plaintiff has introduced the formal evidence of his prosecution and discharge. Hence, in a few of the states, the decisions declare that the discharge of the accused is not admissible as evidence of probable cause, and that the effect of such discharge is limited to proving that the prosecution has terminated: *Thompson v. Beacon Valley Rubber Co.*, 56 Conn. 493; *Heldt v. Webster*, 60 Tex. 207; *Ganea v. Southern Pac. R. R. Co.*, 51 Cal. 140; *Frosmann v. Smith*, Litt. Sel. Cas. 7; 12 Am. Dec. 265; *Staub v. Van Bakenyaer*, 36 La. Ann. 467; *Apper v. Woolston*, 43 N. J. L. 57.

Acquittal as Evidence of Want of Probable Cause.—If the prosecution terminated in favor of the accused otherwise than by his discharge by the grand jury or the committing magistrate, the decisions agree that such termination is not evidence of the absence of probable cause. Hence, though he proves a verdict of acquittal and a judgment in his favor thereon, he must still offer some evidence tending to show that his prosecution was without probable cause: *Grant v. Desch*, 3 Rob. (La.) 17; 38 Am. Dec. 228; *Bitting v. Ten Eyck*, 22 Ind. 421; 42 Am. Rep. 505; *Griffin v. Chubb*, 7 Tex. 603; 58 Am. Dec. 85; *Boeper v. Langenberg*, 97 Mo. 390; 10 Am. St. Rep. 322; *Stewart v. Sonneborn*, 36 U. S. 137; *Ulkman v. Abrams*, 9 Bush, 738; *Purcell v. MacNamara*, 9 East, 361; 1 Camp. 199; *Sweeney v. Perney*, 40 Kan. 102. In some of the states, a justice of the peace, or other magistrate before whom a criminal prosecution is tried, is required, if he finds it to have been malicious and without probable cause, to state such conclusion in his docket, and to assess the costs against the prosecutor. The effect of his conclusion is, however, limited to the imposition of such costs, and his finding cannot be received in a civil action as evidence of the want of probable cause: *Casey v. Sevaton*, 30 Minn. 516. So the abandonment of the prosecution, or its dismissal on the entry of a *nolle prosequi*, at the instance or with the assent of the prosecutor, after the accused has been held to answer by a magistrate or grand jury, is not evidence of the want of probable cause for the commencement of the prosecution: *Flickinger v. Wagner*, 46 Md. 580; *Yocum v. Polly*, 1 B. Mon. 358; 36 Am. Dec. 583; *Cockfield v. Braveboy*, 2 McMull. 270; 39 Am. Dec. 123; *Joiner v. Ocean Steamship Co.*, 86 Ga. 238; *Purcell v. MacNamara*, 9 East, 361; 1 Camp. 199; *Green v. Cochran*, 43 Iowa, 544.

Evidence that the Prosecution was to Accomplish Some Collateral Purpose or to forward some private interest of the prosecutor is always admissible, both to show the absence of probable cause and to create the inference that it was malicious, and that the real or chief object of the prosecutor was to obtain

possession of property, or the payment of a debt, and the like: *Schofield v. Ferrera*, 47 Pa. St. 194; 86 Am. Dec. 532; *Paddock v. Watts*, 116 Ind. 146; 9 Am. St. Rep. 832; *Kimball v. Bates*, 50 Me. 308; *McDonald v. Rooke*, 2 Bing. N. C. 207; 2 Scott, 359; 1 Holges, 314; *Brooks v. Warwick*, 2 Stark. 389; *Grundy v. Crescent News and Hotel Co.*, 38 La. Ann. 374; *Hiatt v. Kinkaid*, 28 Neb. 721; *Tucker v. Cannon*, 23 Neb. 196.

Reputation of the Plaintiff. — In a couple of cases decided in the court of appeals of Missouri, it was asserted that the plaintiff in an action for malicious prosecution ought not to be allowed to prove that his reputation before such prosecution was good: *Kennedy v. Holladay*, 25 Mo. App. 503; *Brennan v. Tracy*, 2 Mo. App. 540; and in Illinois it was said that while evidence of the plaintiff's good reputation should be received when the charge against him was made upon information and belief, for the purpose of showing whether the defendant probably believed what he swore he did, yet that it was not admissible, where the charge was made as of the prosecutor's own knowledge: *Skidmore v. Bricker*, 77 Ill. 164. Reason or authority in support of either decision we have not heard or seen, and hope to be spared hearing or seeing. Certainly a reasonable man ought to pause before making a charge of crime against one whom he knows to bear a good reputation, and to have lived a blameless life in the community in which he resides. For the purpose of showing that his prosecution was without probable cause, the plaintiff may, therefore, offer evidence of his previous good reputation, and that it was known to his accuser, or, from the latter's long acquaintance, should have been known to him: *McIntire v. Levering*, 148 Mass. 546; 12 Am. St. Rep. 594; *Ross v. Innis*, 35 Ill. 487; 85 Am. Dec. 373; *Blissard v. Hayes*, 46 Ind. 166; 15 Am. Rep. 291; *Woodworth v. Mills*, 61 Wis. 44; 50 Am. Rep. 135; *Israel v. Brooks*, 23 Ill. 575.

Evidence Tending to Prove Actual Ill-will on the part of the prosecutor towards the accused is always admissible for the purpose of raising the inference that the prosecution was induced by malice: *Caddy v. Barlow*, 1 Moody & R. 275; *Thomas v. Norris*, 64 N. C. 780. Such ill-will or malice may be established to the satisfaction of the jury from the conduct as well as language of the prosecutor, and without showing any other hostile demonstrations beyond those manifested in the mode of prosecuting or preferring the charge, as where the means employed by the prosecutor were unnecessarily injurious: *Thompson v. Force*, 65 Ill. 370; *Turner v. Walker*, 3 Gill & J. 377; 22 Am. Dec. 929; or the value of the property the accused was charged with taking was, in the affidavit for his arrest, grossly overstated: *Woodworth v. Mills*, 61 Wis. 44; 50 Am. Rep. 135; or unusual zeal was manifested by the prosecutor: *Garvey v. Wayson*, 42 Md. 178; *Straus v. Young*, 36 Md. 246; or his acts were rash and wanton: *Travis v. Smith*, 1 Pa. St. 234; 44 Am. Dec. 125; *Casebeer Rice*, 18 Neb. 203; or a false statement of the case was made by him for the purpose of procuring advice from an attorney, favorable to the arrest: *Walt v. Odell*, 56 Cal. 136.

The Facts and Circumstances under Which the Prosecutor Acted may be proved for the purpose of showing that he could not, as a reasonable man, have believed in the truth of the charge made by him, and that his conduct can be imputed to nothing but malice. Thus plaintiff may prove that he was the owner of property with the theft of which he was charged, and that the prosecutor knew of such ownership: *Lunsford v. Deitrich*, 86 Ala. 250; 11 Am. St. Rep. 37; that though the accused was charged with unlawfully and forcibly defending possession of property, the only defense made by him was in lawful resistance of an attack made by the prosecutor: *Casebeer v. Rice*, 18

Neb. 203; that a charge of larceny was preferred, when the prosecutor knew that the property had been taken up under the estray laws, and had no reason for believing it to have been stolen: *Bauer v. Chry*, 8 Kan. 580; that the prosecutor charged the commission of the crime of perjury in making an affidavit averring his insolvency, when he must have known, from a proper examination of his affairs, that he was in fact insolvent, and that the charge of insolvency was true: *Montrose v. Bradshy*, 68 Ill. 185; that at the time the accused was charged with having fraudulently disposed of mortgaged chattels, he had a large amount of other property liable to be taken in payment of his debts, for the purpose of showing that his prosecutor could not have believed that the disposal of the mortgaged property was for the purpose of defrauding the mortgagee: *Reison v. Mott*, 42 Minn. 49; 18 Am. St. Rep. 489.

As bearing upon the question of probable cause, the plaintiff may offer and the court receive evidence tending to show that the person upon whose information the prosecutor acted was known to him to be unreliable or to have been in prison: *McIntire v. Levering*, 148 Mass. 546; 12 Am. St. Rep. 594. It is not evidence of the absence of probable cause that the prosecutor did not seek the accused for the purpose of inquiring whether he had any defense, or of giving him an opportunity to explain the circumstances creating the belief in his guilt: *Miller v. Chicago etc. R. R. Co.*, 41 Fed. Rep. 898; and even when the accused is sought and denies his guilt, the prosecution, after such denial, is not without probable cause, if all the known facts in the case, including the denial, were sufficient to induce a reasonable ground of suspicion of the plaintiff's guilt: *Chicago etc. R. R. Co. v. Krtaki*, 30 Neb. 215. The fact that no evidence was offered by the prosecutor to sustain his charge when it came up for hearing and trial may be proved by any person who was present at the trial or hearing, for the purpose of showing that it was without probable cause: *John v. Bridgman*, 27 Ohio St. 22. But if there was some evidence offered, the judge or magistrate will not be permitted to state his view of its effect, nor that he discharged the accused because the evidence was insufficient to hold him: *Dempsey v. State*, 27 Tex. App. 269; 11 Am. St. Rep. 193; nor are any of the observations of the judge or magistrate during the trial or examination, or in pronouncing judgment, admissible against the prosecutor: *Webster v. Zachariah*, 16 L. T., N. S., 432; *Barker v. Angell*, 2 Moody & R. 371. There is a conflict in the authorities as to whether on the trial of the civil action for malicious prosecution evidence may be received for the purpose of showing what was the testimony of a witness at the hearing or trial of the criminal charge. On the one side, it is said that such evidence is inadmissible either to show probable cause or the want of it, because it is not the best evidence, and that the witnesses examined at the criminal trial, if their testimony is again desired, must be called and examined at the trial of the civil action: *Richards v. Foulke*, 3 Ohio, 52; *Burt v. Place*, 4 Wend. 591; but a slight preponderance of the authorities dissents from this view, and maintains that upon the issue of probable cause it is competent for either party to show what was testified to at the trial of the criminal charge; that this need not be proved by the testimony of the witnesses themselves, for they may have forgotten their own testimony, or may, in the civil action, testify falsely concerning it, and, therefore, that it is competent, either from the reporter's notes of the trial, or by the oral testimony of any other person who was present and remembers, to prove what was said by any witness or witnesses upon his examination on the trial of the criminal charge: *Goodrich v. Warner*, 21 Conn. 432; *Brown v. Willoughby*, 5 Col. 1; *Bacon v. Toms*, 4 Cush. 238. The declarations of the arresting officer are not admis-

sible for the purpose of showing the malice of the prosecutor, where they were not made in his presence or hearing, nor by his authority: *Reisner v. Mott*, 42 Minn. 49; 18 Am. St. Rep. 489; nor can the right of the officer to represent or speak for the prosecutor or the existence of a conspiracy between him and the officer be proved by the latter's declarations: *Chisman v. Carney*, 33 Ark. 318. The plaintiff ought not to be allowed to give evidence, the only purpose of which must be to create a prejudice against the defendant or a sympathy for the plaintiff. Hence the reception of evidence to the effect that the character of the defendant was bad: *Walker v. Pittman*, 108 Ind. 341; or that the plaintiff was a minor when he was prosecuted, or at the time of the commission of the supposed crime of which he was charged, is erroneous: *Motes v. Bates*, 74 Ala. 374.

Evidence for Defendant—Judicial Proceedings.—The record of the criminal prosecution is also evidence for the defendant, and so far as it speaks in his favor is in some respects more efficient than when it is received on behalf of the plaintiff. What its effect is when it shows a conviction, whether such a conviction has been vacated or not, we have considered at page 142. If anything appears from the proceedings against the plaintiff which may be construed as an admission either of his guilt, or of there being probable cause for his prosecution, it is admissible against him. Therefore, it has been held that the voluntary waiver by the accused of his examination, and his entering into recognizance for his appearance to answer the charge against him, were admissible as evidence of probable cause for his prosecution: *French v. Smith*, 4 Vt. 363; 24 Am. Dec. 616; *Vansickle v. Brown*, 68 Mo. 627. The fact that the accused was held to answer by the examining magistrate, or was indicted by the grand jury, is generally treated as *prima facie* but never as conclusive evidence of probable cause: *Diemer v. Herber*, 75 Cal. 287; *Ganea v. Southern Pac. R. R. Co.*, 51 Cal. 140; *Hale v. Boylen*, 23 W. Va. 234; *Raleigh v. Cook*, 60 Tex. 438; *Graham v. Noble*, 13 Serg. & R. 233; *Bacon v. Towne*, 4 Cush. 217; *Ross v. Hixon*, 46 Kan. 550; *Ricord v. Central Pac. R. R. Co.*, 15 Nev. 167; *Garrard v. Willet*, 4 J. J. Marsh. 628; *Peck v. Chouteau*, 91 Mo. 138; 60 Am. Rep. 236; *Bell v. Percy*, 11 Ired. 233; *Brown v. Griffin*, Cheves, 32; and the principal case; though this effect has sometimes been denied to his indictment: *Motes v. Bates*, 80 Ala. 382. If the jury or the court entertained doubt upon the subject of the innocence of the accused, this fact is generally permitted to be proved, as tending to show probable cause. If there were two trials, because the jury on the first trial could not agree, this is unquestionably evidence of probable cause: *Johnson v. Miller*, 63 Iowa, 529; 50 Am. Rep. 758; and though the jury ultimately concurred in a verdict of acquittal on the first trial, it has been held that parol evidence is admissible for the purpose of showing that they hesitated, and that they entertained doubts of the innocence of the accused from the evidence before them: *Grant v. Deuel*, 3 Rob. (La.) 17; 28 Am. Dec. 228; *Smith v. Macdonald*, 3 Esp. 7. This character of evidence concerning the deliberations of the grand jury has been excluded, and we think properly, both because the accused may not have had any opportunity to present evidence in his favor before them, and because public policy is best subserved by keeping secret the votes and opinions of the grand jurors: *Scotten v. Longfellow*, 40 Ind. 23.

Bad Reputation of Plaintiff.—One of the elements of damage which the jury may properly consider is the injury to the reputation of the plaintiff by his prosecution, and that injury is manifestly less when, before the prosecution, he had little or no reputation to lose. So one is more likely to entertain a reasonable belief in the guilt of a person of bad reputation than of one

whose reputation is good. Evidence of the bad reputation of the plaintiff before the charge was preferred against him is therefore admissible both in mitigation of damages and to show that his prosecution was not without probable cause: *Rosenkrans v. Barker*, 115 Ill. 331; 56 Am. Rep. 169; *O'Brien v. Frasier*, 47 N. J. L. 349; 54 Am. Rep. 170; *Gregory v. Chambers*, 78 Mo. 294; *Martin v. Hardesty*, 27 Ala. 458; 62 Am. Dec. 773; *Fitigibbon v. Brown*, 43 Me. 169; *Rodriguez v. Tadmire*, 2 Esp. 721; *Miller v. Brown*, 3 Mo. 127; 23 Am. Dec. 693; *Ges v. Oulser*, 13 Or. 598; *Pullen v. Glidden*, 68 Me. 559. The defendant is entitled to show that when the plaintiff was arrested he was in the company of a person of bad character, and that he harbored and habitually associated with persons of that character, and thereby exposed himself to suspicion: *Hitchcock v. North*, 5 Rob. (La.) 328; 39 Am. Dec. 540; or, though the prosecution was for larceny, that the plaintiff had the reputation of being a gambler and horse-racer: *Martin v. Hardesty*, 27 Ala. 458; 62 Am. Dec. 773. If the prosecution was for the purpose of compelling plaintiff to give sureties to keep the peace, the defendant may show not only that the plaintiff threatened him, but that his reputation was that of a violent and quarrelsome man: *Sherwood v. Reed*, 85 Conn. 450; 95 Am. Dec. 284. From the general rule that the bad reputation of the plaintiff may be proved by the defendant, there is a slight and feeble dissent: *Oliver v. Pate*, 43 Ind. 132; *Eckbach v. Hart*, 47 Md. 61. In Wisconsin, while the general rule is conceded, it has been held that evidence of such reputation is not admissible under the general issue: *Scheer v. Keonon*, 34 Wis. 349.

Evidence of Other Crimes. — Though the plaintiff must be prepared to defend his general reputation, he is not required to meet charges of specific offenses: *Gregory v. Thomas*, 2 Bibb, 286; 5 Am. Dec. 608; nor can the prosecutor support his defense of probable cause by proving that though the plaintiff did not commit the crime of which he was accused, yet that he did at or about the same time commit another and entirely different offense: *Carson v. Edgeworth*, 43 Mich. 241; *Chrisman v. Carney*, 33 Ark. 316; *Patterson v. Garlock*, 39 Mich. 447; *Sutton v. McConnell*, 46 Wis. 269. When, however, a guilty knowledge is essential to the crime of which plaintiff was accused, the defendant may prove facts and circumstances, known to him at the time of the prosecution, sufficient to create a belief in the mind of a reasonable man, and in fact creating a belief in the defendant's mind, that the accused had committed other offenses like that for which he was prosecuted: *Thelin v. Dorsey*, 59 Md. 539; *Thomas v. Russell*, 9 Ex. 764.

Defendant's Evidence of his Motives. — The defendant in those states in which he is permitted to testify in his own behalf is allowed to give direct evidence of his motives and purposes in the prosecution. He may be asked whether he was actuated by malice or not, whether he made the complaint against the accused in good faith, entertaining an honest belief in his guilt: *Sherburne v. Rodman*, 51 Wis. 474; *Greer v. Whitefield*, 4 Lea, 85; or whether he had any ill-feelings against him: *Vansickle v. Brown*, 68 Mo. 627; *McCormick v. Perry*, 47 Hun, 71; *Coleman v. Hewrick*, 2 Mackey, 189; or whether from all the facts known to him when he commences the prosecution, taken in connection with the advice of his counsel, he believed the charge to be true and the accused guilty: *Heap v. Parrish*, 104 Ind. 35; *Turner v. O'Brien*, 5 Neb. 323; *Spalding v. Lowe*, 56 Mich. 366; *Sparling v. Conway*, 75 Me. 510. Of course the testimony on this point is not conclusive in his favor, but is to be weighed in connection with the other evidence of the case, and the jury must determine from what he did and the circumstances under which he did it, as well as from his present testimony concerning his motives, whether his prosecution was without probable cause and malicious or not.

Facts not Known to the Prosecutor. — Evidence tending to prove the actual guilt of the plaintiff is always admissible in favor of the defendant, for a guilty man will not be permitted to recover for his prosecution whether the facts within the knowledge of the prosecutor at the time the charge was made were or were not sufficient to justify the making of it. But with this exception, the defense of probable cause, so far as it is made to depend upon the ground that there were circumstances sufficient to excite the suspicion of a reasonable and prudent man, and generate in his mind the conviction of the guilt of the accused, is restricted to facts known to the prosecutor when he preferred his charge. It may be that there were other existing circumstances of which he afterwards became aware, and which, had he known them at the time, would have strengthened his conviction and made it more reasonable, but as he, from not knowing them, could not have acted upon them, evidence of them should not be received to justify his action: *Harkrader v. Moore*, 44 Cal. 144; *Deleyal v. Highley*, 3 Bing. N. C. 959; *Galinovsky v. Stewart*, 49 Ind. 156; 19 Am. Rep. 677; *Turner v. Ambler*, 10 Q. B. 252; 6 Jur. 346; 11 L. J. Q. B. 158; *Threefoot v. Nichols*, 68 Miss. 116; *Bell v. Percy*, 5 Ired. 233; *McIntire v. Levering*, 148 Mass. 546; 12 Am. St. Rep. 594; *Joselyn v. McAllister*, 25 Mich. 45. Nor, on the other hand, can the effect of circumstances, known to the prosecutor, tending to establish the existence of probable cause be weakened by other explanatory or exculpatory facts of which he had no knowledge or notice: *King v. O'Brien*, 11 R. I. 582.

Evidence of Facts Justifying the Prosecutor. — In a preceding part of this note we have given instances of prosecutions deemed, as matter of law, to be upon probable cause, and of others from which probable cause was adjudged to be absent. What was there said should be considered in connection with what we shall here say upon the subject of the evidence on the part of the defendant tending to show that the facts and circumstances under which he acted were such as to justify his action.

Actions for malicious prosecution often furnish temptations for seeking to bring before the jury evidence of extrinsic matters for the purpose of awakening their prejudices or sympathies, and there is no doubt that all matters which can only minister to this purpose ought to be rigidly excluded: *Brown v. Smith*, 83 Ill. 291. But when the defense is, that the prosecutor acted in good faith, and as a prudent and reasonable man would act in the same circumstances, it is evident that his defense cannot be fully and fairly made unless he is permitted to disclose to the jury all the facts and circumstances influencing his action, and which were such as a prudent and law-abiding man might reasonably and lawfully act upon: *Collins v. Hayte*, 50 Ill. 337; 99 Am. Dec. 521; *Collins v. Fisher*, 50 Ill. 359.

A Mere Suspicion or Belief that the accused had committed the crime of which he is charged, however sincere, is not evidence of probable cause. Nor is it material that other persons than the prosecutor shared in such belief. Hence he should not be permitted to prove his own belief or the belief of others, or that he had been told by others that the accused was guilty, or that there was a general suspicion of such guilt in the community, except he also shows that such belief was based upon such information as might generate it in the mind of a prudent, reasonable man: *Brainerd v. Brackett*, 83 Me. 580; *Holburn v. Neal*, 4 Dana, 120; *Carl v. Ayers*, 53 N. Y. 14; *Stons v. Stevens*, 12 Conn. 219; 30 Am. Dec. 611; *Norvel v. Vogel*, 39 Minn. 107; *Furnham v. Feeley*, 56 N. Y. 451. Some of the courts have, however, and perhaps correctly, admitted evidence that it was commonly reported in the neighborhood in which the parties lived that the plaintiff had committed the crime for

which he was prosecuted, not as being in itself sufficient to establish probable cause, but as lending force to any other criminatory facts or information: *Pullen v. Glidden*, 68 Me. 559; *Baron v. Mason*, 31 Vt. 201.

The Prosecutor is not Required to Act upon his Personal Knowledge. — "Actual knowledge that the crime was committed is not necessary, nor is it essential that the prosecutor shall know the facts and circumstances upon which he predicates his belief. He may act upon creditable information or deceptive appearances of guilt, if he acts in good faith": *Brown v. Willoughby*, 5 Col. 1; *Hooper v. Vernon*, Sup. Ct. Md., March, 1891. While the prosecutor may act upon information received from others, it would seem to be his duty not to act upon mere general charges of the commission of the crime without doing anything to verify their truth when he could easily do so, and especially when the person accused bears a good reputation: *Bornholdt v. Souillard*, 36 La. Ann. 103. What was said or told to the defendant must generally be admitted in evidence, not for the purpose of establishing that what was told was true, but of showing whence came the information on which he acted; and if the source was apparently reliable, and of a character to induce a prudent, cautious man to believe that the plaintiff had been guilty of the offense for which he was arrested, and the defendant did so believe, then such information makes out the defense of probable cause: *Lamb v. Galtland*, 44 Cal. 609. If the person from whom the information is derived is known to be of bad reputation, as where he is a discharged convict, the prosecutor is not justified in acting upon such information without taking any steps to verify it: *Anderson v. Friend*, 71 Ill. 475; *Chapman v. Dunn*, 58 Mich. 31; and where the information was in the form of a confession, it may be shown, to break its force as evidence of probable cause, that it was, in effect, extorted by the accused from the person making it: *Harpham v. Whitney*, 77 Ill. 32; *Dorsey v. Clapp*, 22 Neb. 564. Where the information was received from a person of bad reputation, of which the prosecutor and his counsel were not informed, the court refused to decide, as a matter of law, that they were guilty of such want of diligence as to deprive them of the defense of probable cause, from the fact that they did not take any measures to ascertain the reputation of their informant, as they might readily have done: *Jordan v. Alabama etc. R. R. Co.*, 81 Ala. 220. "However suspicious the appearances may be from existing circumstances, if the prosecutor has knowledge of facts which will tend to explain the suspicious appearances and exonerate the accused from the criminal charge, he cannot justify a prosecution by putting forth the *prima facie* circumstances, and excluding those within his knowledge which tend to prove innocence": *Fagnan v. Knox*, 66 N. Y. 525. The facts and circumstances upon which the defense relies as evidence of probable cause must tend to show the commission of the crime charged. It is not sufficient that they existed and tended to prove, or proved, a wrongful or criminal act, if it was not the act charged. Hence probable cause for a prosecution for larceny is not shown by evidence that the facts upon which the defendant proceeded tend to prove that the property had been converted: *Turner v. O'Brien*, 5 Neb. 542; *Falvey v. Faxon*, 143 Mass. 284; *Stone v. Stevens*, 12 Conn. 219; 30 Am. Dec. 661; *Bobbin v. Kingsbury*, 138 Mass. 538; nor for perjury, by showing that the accused swore falsely in a matter not material to the issue on trial: *Plath v. Braunsdorff*, 40 Wis. 107. When, by mistake, a charge is made of one crime or against a certain person, when the prosecutor intended to charge another crime or another person, it is said that proof of the crime intended to be charged may be received in mitigation of damages: *Bisley v. McBarron*, 125 Mass. 272; *O'Brien v. Frasier*, 47 N. J. L. 349; 54 Am. AN. ST. REP., VOL. XXVI.—11

Rep. 170. The defendant is always allowed to prove that he acted upon the advice of counsel taken in good faith and upon full disclosure of facts: *Wright v. Hanna*, 98 Ind. 217; *Levy v. Brannan*, 39 Cal. 485; *Williams v. Vanmeter*, 8 Mo. 339; 41 Am. Dec. 644; *Workman v. Shelly*, 79 Ind. 442; and may show what opinion the latter gave him: *Collins v. Huxley*, 50 Ill. 337; 99 Am. Dec. 521. And if the defendant sought to obtain the advice of his counsel before commencing the prosecution, but was unable to do so because he could not find him, it may be shown, to rebut the inference of malice, and in mitigation of damages, that before the arrest was effected, the attorney was found and consulted, and his advice followed: *Hopkins v. McGillicuddy*, 69 Ma. 273. For the purpose of avoiding the effect of the advice given by the attorney, it may be shown, either upon cross-examination of defendant's witnesses, or by witnesses for the plaintiff in rebuttal, what facts were stated to the attorney, or that some of the material facts were omitted from the statement: *Cooper v. Uterback*, 37 Md. 282; or from such omission, or from other facts and circumstances, that the advice of the attorney was sought merely as a cover to protect defendant, and not in good faith with a view to being guided and controlled by it: *McCarthy v. Kuchen*, 59 Ind. 500.

DAMAGES. — The amount of damages to be awarded the injured party is, in an action for malicious prosecution, left to the discretion of the jury, to be determined by them from all the evidence submitted for their consideration. It is not proper to permit witnesses to testify to the amount of such damages: *Lunsford v. Deirich*, 86 Ala. 250; 11 Am. St. Rep. 37. It is their province to disclose the facts and circumstances from which the conclusion of the jury is to be drawn, and when drawn, it will not be reviewed by the court except in extreme cases: *Chapman v. Dodd*, 10 Minn. 350; *Ross v. Innes*, 35 Ill. 487; 85 Am. Dec. 373; in which the amount of the recovery is so disproportionate to the injury suffered as to indicate that the jury must have been actuated by passion, prejudice, or some other inadmissible motive: *Loewenthal v. Streng*, 90 Ill. 74; *Walker v. Martin*, 52 Ill. 347. It is important, however, to consider what elements of damage may properly influence the jury in reaching a verdict, for without determining what these elements are, it is impossible to decide what evidence should be admitted or excluded, or what injuries are necessarily redressed by a verdict and judgment in favor of the plaintiff, so as to preclude any further recovery by him. Speaking of an action for malicious prosecution, the supreme court of Michigan said: "We may observe, in general terms, that the elements of damage were the expenses of the plaintiff, if any, in and about the prosecution complained of to protect himself; his loss of time; his deprivation of liberty, and the loss of his society to his family; the injury to his fame; personal mortification, and the smart and injury of the malicious arts and acts of oppression of the parties": *Hamilton v. Smith*, 39 Mich. 222. In an early case, it was said that for a malicious prosecution the plaintiff may recover for damages, — 1. To his fame; 2. To his person; and 3. To his property. The damages to his fame are of the same character, and may include the same elements as if the action were for slander or libel. The damages to his person include loss of his liberty, and the danger to which he is subjected of loss of life or liberty through the prosecution. The damages to his property embrace his losses in defending himself against the charge for which he is prosecuted: *Savile v. Roberts*, 1 Ld. Raym. 374; *Lavender v. Huigens*, 32 Ark. 763. There is no doubt that he may recover for each of these three elements of damage, but probably there are conceded elements of damage which it would be difficult to include in either of these classifications.

Reputation, Damage to. — That the plaintiff may recover, in an action for malicious prosecution, for injuries resulting to his reputation from the making of the charge against him is beyond controversy; and therefore he cannot sustain a subsequent action of slander or libel for preferring the charge against him, though if the charge was repeated at other times, a separate action may be sustained for the damages resulting from this repetition: *Sheldon v. Carpenter*, 4 N. Y. 578; 55 Am. Dec. 301; *Rockwell v. Brown*, 38 N. Y. 207.

Mental Suffering. — We do not know that mental suffering can properly be regarded as an injury either to reputation, person, or property, but the authorities agree that the indignity of being charged with the commission of crime, and the mental suffering occasioned to the accused thereby, are proper matters to be considered by the jury, and compensated by their verdict: *Parkhurst v. Masteller*, 57 Iowa, 474; *Lunsford v. Deirick*, 86 Ala. 250; 11 Am. St. Rep. 37; *McWilliams v. Hoban*, 42 Md. 56.

The Imprisonment of the Plaintiff being a natural consequence of his prosecution, he may recover such damages as naturally arise therefrom. They necessarily include compensation for wounded pride and the consequent mental suffering, injury to his health, including insanity and mental aberration: *Plath v. Braunsdorf*, 40 Wis. 107; and loss of time: *Hamilton v. Smith*, 39 Mich. 222. The mode in which plaintiff was treated may also be shown, as that he suffered from cold, or the want of proper food and bedding, or was kept separate from his wife: *Spear v. Hiles*, 67 Wis. 350; *Abrahams v. Cooper*, 81 Pa. St. 232. On the other hand, it has been held that the prosecutor is not answerable for the mode in which the officers of a prison discharged their duties; and therefore that indignities and neglects of theirs ought not to be permitted to enhance the damages recoverable by the sufferer: *Zebley v. Storey*, 117 Pa. St. 478.

Attorneys' Fees. — Expenses incurred in defending himself against the prosecution, which he claims to have been malicious, may be recovered by the plaintiff, including a reasonable fee for his counsel in such criminal prosecution, whether it has been actually paid or not: *Marshall v. Betner*, 17 Ala. 632; *Zeigler v. Powell*, 54 Ind. 173; *Gregory v. Chambers*, 78 Mo. 294; *Krug v. Ward*, 77 Ill. 603; *Walker v. Pittman*, 108 Ind. 341; *Landa v. Obert*, 45 Tex. 539.

The Condition of the Plaintiff's Family or the effect of his prosecution upon any member of it seems not to constitute an element of damage proper for the consideration of the jury. Hence he should not be permitted, for the purpose of enhancing his damages, to prove that his wife was dead and he had four children to support and care for: *Reisan v. Mott*, 42 Minn. 49; 18 Am. St. Rep. 489; nor that he had a wife living, and that her health had been injured and her mind unbalanced by his prosecution: *Hampton v. Jones*, 58 Iowa, 317.

Exemplary Damages. — In actions for malicious prosecution, as in other actions for tort, there is a difference of opinion as to whether damages may be allowed by way of punishment or example, the one side insisting "that compensation to the plaintiff is the purpose in view; and when that is accorded, anything beyond, by whatever name called, is unauthorized; that it is not the province of the jury, after full damages have been found for plaintiff, so that he is fully compensated for the wrong committed by the defendant, to mulct the defendant in an additional sum, to be handed over to the plaintiff, as a punishment for the wrong he has done to the plaintiff": *Wilson v. Bowen*, 64 Mich. 133; and the other contending that, except as to expenses

incurred and other elements of damage susceptible of precise proof, "no measure of damages can be prescribed except the enlightened conscience of impartial jurors": *Coleman v. Allen*, 79 Ga. 637; 11 Am. St. Rep. 449; and that as the action is not maintainable unless the conduct of the defendant has been both malicious and without probable cause, the jury may not only compensate plaintiff for his actual damages, but, in addition thereto, award a further sum as a punishment of defendant for his wrongful and malicious act: *McWilliams v. Holan*, 42 Md. 56; *Parkhurst v. Masteller*, 57 Iowa, 474. To warrant the giving of exemplary damages, the courts generally require that the evidence be such as to justify the inference of actual malice, or the "prosecution to have been pursued by the defendant for his private ends and with reckless disregard of the rights of plaintiff": *Vinell v. Core*, 18 W. Va. 1; *Cooper v. Utterback*, 37 Md. 284; *Spears v. Hiles*, 67 Wis. 350; or "a formed design to injure and oppress": *Burnett v. Reed*, 51 Pa. St. 191. Hence if the defendant became responsible merely by approving an unlawful arrest after it had been made, being without previous knowledge of it, and free from all actual malice, he cannot be subjected to exemplary damages: *Rosenkrans v. Barker*, 115 Ill. 331; 56 Am. Rep. 169; *Grund v. Van Vleck*, 69 Ill. 478. If no actual damages resulted from the malicious prosecution, there can be no award of exemplary damages. If the defendant has done no actual injury, there is no legal reason for punishing him: *Schluppel v. Norton*, 38 Kan. 567.

Wealth of Defendant.—The injury to the fame or reputation of the accused is probably greater when his accuser is a person of wealth than when he is of humble or indigent circumstances, and this consideration might justify the admission of evidence of the defendant's pecuniary condition in all cases; but at all events, where it is conceded that the jury may award exemplary damages by way of punishment, evidence of the wealth of defendant must necessarily be received to enable them to determine what would operate as a sufficient punishment in the case before them; for a penalty adequate as a punishment of a man of small or moderate fortune would have no punishing or deterring effect upon a defendant of great wealth: *Peck v. Small*, 35 Minn. 465; *Spears v. Hiles*, 67 Wis. 350; *Weaver v. Page*, 6 Cal. 681; *Coleman v. Allen*, 79 Ga. 637; 11 Am. St. Rep. 449; *Whitfield v. Westbrook*, 40 Miss. 311; *Wins v. Peckham*, 42 Wis. 493.

Mitigation of Damages.—With reference to the actual damages suffered by plaintiff, there can generally be no mitigation; for if he is entitled to recover at all, he is entitled to compensation for whatever he has suffered, and the amount of his recovery cannot be diminished by proof of defendant's good faith, or of anything else not sufficient to make out a complete defense: *Fennelon v. Butts*, 53 Wis. 344; *Wilson v. Young*, 31 Wis. 574. The previous bad reputation of the plaintiff may be proved in mitigation, because the injury resulting to him from the prosecution was probably less than if his reputation had previously been unquestioned: *Fitzgibbon v. Brown*, 43 Me. 169; *Bacon v. Towne*, 4 Cush. 217; *O'Brien v. Frasier*, 47 N. J. L. 349; 54 Am. Rep. 170; *Rosenkrans v. Barker*, 115 Ill. 331; 56 Am. Rep. 169. All evidence tending to disprove malice is also admissible in mitigation of exemplary damages. Therefore, evidence of the excitement under which defendant labored when he instituted the prosecution, and all other facts and circumstances which may legitimately be considered in determining whether and to what extent he should be punished, are admissible in mitigation of damages: *Carter v. Sutherland*, 52 Mich. 597; *Bradner v. Faulkner*, 93 N. Y. 515.

**ATCHISON, TOPEKA, AND SANTA FE RAILROAD
COMPANY v. LONG.**

[46 KANSAS, 701.]

WATERCOURSE — INJUNCTION AGAINST OBSTRUCTION. — Where a railroad company, in constructing its road across a natural watercourse, totally diverts the water therein from the land of an owner, where it naturally flowed prior to the construction of the road, such land-owner is entitled to a mandatory injunction against the company.

MANDATORY INJUNCTION WILL BE ISSUED only when a court of law cannot grant adequate relief, or where full compensation in damages cannot be made.

George R. Peck, A. A. Hurd, and Robert Dunlap, for the plaintiffs in error.

Haslett and Harris, for the defendant in error.

SIMPSON, C. The material facts in this case are substantially undisputed, and are, that Long is the owner and has been in the possession of the land described in his petition for a long time prior to the commencement of this action, and to the building of the railroad by the plaintiff in error, and is still the owner and in the possession and daily occupancy thereof; that into and over the land of Long there ran a natural watercourse which was fed largely, and in excessive dry weather entirely, from and by a spring on the land of an adjoining proprietor. The land is a part of the homestead of Long, and the spring furnished a never-failing flow of water through said land. When the plaintiff in error constructed its road through the land of the adjoining proprietor, this spring, being located within its right of way, was filled up by the building of an embankment from twenty to thirty feet high, and probably one hundred feet wide at its base, and by that means the flow of the water was completely shut off and diverted from the land of Long. The railroad does not run through Long's land, but near his line. The spring was located about two hundred feet from his land. The water of the spring branch was also diverted from its natural channel by a ditch dug by the railroad company to Four Mile Creek, so that the water was completely diverted from the land of the defendant in error at all times and in any event by the filling up of the spring and the construction of the ditch. The railroad was constructed about one year before the commencement of this action. The court below granted Long a perpetual injunction against the plaintiffs in error from stopping

and diverting the flow of the water through the spring branch, and from the spring thereon, from his land. The railroad companies bring the case here for review, and insist that the damages, both présent and future, resulting from diverting the flow of the water, can be easily measured and assessed in one action; that the benefit to Long is small, and the inconvenience to the railroad companies great; that the courts will not issue a mandatory injunction unless a very great necessity exists, and for other reasons.

A mandatory injunction is rarely granted. The case must be an extreme one, to authorize its issue. It is universally restricted to cases where a court of law cannot grant adequate relief, or where full compensation cannot be made in damages. Is this such a case? It must be conceded that the defendant in error has the undoubted legal right to the use and enjoyment of the flow of the water in a natural watercourse that runs through his land. This right is an immemorial one, and is protected by all courts. It may be conceded, also, that the railroad company had the right to construct its track along or over this watercourse, but in such construction it must observe the right of landed proprietors to the natural flow of the water. In this state there is a special statutory provision requiring a railroad company "which constructs its track along or across a watercourse, to restore the watercourse to its former state, or to such a state as not necessarily to impair its usefulness": Gen. Stats. 1889, par. 1207, sec. 47, subd. 4. Long has the legal right to the uninterrupted flow of the water. The railroad company has the legal right to construct its road across the watercourse on the condition that it does not impair the usefulness of the stream to Long. It is evident that the railroad company has deprived Long of his legal right, and at the same time violated the statutes of the state. Can the damages sustained by Long be estimated in dollars and cents, and he be awarded a sum sufficient to remunerate him for the past and compensate him for the future? It would be a perplexing question, and with the varying conditions surrounding it, we doubt whether any just method or equitable admeasurement of his damages could be adopted so as to render exact justice. The railroad company, by a culvert, probably by a pipe, or in some other comparatively inexpensive manner, can permit the water to flow from the spring into the natural channel of the stream. The railroad company says that Long has a larger natural watercourse running

through the same land, and hence we ought not to grant the writ. That might affect the question of the damages; but because Long has the right to the use and enjoyment of the two watercourses, it is no reason why the railroad company should divert one of them from his land. We are supported in the conclusion we reach by the cases of *Webb v. Portland Mfg. Co.*, 3 Sum. 189; *Corning v. Troy etc. Factory*, 40 N. Y. 191; *Kerr on Injunctions*, 330; *High on Injunctions*, 478.

We recommend that the judgment of the district court be affirmed.

The COURT. It is so ordered.

INJUNCTION — DIVERSION OF WATERCOURSE. — An injunction will issue to stop the diversion or unreasonable obstruction of a watercourse: *Ulbricht v. Enfsaula Water Co.*, 86 Ala. 587; 11 Am. St. Rep. 72, and note; *Heilbron v. Fowler etc. Canal Co.*, 75 Cal. 426; 7 Am. St. Rep. 183, and note; *Fernald v. Knox Woolen Co.*, 82 Ma. 48; *Walker v. Emerson*, 89 Cal. 456; *Last Chance etc. Ditch Co. v. Heilbron*, 86 Cal. 1.

INJUNCTION — WHEN WILL ISSUE. — A mandatory injunction will issue only when the remedy at law cannot be applied, and it is the only appropriate remedy: *Pensacola etc. R. R. Co. v. Spratt*, 12 Fla. 26; 91 Am. Dec. 747, and note; *Brown v. Hoff*, 5 Paige, 235; 28 Am. Dec. 425. A mandatory injunction will only be ordered in a case of necessity to prevent extreme or very serious damage: *Bailey v. Schmitz*, 45 N. J. Eq. 178; *Delaware etc. R. R. Co. v. Central Stock-yard etc. Co.*, 43 N. J. Eq. 605; and will not issue where there is a remedy at law: *Gardner v. Stroever*, 81 Cal. 148; *Andrews v. McLeod*, 66 Miss. 348. For a full discussion as to when mandatory injunctions will or will not be issued, see extended note to *Murdock's Case*, 20 Am. Dec. 389-402.

FIRST NATIONAL BANK v. RIDENOUR.

[46 KANSAS, 712.]

CHATTEL MORTGAGE — PRESUMPTION AS TO ASSENT OF CREDITOR. — Where a chattel mortgage is executed in good faith in favor of a *bona fide* creditor, his assent thereto will be presumed from the time of its registration, although it was executed and recorded without his knowledge.

FRAUDULENT CONVEYANCES — CHATTEL MORTGAGE PREFERRING CREDITOR.

— A chattel mortgage, executed in good faith in favor of a *bona fide* creditor, is not necessarily fraudulent and void as to the other creditors of the insolvent mortgagor, although it exhausts his property, and its effect is to hinder and delay them, or to absolutely prevent them from enforcing any part of their claims.

ACTION to foreclose a chattel mortgage. The firm of Lovejoy and Glasscock, being indebted to the plaintiff bank in the sum of ten thousand dollars and accrued interest, executed a chattel mortgage to C. J. Lovejoy to secure such indebtedness.

The mortgage was duly filed and recorded September 1, 1886. Several days thereafter, attachments were levied upon the goods therein described in suits against Lovejoy and Glasscock, in favor of the defendant Ridenour, Baker, & Co., the First National Bank of Illinois, and Kuh, Nathan, and Fisher, and judgment obtained in each case against Lovejoy and Glasscock. The trial court in the present case made the following findings of fact and conclusions of law, and rendered a personal judgment in favor of plaintiff, against C. J. Lovejoy, H. C. Lovejoy, and A. C. Glasscock, but decided that the plaintiff's chattel mortgage was void as against the defendants and the other attaching creditors who were made parties defendant to this suit. C. J. Lovejoy, the nominal mortgagor in the chattel mortgage was a member of the firm of Lovejoy and Glasscock, and one of the principals in the notes described in the mortgage in favor of the plaintiff, and the payment of which the mortgage was given to secure.

" FINDINGS OF FACT.

"1. The firm of Lovejoy and Glasscock executed the mortgage described in the plaintiff's petition, and delivered the same to C. J. Lovejoy.

"2. At the time of the execution of said mortgage, the firm of Lovejoy and Glasscock was justly indebted to plaintiff to the amount of the note described in the petition, which is the indebtedness to the First National Bank of Emporia, in said mortgage described, and was also justly indebted to the National Bank of the State of Illinois, which is also described in said mortgage, neither of which debts has been paid.

"3. At the time of the execution of said mortgage, the said C. J. Lovejoy was a member of the firm of Lovejoy and Glasscock, and liable for all the debts of said firm. At and prior to the time of the levy of the several attachments mentioned in this case, the said C. J. Lovejoy was in the actual and exclusive possession of the property involved in this action, claiming the same under said mortgage.

"4. The said mortgage was given to hinder, delay, and defraud the creditors of the firm of Lovejoy and Glasscock, which said intent was known to and participated in by the defendants C. J. Lovejoy, H. C. Lovejoy, and A. C. Glasscock.

"5. The plaintiff had no knowledge or notice of such intent, and did not participate therein.

"6. The value of the mortgaged property was not in excess of the debts described in said mortgage.

* 7. At the time of the execution of the notes to the First National Bank of Emporia, and the National Bank of the State of Illinois, mentioned in the chattel mortgage set out in the petition, the defendant C. J. Lovejoy was a member of the firm of Lovejoy and Glasscock, and he was one of the principals of said notes, and not simply a surety therein.

" 8. At the time of the commencement of the action, the defendants Ridenour, Baker, & Co., the National Bank of the State of Illinois, Kuh, Nathan, and Fisher, the Alcott Packing Company, the Gauss-Shelton Hat Company, and Charles Nelson each had a valid attachment lien upon the property, or some portion of it, which was included in the chattel mortgage set out in the plaintiff's petition, and which was taken possession of by the receiver herein."

" CONCLUSIONS OF LAW.

" As conclusions of law based upon the foregoing findings of fact, the court finds that the chattel mortgage set out in plaintiff's petition is void; and that plaintiff has no right to or lien upon any of the funds in the hands of the receiver herein, and that the defendants Ridenour, Baker, & Co., the National Bank of the State of Illinois, Kuh, Nathan, and Fisher, the Alcott Packing Company, the Gauss-Shelton Hat Company, and Charles Nelson are entitled to said funds in the hands of the receiver, in accordance with their several attachments."

In the first opinion filed in this case, the court decided, reversing the judgment of the court below, that the chattel mortgage in suit must be considered as a security given by the firm of Lovejoy and Glasscock to the plaintiff bank, and that although it was executed by the mortgagors and nominal mortgagee for the purpose of hindering and delaying their creditors, still, as the plaintiff bank did not know of nor participate in the fraud, the mortgage was not void in the hands of the bank in favor of the subsequent attaching creditors of the mortgagors. Judgment was therefore rendered in favor of the plaintiff bank for the foreclosure of its chattel mortgage, and the application of the proceeds thereof to the payment of its debt.

Sluss and Stanley, for the plaintiff in error.

Kellogg and Sedgwick, and Brooks and Coffin, for the defendants in error.

HORTON, C. J. It was declared in the former opinion handed down (46 Kan. 707), among other things, that "the assent of the beneficiary in the deed may be given any time after the deed is executed, and, in the absence of proof to the contrary, will always be presumed: *Field v. Arrowsmith*, 3 Humph. 442; 39 Am. Dec. 185. 'It will be presumed, on the part of the beneficiaries under a deed of trust, in the absence of proof to the contrary, that each accepts the provisions made for his benefit, and such acceptance may be given at any time after the conveyance is made, unless renounced or waived; and such acceptance in fact will relate back to the day of registration: *Furman v. Fisher*, 4 Cold. 626; 94 Am. Dec. 210.'"

Upon this declaration of law, we held that the chattel mortgage of ten thousand dollars, executed by Messrs. Lovejoy and Glasscock, on the 30th of August, 1886, to secure the indebtedness due the First National Bank of Emporia, was a prior lien to the attachments on the goods of the firm made by their creditors several days after the filing of the mortgage, and upon such conclusion we reversed the judgment of the trial court, and directed judgment accordingly. This declaration of law and the reversal of the judgment of the trial court were vigorously assailed at the rehearing, upon the ground that the chattel mortgage was executed by the firm of Lovejoy and Glasscock with the intent to hinder, delay, and defraud their creditors, and therefore that it had no force or effect in favor of the bank until the bank actually assented to or accepted the mortgage; and upon this it is maintained, even if the chattel mortgage was valid between the parties, that it had no validity or force as to the attaching creditors until after the assent or acceptance of the bank, which it is alleged was subsequent to the levy of the attachments. Therefore it is urged that in any event the attachment liens were prior to the chattel mortgage lien. We concede, as stated by Burrill on Assignments, that the assent of a creditor to a void or fraudulent assignment or chattel mortgage must be actually given, and will not be presumed: Burrill on Assignments, 5th ed., p. 444, sec. 295. In *Benning v. Nelson*, 23 Ala. 801, it is said by Phelan, J., that "if a jury should find the fact to be that a deed was made by the grantor with intent 'to hinder, delay, and defraud creditors,' the law will not presume the assent of a beneficiary to such a deed, however much it might really be for his benefit, because this would be

to put it in the power of the grantor, by the aid of a legal presumption, to make valid his own fraudulent deed. Such a deed can only become valid by the actual assent of the beneficiary in some form. Until such actual assent, any creditor may levy or attach and hold in defiance of the deed." See also *Townsend v. Harwell*, 18 Ala. 301; *Stewart v. Spencer*, 1 Curt. 157; *Ashley v. Robinson*, 29 Ala. 112; 65 Am. Dec. 387; *Baldwin v. Peet*, 22 Tex. 708; 75 Am. Dec. 806.

We do not construe the findings of the trial court, however, when considered together, as showing that the chattel mortgage to the First National Bank was given to hinder, delay, and defraud the creditors of the firm of Lovejoy and Glasscock. It is true that the trial court made such a finding, or rather made such a general conclusion of law; but this general statement or conclusion is greatly modified by the further findings of the trial court, which stated that the First National Bank had no knowledge or notice of any intent upon the part of the firm of Lovejoy and Glasscock to hinder, delay, and defraud its creditors, and did not participate in any such fraud or intent, and that the value of the property embraced in the chattel mortgage was not in excess of the debts due to the First National Bank from the firm of Lovejoy and Glasscock, as described in the mortgage. From all the findings of fact, we must construe that the finding or conclusion of the trial court, that the chattel mortgage "was given to hinder, delay, and defraud the creditors of the firm of Lovejoy and Glasscock," meant that as the effect of the mortgage was to hinder and delay all the other creditors of the firm excepting the First National Bank of Emporia, such chattel mortgage was given to defraud. Every preference by an insolvent debtor to one creditor over another tends to hinder and delay the creditor not secured or paid, but we have decided time and again that "a debtor, even in failing circumstances, may prefer creditors if the same is done in good faith; and this, not only in the form of actual payment of money to the particular creditors preferred, but also in the form of the sale or appropriation of the property, or the giving of chattel mortgages to such creditors": *Tuttle v. Coldwell*, 80 Kan. 125; *Bailey v. Kansas Mfg. Co.*, 32 Kan. 78. It is well settled that an insolvent, as long as he retains a *jus disponendi* of his property, may appropriate it to the payment of his debts, and may prefer creditors. He may use all his property this way, or he may so use a part, and make a general assignment of the re-

mainder: *Lampson v. Arnold*, 19 Iowa, 479; *Dodd v. Hills*, 21 Kan. 707; *Randall v. Shaw*, 28 Kan. 419. See also *Winfield Nat. Bank v. Croco*, 46 Kan. 620, and the cases cited.

It is true that the chattel mortgage was made to the national bank while the firm of Lovejoy and Glasscock was insolvent, and that such preference or chattel mortgage operated to hinder and delay the other creditors in the collection of their claims; and we may further say from the findings that it was the intention of the firm of Lovejoy and Glasscock to prefer and pay the claim of the First National Bank in preference to the claims of the other creditors, even if such payment exhausted all of their property; but all of these things, under the frequent prior decisions of this court, do not affect the validity of the chattel mortgage, as it was executed in good faith to pay a *bona fide* debt, and the value of the property mortgaged was not in excess of the debt described therein and actually due from the firm of Lovejoy and Glasscock to the bank. Under these circumstances, as there was no fraud in fact within the prior rulings of this court, we repeat what we said before, that the assent of the First National Bank of Emporia to the chattel mortgage, although given after it was executed and even after the levy of the attachments, must be presumed, and such assent or acceptance in fact will relate back to the day of the filing of the mortgage. This is the law where the chattel mortgage is not fraudulent or void. But opposing counsel say that any deed, any chattel mortgage, or any assignment may be fraudulent, although made in consideration of an honest debt, and a large number of authorities are cited supporting this view. We concur in what is said in the authorities upon this matter, but hold that the findings of fact do not show that the chattel mortgage or transfer is fraudulent. In the cases where the transfers were fraudulent, but the considerations on honest debts, it appeared that the deeds or conveyances were made for the ease and favor of the debtor, or for some other purpose to aid and assist the debtor, rather than to protect and prefer the honest creditor. Thus it is said, in *Devries v. Phillips*, 63 N. C. 53: "It is well settled that a conveyance to secure a *bona fide* debt, or for a valuable consideration, will be fraudulent if made for the ease and favor of the debtor."

In *Shelley v. Boothe*, 73 Mo. 74, 39 Am. Rep. 481, it was ruled "that if it appeared from the circumstances attending the transaction that the preferred creditor was not acting from

an honest purpose to secure the payment of his own debt, but from a desire to aid the debtor in defeating other creditors, or in covering up his property, or in giving him a secret interest therein, or in locking it up for the debtor's own use and benefit, he will not be protected, and the sale would be fraudulent as to other creditors, because in such cases the fraud of the debtor becomes the fraud of the preferred creditor because of his participancy therein."

In *Smith v. Schwed*, 9 Fed. Rep. 488, it was decided "that if the purpose of the preferred creditor is, not to secure his debt, but to help the debtor cover up his property, he cannot shield himself by showing that his debt was *bona fide*."

In *Drury v. Cross*, 7 Wall. 299, the preferred creditors unlawfully combined together to raise the decree to an extent which prevented all fair competition at the sale of the property, and therefore, in that case, they were not protected. *James v. Railroad Co.*, 6 Wall. 752, was a similar case of actual fraud by certain parties to prevent fair competition at a sale.

In the case of *Cox v. Miller*, 54 Tex. 16, there is a discussion of whether the facts in that case show that the mortgage was given to secure a *bona fide* debt, or whether it was simply a colorable pretense resorted to for the purpose of covering up the property. The facts were set forth, among which were, that the property conveyed was greatly in excess of the pretended debt, and that the security was only a part consideration for the conveyance, and that the motive of the conveyance was to transfer to the grantee a large amount of property under the false claim that it really belonged to her, and for the purpose of putting it beyond the reach of creditors.

In *Thompson v. Furr*, 57 Miss. 478, it appeared that there was a secret agreement between the debtor and creditor, secured by a mortgage, that a one-half interest in the property conveyed was to be held by a secret trust for the benefit of the debtor, and was not to apply to the payment of the debt; and the consideration of the conveyance was falsely set at about double the actual debt, for the purpose of misleading the creditors, which, of course, would be a fraud upon the creditors in fact; and wherever there is a fraud in fact, notwithstanding a *bona fide* debt may be incidentally secured, it vitiates the transaction.

These and many other cases which are cited show that where the conveyance to a creditor having a *bona fide* claim is in ex-

cess of the actual debt, or is given to favor the debtor, or to merely cover up the property from other creditors, or to prevent a fair sale of the property, then the transaction, sale, or conveyance so fraudulently made to the creditor having the honest debt is void, at least as to the creditors not preferred: See *Wallach v. Wylie*, 28 Kan. 138; *Winstead v. Hulme*, 32 Kan. 568. But in this case the findings, taken as a whole, bear no such interpretation. The chattel mortgage, according to the findings, was not given to favor the insolvent firm, but to protect honest debts due the bank. The mortgage was not in excess of the debts secured, or given to cover up property, or to prevent a fair sale thereof.

The rehearing will be denied.

CHATTEL MORTGAGES — REGISTRATION NOTICE. — Registration of a chattel mortgage is constructive notice of its existence in any county in which the mortgaged property may be: *Grand Island etc. Co. v. Frey*, 25 Neb. 66; 13 Am. St. Rep. 478, and note.

FRAUDULENT CONVEYANCES — CHATTEL MORTGAGES TO ONE CREDITOR. — A chattel mortgage to secure future advances is not fraudulent as to other creditors: *First Nat. Bank v. Turnbull*, 32 Gratt. 695; 34 Am. Rep. 791, and note; *Tully v. Harloe*, 35 Cal. 302; 95 Am. Dec. 102, and note. A mortgage by a factor to his principal to secure goods appropriated by the former is not fraudulent as to other creditors if the employment still continues: *Blood v. Palmer*, 11 Me. 414; 26 Am. Dec. 547. See note to *Badlam v. Tucker*, 11 Am. Dec. 203. A chattel mortgage to secure a *bona fide* creditor is not fraudulent: *Bliss v. Couch*, 46 Kan. 400; *McFadden v. Ross*, 126 Ind. 341. A creditor in failing circumstances, under the insolvency laws of this state, may mortgage his entire property to one creditor and leave the rest unsatisfied: *Turner v. Iowa Nat. Bank*, 2 Wash. 192. A conveyance made in good faith to secure a *bona fide* creditor is not void as to other creditors: *Erdall v. Atwood*, 79 Wis. 1.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

TRISCONI v. WINSHIP.

[48 LOUISIANA ANNUAL, 45.]

CORPORATIONS—RIGHT OF STOCKHOLDERS TO SELL STOCK.—Stockholders in a corporation, including its directors who own stock, have the indisputable right to dispose of their stock at their pleasure.

CORPORATIONS—POWER OF MAJORITY OF STOCKHOLDERS TO WIND UP.—In the absence of any express statutory prohibition, a majority of the stockholders in a corporation, acting within the scope of their authority, may wind up its affairs and dissolve it, for reasons deemed by them sufficient; and the courts are powerless to inquire into and determine the expediency or sufficiency of the motives which dictated such action, although it entails a loss upon the minority of the stockholders.

CORPORATIONS.—**STOCKHOLDERS** are under no obligation to inform their co-stockholders of their intention to exchange their stock for the stock of another corporation, or of their intention to invest therein.

Leonard, Marks, and Bruen, for the appellant.

Bayne, Denégre, and Bayne, and Thomas J. Semmes and Legendre, for the appellees.

BERMUDEZ, C. J. The pith of the elaborate incriminating petition in this case is, that the plaintiff, as a stockholder of the Bienville Oil Works, has, in consequence of ill practices, in dereliction and violation of duty, of the directors of that corporation, aided and abetted therein by the representatives of an oil trust organization, sustained such grave injury that his shares (twenty-five) have become valueless.

He therefore prays for judgment against those directors and representatives *in solido* for the loss inflicted, namely, at least the value of the stock at par, viz., two thousand five hundred dollars.

The petition was accompanied by interrogatories on facts and articles, designed to elicit from the parties sued significant matters in support of the averments.

The defenses set up are, that the claim is one sounding in damages arising *ex delicto*, and, as such, is barred by the prescription of one year; that if injury was occasioned as charged, it was sustained by the mass of the stockholders alike, and by no one in particular, as distinguishable from that done to the others, and the plaintiff has no right of action; that the facts alleged are not true and not proved, and if so, that the directors, in their individual capacity, had the right to act as they did; that, officially, they merely executed the will of a majority of the stockholders, legally expressed, in suspending the further operating or working of the company, and disposing of its assets and discharging its liabilities by a liquidation of its affairs.

On behalf of the parties who are asked to be cited, as representing the oil trust, it is urged that they do not represent that organization, which has therefore not been reached by the process of the court; that, as holders of certificates issued by the concern, they cannot, under any circumstance, be held responsible, as is attempted to be done.

In an elaborate and well-prepared opinion, the industrious and able district judge has unfolded the condition of the affairs of the Bienville Oil Works Company from their incipency down to their discomfiture. He has passed on the merits of the case as to the directors; and as concerns the alleged representatives of the trust, he has held that it was not in court in this litigation, and declined to entertain the action against it, concluding that the certificate-holders would not be made liable, as was sought.

From the judgment thus rendered the plaintiff has appealed.

The *gravamen* of the complaint seems to be, that the directors of the Bienville Oil Works Company, by a secret and fraudulent combination and bargain with the American Oil Trust, an alleged unlawful organization, transferred their stock in the company to the latter to subserve its own interests, and in disregard of their obligations to the other stockholders, and in violation of their rights, have thus wrecked the company, thereby destroying the value of its stock other than that held by the trust.

The following are the salient facts of the case: In 1871 the Bienville Oil Works Company was organized in New Orleans.

For some time it was in a flourishing condition and did prosperous business, which, however, in the course of time, finally declined, so that the stock was worth sixty only on the 1st of July, 1886, when, some days later, a liquidation having been decided upon, it sank to little or nothing. In 1884 certain parties had created an American cotton-oil trust, the purpose of which was the acquisition of oil mills and refineries. Certificates of stock for upward of forty millions were issued, as a means to acquire the shares of stockholders in the oil factories in contemplation. By using the certificates in that manner, parties charged with representing the trust succeeded in acquiring a majority of the stock of the Bienville Oil Works Company, the stock remaining in their names, or in that of appointed persons, and not put in that of the trust. At this juncture, the stockholders, by the required majority, considering that it was their own interest, as well as that of the other stockholders who would not concur, to suspend absolutely, or stop permanently, the working of the mill, and to liquidate its affairs, did so ordain; and the directors acted in furtherance of that decision, the result being that the realized assets proved barely sufficient to meet the debts of the defunct corporation.

Indisputably, the stockholders of the Bienville Oil Works Company, including the directors, who necessarily were such, had the right to dispose, at their pleasure, of the shares which they owned in the corporation.

There exists no law which requires that a mercantile organization shall continue in business, however ruinous, when the majority of the stockholders, as fixed by the charter, or by the law when not so fixed, deem that it is their interest to go no further, and to wind up its affairs.

Section 687 of the Revised Statutes expressly authorizes three fourths of the stockholders of a corporation to dissolve it altogether.

The power and rights of such majority in this respect is placed beyond judicial supervision and control.

The discretion is absolute in them, and the minority have no occasion, legally, to complain. By their accepting the terms of the charter, and the laws under which the same was framed, and the body organized, the award of the majority becomes that of a power of the choice and selection of the stockholders, to which the minority must submit.

In the absence of any express statutory prohibition, a man-

jority of the stockholders may wind it up, for reasons by them deemed sufficient, the moment that they act within the scope of their legal attributions: 1 Morawetz on Private Corporations, 413, 474; *Oglesby v. Attrill*, 105 U. S. 610; *Bailey v. Birkenhead etc. R. R. Co.*, 12 Beav. 433.

The action of the majority in the instant case being lawful, as done with legal sanction and authority, this court is powerless to inquire into and determine of its expediency, or the sufficiency of the motives which prompted and dictated it, without transforming itself into the corporation, and acting as its board of administrators, which it surely cannot do.

No doubt the shares owned by the plaintiff, and purchased at a premium, became depreciated, and went down gradually, so as finally to be reduced to nothing, but for this he has no one to blame but himself.

He could have done as the other stockholders did, — exchanged them for certificates; but he has not chosen so to do. Had he done so, he would have realized the fabulous profits which he says they have, and which he regrets not having reaped.

If he knew of the opportunity, he should have availed himself of it; and if he knew not of it, it is his own misfortune. He should have been more vigilant, and not slept on his chances.

Surely, purchasers of stock are under no obligation to admonish, or give notice, in advance, of their intention to invest, for this would be detrimental to their interest.

The evidence establishes that after the transaction had apparently terminated, the plaintiff proposed to sell his stock, and was offered thirty per share, which he declined, asking for more.

Had he accepted, he would not be to-day an unfortunate and improvident loser, whose condition cannot be improved.

This view of the case dispenses us from considering the pleas of prescription and no right of action set up by the defendants.

Judgment affirmed.

CORPORATIONS — POWER TO WIND UP AFFAIRS AND RETIRE FROM BUSINESS. — A corporation has a right, with the consent of all of its stockholders, to sell its plant and retire from business: *Holmes etc. Mfg. Co. v. Holmes etc. Metal Co.*, 127 N. Y. 252; 24 Am. St. Rep. 448, and note; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; 99 Am. Dec. 300, and extended note discussing this subject.

CORPORATIONS — RIGHT OF STOCKHOLDER TO TRANSFER STOCK. — A stockholder may make a valid transfer of his stock: *Commercial Bank v. Kortwright*, 22 Wend. 348; 34 Am. Dec. 317, and note; *State Bank v. Cox*, 11 Rich. Eq. 344; 78 Am. Dec. 458; *Small v. Saloy*, 42 La. Ann. 183. See extended note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 864.

STATE v. ROUBLES.

(43 LOUISIANA ANNUAL, 200.)

EMBEZZLEMENT — INDICTMENT — NECESSARY AVERMENTS. — An indictment for embezzlement must allege a fiduciary relation sustained by defendant, as clerk, agent, servant, or otherwise, made by the statute an element of the offense, and that, by virtue of such relation, he took into his possession the property which he is charged with embezzling, the ownership of which must be alleged with the same degree of certainty required in an indictment for larceny.

Laurent and Dupré, for the appellant.

Walter H. Rogers, attorney-general, for the state.

BREAUX, J. An information was filed against the defendant, charging him with having embezzled the amount of a draft he had been intrusted with by one William Burr, for the purpose of its collection, which he collected and feloniously appropriated to his own use.

He was tried, convicted, and, a few days later, was sentenced to imprisonment in the penitentiary for twelve months.

Errors are alleged in a motion in arrest of judgment, which are also made a bill of exception.

It is contended that the information is deficient in matter of substance in not charging that the defendant was in the employ of the person by whom he was intrusted with the collection of the draft; that it was not sufficient to allege that he had been intrusted with the collection, but that the capacity in which he was intrusted, whether as clerk, agent, or servant, should have been stated.

In deciding the questions presented, we must consult the statutes of our own state and the decisions of our courts.

Those of other states are not always safe guides, owing to the varying terms of the statutes creating the offense.

We copy from the statutes the words applying in this case: "Any . . . agent . . . servant who shall wrongfully use, dispose of, cancel, or otherwise embezzle any money, bill, note, check, order, draft, or any other property which he shall have

received for another, or for his employer, principal, or bailor, or by virtue of his . . . trust or employment, or which shall have been intrusted to his care, keeping, or possession by another, or by his employer, principal, or bailor, . . . upon conviction thereof, or of having aided or abetted in the commission thereof, or having been accessory, etc., shall suffer."

The offense may be described as the embezzling of property designated by the statute by the person and under the circumstances specified therein.

It is the "fraudulent appropriation of property by a person to whom it has been intrusted."

Although the defendant was not in the regular employment of the prosecuting witness, the single act with which he is charged may have created the relation of principal and agent, or employer and servant.

The bare temporary charge, the intrusting him with the collection of the draft, may have made him, *quoad* the collection, the agent.

In the matter of contracts, the party who is charged with the responsibility of representing another is termed the agent; the party represented, the principal; in non-contract law, master and servant.

"A servant is commonly an agent; and ordinarily an agent is a servant. In the law of contracts, the related parties are usually termed principal and agent; in the non-contract, master and servant. In both there may be an agent or servant by *entropel*, as well as by direct appointment": Bishop on Non-contract Law, 694.

To constitute an agency, it is not necessary that there should be more than one act authorized, or more than one act performed, "unless this single act created the relation": 2 Archbold, 578.

In the case of *State v. Jones*, 9 La. Ann. 307, the defendant was indicted under the embezzlement statute of March, 1845.

There was an agreement between him and the prosecuting witnesses to purchase property on joint account. The latter placed a note in his hand to be delivered to the owner of the property, in payment of his half of the price, which note the defendant did not deliver, but negotiated.

"The agreement between Holmes and Jones to purchase the schooner on joint account did not deprive the transaction of the character of agency, undertaken by Jones for Holmes in

purchasing the one-half interest in the schooner for him." See also 1 Bishop's Crim. Law, Eng. ed., 347.

It is contended by the defendant "that it was not sufficient to allege that he had been intrusted with the collection, but that the capacity in which he was intrusted, whether as clerk, agent, or servant, should have been stated."

There can be no question that the defendant's fiduciary character must be averred.

It is not necessary, however, to allege the particular word of the statute, for the cases on embezzlement seem to employ them almost interchangeably, especially "clerk" and "servant," but the capacity "in which he was intrusted, whether as clerk, agent, or servant, should be alleged. The allegation must contain a word found in the statute, else it will ordinarily be defective": 2 Bishop's Crim. Law, 349; 2 Bishop's Crim. Proc. 323.

The information should charge "that the defendant stood in some fiduciary relation to another person named within the terms of the statute, as that he was the other's 'servant,' or clerk, or 'treasurer,'" or some other word should be used equally as expressive and within the meaning of the statute.

None of these words are alleged in the information, nor any equivalent word, only that the defendant was intrusted. It should have been alleged that by virtue of his employment, or by virtue of the trust as clerk, agent, or servant, he received and took into his possession. The confidence violated by the "agent," clerk, or "servant" must be set forth. "There must be some of the fiduciary relation sustained by the defendant, and made by the statute an element of the offense. The fiduciary relation is not alleged. The pleader would not be allowed, in framing his indictment, to make, under all circumstances, his own choice of terms," says Bishop on Criminal Law (vol. 2, p. 332). "There are various terms, such as 'agent,' 'servant,' 'clerk,' and the like, employed in them to designate the classes of persons within their penalties. If the pleader is satisfied the defendant is either an 'agent,' a clerk, or a servant, he selects the term which pleases him best; then, should the proof sustain the allegation in this respect, all is well, though it should appear that one of the other statutory terms would be equally appropriate": 2 Bishop's Crim. Law, 334.

We will not rest our decision on the ground just considered.

We will examine the next presented, viz., "that it is not

stated who was the owner of the draft, nor that it was to be collected for the account of the prosecuting witness."

The ownership of the property embezzled must be alleged, or an equivalent term used.

"The ownership must be alleged, and with the same accuracy and after the same rules as in an indictment for common-law larceny": 2 Bishop's Crim. Proc. 321; 2 Archbold, 564.

"Unless the pleader be relieved from this exactness by special statute, the goods and ownership must be set out with the same completeness as in larceny": 2 Wharton, sec. 1945.

The words of our statute, viz., "Any servant or agent, and who shall wrongfully use . . . money, etc., intrusted to his care, keeping, or possession by another," do not relieve from the necessity of alleging the ownership. It is not alleged to whom the draft belonged, nor for whose account it was collected.

It cannot be presumed that the prosecuting witness is the owner because of the allegation that the defendant was intrusted with its collection by him.

We have not hastily reached the conclusion before expressed, for those who violate confidence in matter of money should be punished; but we will not decide that an information is legal, drawn under a statute adopted to punish any "servant, clerk, broker, agent, consignee, trustee, attorney, mandatory, depositary, common carrier, bailee," when it is not alleged that the draft nor the amount collected belonged to the prosecuting witness, nor that it was received and its amount embezzled by virtue of any of the relations above expressed.

Because (quoting from the information) "he was intrusted by one Willie Burr with the possession of a certain draft for the sum of twenty dollars on James Nicholson, of Washington, Louisiana, for the purpose of collecting said amount, and having collected said amount, the defendant did feloniously and fraudulently embezzle," etc., it does not necessarily follow that he was intrusted within the words or intendment of the statute.

It is therefore ordered, adjudged, and decreed that the judgment and sentence appealed from be annulled and quashed, as not good in law, and that the verdict of the jury be set aside, and the defendant remanded in custody subject to the orders of the district court of the parish of St. Landry.

EMBEZZLEMENT — INDIOTMENT — NECESSARY AVERMENTS. — As to the necessary averments in an indictment for embezzlement, see the following cases: *Commonwealth v. Butterick*, 100 Mass. 1; 97 Am. Dec. 65, and note; *Stropes v. State*, 120 Ind. 562; *State v. Jannson*, 74 Iowa, 602; *State v. Sullivan*, 43 Kan. 566; *State v. Griffith*, 45 Kan. 142; *Huffman v. State*, 89 Ala. 33; *Colvin v. State*, 127 Ind. 403; extended note to *Collins v. State*, 98 Am. Dec. 126.

SUCCESSION OF ARMANT.

[43 LOUISIANA ANNUAL, 310.]

WILL — SIGNATURE. — AN OLOGRAPHIC WRITING, containing testamentary dispositions, offered for probate as a will, having a caption beginning "Testament d'Aglæe Armant," but without any signature at the end, is void as the will of Aglæe Armant, because it does not contain such signature as is required to an olographic will.

WILL, OLOGRAPHIC — SIGNATURE. — Testamentary dispositions following the signature of an olographic will are invalid, although it does not affect the validity of the will that superfluous or useless words connected with the signature follow it.

WILL, OLOGRAPHIC — SIGNATURE. — Where the name of a testatrix does not appear at the end of a writing claimed to be her will, but is written in the beginning thereof, without the distinctive characteristics attached to her signature to other documents which she invariably signed at the end, the writing will fail as her will, on the ground that the name was not intended as a signature, and that, whether so intended or not, it was not at the end of the writing, as required by law.

WILLS — FORMALITIES PRESCRIBED BY LAW FOR EXECUTION OF OLOGRAPHIC WILLS must be strictly observed, or the will is void.

T. J. Semmes and Legendre, for the appellant.

Sims and Poché, for the appellee.

FENNER, J. "Testament d'Aglæe Armant." Such is the caption appearing at the beginning of an olographic writing containing testamentary dispositions, and offered for probate as a will, but without any signature at the end; and the question is, Does this caption import such a signature as is required to an olographic testament? Before the adoption of the Napoleon Code, an ordinance of Louis XV. provided that olographic testaments should be "entirely written, dated, and signed in the handwriting of him or her making them."

Under this provision, the jurisprudence of France required, in the language of Pothier, that "la signature doit être à la fin de l'acte, parcequ'elle en est le complément et la perfection; c'est pourquoi un *postscriptum* après signature est nul, s'il n'est pas aussi signé": Poth. Don. and Test., c. 1, art. 2, sec. 2. Thus interpreted, the same provision passed into the

Napoleon Code. The commentators on the code and the French tribunals have uniformly adopted the same interpretation. The only exception made (and that by a divided opinion) is, that the date may follow signature, and that words written after the signature which are superfluous may be disregarded. Thus in the case of *Veuve Guyot*, the will ended thus: "Fait par moi Pauline d'Espinose, Veuve Guyot, qui ai signé après la lecture et méditation." The court maintained the will, on the ground that the name was intended as a signature, and that "the two lines which follow the signature can have no influence on the form of the testament, which was perfect when they were written": *Jour. du Palais*, 20 Apr. 1812. It is useless to cite the French commentators; they all agree that testamentary dispositions following the signature are invalid.

The following is a summary of the French doctrine and authorities as given by an annotator of the code: "Although the natural place of the signature be at the end of the act, because it expresses the final approval given by the testator to the dispositions of last will which he has made, it is, however, admitted that the writing by the testator of his name toward the end of the act may be considered as a signature if it is placed after all the dispositions constituting the testament. It does not matter that after the name there may follow some words connected with it, if the words thus following are superfluous or useless"; quoting *Cassation*, 20th April, 1813; *Merlin Rep.*, verbo *Signature*, sec. 3, art. 7; *Toullier* on Art. 970, French Code; *Marcadé* on Art. 970, French Code; 4 *Demante*, No. 115; 4 *Massé and Vergé*, p. 96, sec. 438; 7 *Aubry and Rau*, p. 108, sec. 668; *Vazeille* on Art. 970, No. 4; 2 *Grenier and Bayle*, No. 228; 4 *Sé. Espes-Lescot*, No. 1010; 21 *Demolombe*, No. 114; *Coin Delisle*, Art. 970, No. 42; 3 *Troplong*, No. 1494; 13 *Laurent*, No. 227. See also *Cress* on *Successions*, who takes the same view.

Marcadé, who is as liberal as any, in commenting on a testament ending thus, "Fait et signé par moi Michel Francois, Walla, le 20 Dec., 1808," says: "The question must be determined according to the circumstances of fact. If the names are accompanied with the ordinary paraph of the party; if, having no paraph, the party has taken care to write the name in more pronounced character than the rest of the writing; if the name, though written in like character, is that of a party whose acts generally have been signed in ordinary writing and by placing the name in the body of the concluding phrase,—

one might say that it was a signature, and that the testament was valid. But if, on the contrary, the name thus written was without a paraph, and in no manner distinguished from the rest of the writing, and comes from a party who has always attached to his acts an independent signature, one would say this was not a signature": 4 Marc. 10. Applying these tests, we find that the name of this testatrix is written without a paraph, though the evidence shows that she usually, but not universally, employed one; that the name is written without any distinctive characteristics; and that, as appears from every document produced, she invariably attached an independent signature at the end. Moreover, it seems to us that the coupling of the "d" with the name in itself excludes the idea of its being intended as a signature.

Thus under French jurisprudence, this will would fail to stand, for two reasons: 1. Because the writing of the name was not intended as a signature; 2. Because, whether so intended or not, the signature was not at the end of the act.

This jurisprudence was extant and well established when, in 1825, the article of the French code was copied into our own. We think it to be a fair presumption that the framers of our code, familiar with the interpretation of the same language, both prior to and subsequent to the Napoleon Code, must have intended and expected that our own article should receive the same interpretation, particularly as it conforms to the common and customary meaning attached to the word "signature," as well as to the definitions thereof in all standard dictionaries.

Why should we depart from it?

It is true that in interpreting a like provision of the first English statute of frauds, an English court held that writing the name at the beginning of the testament supplied the absence of signature at the end; and some other courts, with that subjection to precedent which characterizes that system, followed the decision. But though following it, some of the judges intimated that if it were *res nova* they would decide differently, and the doctrine was condemned by sound legists. Dr. Browne, in his work on civil law, and Dr. Christian in his edition of Blackstone, criticise it severely: Browne on the Civil Law, 278, note 16.

And such was the prevalent dissatisfaction that an act of Parliament was passed to amend the statute so as expressly to require the signature to be at the bottom of the testament.

We were at first much impressed with the clear proof made that the deceased intended this paper to be her testament. But there is no more doubt that she intended the invalid nuncupative codicil to be her testament. Yet, as the latter was attested by women who are incompetent testamentary witnesses, no one claims its validity. And so if the olographic will is not signed as required by law, her intentions cannot save it.

The question is, not whether she intended this paper to be her will, but whether it is a will clothed with the forms of law. An olographic like every other testament is a solemn act. It matters not how clearly it conveys the last wishes of the decedent; if it is not clothed with the forms prescribed, it is null.

Even apart from the name's not being at the end of the testament, we think the proof does not show that she intended to sign at all. It simply shows that she did not think or know that a signature was essential. If she had known that it was necessary that the testament should be signed, it is impossible to conceive how, in so important a matter, she should have acted so ambiguously and so differently from the course universally pursued by her in signing other acts and documents of every description. The simple fact is, she did not know a signature was necessary, and therefore did not sign. Her mistake in this respect is unfortunate in the interests of justice, but it cannot save the will.

The remaining contention of appellant, that the testatrix had signed the will at the end of the act, and that her signature had been cut off by some third person, is so inconsistent with the one just disposed of that it hardly lies in the mouth of appellant to urge them both. But, moreover, it is unsupported by proof, and has nothing to rest on.

Judgment affirmed.

WILLS — OLOGRAPHIC — NECESSITY FOR SIGNATURE. — An olographic will without a signature at the bottom is invalid: *Waller v. Waller*, 1 Gratt. 454; 42 Am. Dec. 564, and note; *Ramsey v. Ramsey*, 13 Gratt. 664; 70 Am. Dec. 438, and note.

WILLS — OLOGRAPHIC. — Rules concerning execution must be carried out strictly: *Note to Barbour v. Bayon*, 52 Am. Dec. 592.

**CLINE v. CRESCENT CITY RAILROAD COMPANY AND
CITY OF NEW ORLEANS.**

[48 LOUISIANA ANNUAL, 827.]

MUNICIPAL CORPORATIONS — LIABILITY FOR DEFECTIVE STREETS. — A city must keep its streets and sidewalks in good repair, so as to prevent accident or injury to persons or their property; and when injury is caused by the fault of a municipality having previous knowledge of the bad condition of the street or sidewalk, without any contributive act on the part of the party injured, whether by commission or omission, the city is liable.

MUNICIPAL CORPORATIONS — LIABILITY FOR NEGLIGENCE OF RAILROAD USING ITS STREETS. — A city may legitimately grant to a railroad company the privilege to build tracks and run cars on its streets, and may impose the burden it owes of keeping them in good order and repair, so as to avoid injury, upon the company; but the imposition upon and acceptance of such burden by the company will not relieve the city from liability, should the company fail to comply with its obligations, and, by its negligence, inflict injury upon one using due care and not guilty of contributory neglect. In such case, both the city and the company are primarily liable; and when the city is mulcted, it may recover against the company in the same action, if both are made parties, or in a distinct suit.

CONTRIBUTORY NEGLIGENCE, WHEN A PROXIMATE CAUSE OF INJURY, bars the right of recovery.

RAILROADS — LIABILITY FOR INJURY FROM DEFECTIVE TRACK IN STREET. — A railroad company operating in the streets of a city is bound to keep its road, track, and rails in proper order and condition to prevent injury to travelers on the street, independent of contract with the city to that effect; and it is liable for an injury proximately caused by its negligence in this respect, when the party injured was not guilty of contributory negligence.

TRAVELERS, WHO ARE NOT. — TRAVELERS ON CITY STREETS USING TRACKS OF RAILROAD operating therein are not trespassers.

CONTRIBUTORY NEGLIGENCE IS A WANT OF THE EXERCISE OF ORDINARY CARE, which proximately causes the injury complained of.

NEGLECTENCE — RAILROADS — LIABILITY FOR INJURY FROM DEFECTIVE TRACK IN STREET — PROXIMATE CAUSE. — A railroad company operating in the streets of a city is liable for an injury to a traveler by coming in contact with a loose rail and protruding spike in its track, due to its negligence, although the negligence of the city in leaving a dangerous hole in the street may have primarily and remotely caused the fall and accident which resulted in the injury.

MUNICIPAL CORPORATION — NEGLIGENCE — PROXIMATE CAUSE. — The neglect of a city to keep its streets in proper condition for safety does not render it liable, when such negligence is the remote, but not the proximate, cause of the injury.

John M. Bonner, Farrar, Jonas, and Kruttschnitt, and Carlton Hunt, for the appellants.

B. R. Forman, for the appellee.

BERMUDEZ, C. J. This is a suit in damages, alleged to have been sustained in consequence of the death of the husband of plaintiff and father of her minor daughter, occasioned by the gross fault and negligence of the defendants, who are sought to be held liable *in solido*.

The case was once before this court (41 La. Ann. 1051) on exceptions by the railroad company, which had been maintained below, but which were overruled on appeal, the case being remanded for further proceedings.

The fundamental averment is, that on January 21, 1889, John Cline, husband and father aforesaid, was driving a vehicle gently on Calliope Street, between St. Charles Avenue and Prytania Street, in this city, with due care and caution, without any negligence on his part, ignorant of the dangerous condition of that street, when the right fore wheel of his wagon got into a deep hole by the side of the track of the railroad company, ran into a loose rail, was suddenly and unexpectedly stopped thereby; that by the shock thus occasioned, Cline was violently thrown from the vehicle against the loose rail, and against a spike protruding therefrom, the fall resulting in the fracture of his skull, and in his consequent death, after suffering great agony of pain in body and mind.

It is specially charged that this condition of the street was well known to the officers of both defendants, and especially the railroad company, or if not known, could with reasonable diligence have been known, and the danger averted, had they done their duty before the happening of the accident.

The prayer is for thirty thousand dollars damages.

The railroad company excepted, but its objections were disposed of, as has already been stated.

The city pleaded the general issue, and averred a contract with the railroad company, whereby it had agreed to keep the streets on which it passed in proper condition and order, and that, were judgment rendered against the city, it should recover a like judgment against the railroad company, which was thereby called in warranty, but on whom no service was made.

The railroad company answered by a general denial also, pleading that the plaintiff was no party to the contract alleged by the city, and cannot sue under it, and that said contract contains the remedy agreed on, in case of violation, which is exclusive of all others, namely, coercion to specific performance by the city.

It further avers that its railway was properly constructed; that since then it was, on Calliope Street, put out of order by improper drainage, and consequent accumulation of water; that another cause of the condition in which it was put is the constant heavy traffic through that street, and the illegal loads hauled over it; all of which made it impossible to keep said street in better condition, and that the condition in which it was on the day of the alleged accident was not due to any fault or omission of this defendant.

The case was tried by a jury, who returned a verdict for seven thousand five hundred dollars against both defendants, with a reserve of the rights of the defendants as against each other. Judgment was accordingly rendered.

Hence this appeal by both defendants.

The circumstances of the accident may be considered as having been substantially proved; but has the evidence established that the city of New Orleans and the railroad company are equally liable? and that, even in default, the plaintiff himself is not guilty of contributory negligence sufficient to defeat his right of action against both or either of the defendants?

The law governing a case of this description, and the principles upon which it rests, are plain enough; but it is not always easy to apply them to occurring cases, which generally differ in some significant matter of detail.

The testimony is ordinarily conflicting, and such that it is difficult to arrive at the real facts in dispute.

In the present instance, the law and principles have been, to a considerable extent, expounded, when the case came up on the exceptions; but the averments of the petition were taken for true in dealing with the preliminary defenses, and had the plaintiff established on the trial, after the remanding of the case, all the facts averred, full recovery could have taken place, leaving out of view in this statement the *quantum* of damages.

There can be no doubt that a city is under the obligation of keeping its streets, sidewalks, etc., in good order of repair, so, at least, as to prevent serious accident or injury to persons using the same, or to their property; and that where such happen by the heedlessness or fault of the corporation having previous knowledge of the bad condition of the street, sidewalk, or particular dangerous spot, and without any contributive act, whether by commission or omission of the party afflicted, the corporation can be held to repair the damage occasioned.

It is also well settled in law and jurisprudence, that although a municipal corporation, by virtue of the right with which it is vested of control over its streets, can legitimately grant to a railway company the privilege to build its track and run its cars on the same, imposing upon it the burden of keeping them, from curb to curb, or rail to rail, in good order and condition so as to prevent injury, as it is itself bound to do, the concession of the grant and the imposition and acceptance of the burden do not relieve the corporation from liability, should the company fail to comply with its obligations, and by its negligence and default inflict injury to one using due care and precaution, and not guilty of contributory neglect.

It is also well recognized that a party injured has a double action against both the city and the railroad company, regardless of the contract between them, holding each as primarily responsible, and that when the city is mulcted, it has the right to recover against the railroad company in the same action, if both are defendants, and the city has properly brought in the railroad company by a call in warranty, or a distinct suit.

It is likewise firmly established that an injured party, in order to recover, must be shown not to have been guilty of any contributory negligence, — that is, the careless commission or omission of acts which, if prudently done or not done, would have avoided the occurrence of the injury occasioned by the heedlessness of another, and which is considered as the proximate cause of the accident.

The evidence in this case establishes the stubborn facts of the existence of the hole, of the loose rail and protruding spike on the side, the fall of the man, the fracture of his skull on the rail and spikes, and his consequent destruction and death.

Certainly, there are three parties to this accident who may be charged with negligence.

As against the driver, it is claimed that the hole was visible, as it was four feet long, two feet deep, and four inches wide, and it was about three o'clock, P. M., when the wheel of his wagon got into it; that he must have seen it and should have seen it; that if he did not see it, it was because he did not do his duty in looking forward; that if he saw it, he should have avoided it by stopping in time and taking a different course; that if he did not see it, it was his own fault; that he was guilty of contributory negligence, and that his representatives have no right to complain and seek indemnity through him.

As against the city, it is urged that it was bound to keep its streets in good order and condition; that had it done so, the hole would never have existed, or would have been stopped in time, and the accident would not have happened; that its defense of penury is bad; and that its contract with the railroad company did not exonerate it from the obligation.

As against the railroad company, it is pressed that it was bound to keep in like good order and condition the streets through which it ran its tracks and cars, whether under the contract, or independent of any agreement to that end; that surely it was bound to keep its tracks, rails, and spikes, designed to fasten the same down, so that no injury could be produced thereby to any traveler on the streets, although using the same with more or less usual inattention, and that if the condition of the loose rail and protruding spikes be the proximate cause of the death, it is liable in damages.

It cannot be reasonably supposed that the driver knew of the condition of the hole, saw it, and intentionally ran the fore right wheel of his wagon into it. The size and appearance of the hole were not such as unnecessarily and unavoidably must have provoked attention. The hole was such as any one driving on the track may not have noticed. The deceased had a right to drive on the track. The right of way or franchise conceded by the city to the railroad company did not deprive the deceased, or any one else, running vehicles on the street from the right of using any part of the street, or the track itself. There was no trespass.

But even if the driver had seen the hole and had not avoided it, nothing shows that he knew of its dangerous character. Could he be really charged with negligence, it would not be with that sort of negligence technically known as contributory, which is the commission or omission by the party of an act amounting to a want of ordinary care as concurring or co-operating with the negligent act of another, and which is the proximate cause or occasion of the injury complained of. To constitute contributory negligence, there must be a want of ordinary care and a proximate connection between that and the injury: Beach on Contributory Negligence, 7.

No doubt the city was in default. The hole had been in the condition known for more than two weeks. Accidents had occurred, but which had produced no grave injury worth being judicially complained of. The city must be considered as having had notice of the condition of the hole, and it is no

excuse for it to plead poverty, or shift the responsibility on the railroad company so as to avoid liability. The city should have notified the company; but primarily it was bound to put the hole in a condition not to be dangerous. It should be blamed for not having so done.

Nevertheless, the heedlessness of the city in the premises, however censurable, does not fasten upon it the responsibility in damages sought to be saddled upon it.

The falling of the right fore wheel of the wagon into the hole caused a shock; that shock dashed the driver from the vehicle, and he was flung with some violence. The evidence shows that several other travelers on the street and on the track had met with similar accident, had been thrown from their carts on the pavement, but none were killed or dangerously hurt. The unfortunate fellows were more or less bruised, and that was all, although much in itself to some extent.

In the present instance, the driver would have sustained no further injury had it not been that a condition of things existed at the time which did not exist previously, when the other accidents occurred. The city is not sued now for the suffering which the driver sustained in consequence of bruises inflicted by the fall. It is sued for damage suffered in consequence of the death of the driver, and the fact is, that the city is not guilty of any negligence which was the proximate or direct cause of that catastrophe.

The responsibility must rest on other shoulders. The defenses announced of the railroad company have no bottom to stand upon. Conceding all the facts averred, which would seem to tend to show a condition of things amounting somewhat to vis major or uncontrollable circumstances, the railroad company cannot be heard to say that they were of such a character as to prevent it from stopping the hole, and preventing it from being dangerous, — from nailing down securely the loose rail, and fastening steadily the protruding spikes. The plaintiff could sue, independent of any contract between the city and the company.

Though true it be that the hole was somewhat dangerous, and was the cause of the shock which occasioned the fall, the certainty is, that but for the loose rail and protruding spikes, the traveler would not have met with an untimely and sudden death. He would have fallen, would have received some bruises, for indemnifying which he would not probably have sued either the city or the company; but he would not have been killed.

The cause, *causa causans*, of the death was the violent coming in contact of the skull of the deceased with the loose rail and the protruding spikes, in consequence of which the skull was fractured or perforated, with almost instantaneous death as the result.

If, under the facts and the law, this railroad company cannot be held responsible, but must be excused, what is the case in which a company can be held liable for omissions of duty which are the direct cause of irreparable calamity?

In the consideration of this case, and the law and jurisprudence applicable to it, we have consulted with advantage a new work, just issued, on roads and streets, by Elliott, which is quite commendable.

It is very difficult to compute the damages to which the plaintiff, in her own right and as tutrix, is entitled for the loss sustained by the death of the husband and father.

When she opened his estate, she produced the certificate of the coroner to prove the death, and she established from it that he was sixty-two years of age.

It is claimed that, according to the life insurance time tables, he would probably have lived twelve years more, and it is insisted that his earnings during that time would have amounted to a considerable sum, and that this amount, at least, should be recovered in this action.

It may be, and it may not be, that the party would have lived that time. He might have died the next day, the next month, the next year, by disease, or some accident, or some other unforeseen cause.

His earnings were small. The evidence in that respect is entirely unsatisfactory and unreasonable. The fact is, that he was a wagon-driver, doing jobs; but he had to provide for a stable and shed for his horse and wagon, for feed for the animal; he had to supply his own wants. If he earned \$1.50 or \$2 a day, he could have saved very little to provide for his wife and daughter, who, it is to be presumed, owing to their age and condition in life, must have been able to support themselves to some extent.

It is extremely doubtful that the earnings of the poor man could have amounted, in the end, to one thousand dollars, but to avoid doing his representatives any injury, we will allow that sum, thinking it ample.

It is therefore ordered and decreed that the verdict of the jury, and the judgment thereon, as regards the city of New

Orleans, be quashed and reversed, and that there be judgment in favor of the city, with costs in both courts; and it is further ordered and adjudged that the verdict, and judgment thereon, against the railroad company be amended so as to reduce the amount to one thousand dollars, with interest as allowed, and costs below, and that thus amended said judgment be affirmed, at appellee's costs.

MUNICIPAL CORPORATIONS — LIABILITY FOR DEFECTS IN STREETS. — Where the charter of a municipal corporation imposes upon it the duty of keeping its streets in repair, it will be liable to one injured by its failure to perform such duty: *Maus v. Springfield*, 101 Mo. 618; 20 Am. St. Rep. 634, and note; *Browning v. Springfield*, 17 Ill. 143; 63 Am. Dec. 345, and extended note; note to *Baxter v. Winoski Turnpike Co.*, 52 Am. Dec. 92; *Hampson v. Taylor*, 15 R. I. 83. See *Mulvane v. South Topeka*, 45 Kan. 45; 23 Am. St. Rep. 706, and note.

MUNICIPAL CORPORATIONS — LIABILITY FOR NEGLIGENCE OF THIRD PERSONS. — If a city assumes to grant a person the right to place an obstruction in a public street, it will be liable for any injury caused thereby through the negligence of the party maintaining the obstruction: *Cohen v. New York*, 113 N. Y. 532; 10 Am. St. Rep. 506, and note; *Orange City v. Larkin*, 40 Kan. 206; 10 Am. St. Rep. 186. A city will be liable for the negligence of the employees of a street-railway who fail to properly guard a defect in a street: *Blessington v. Boston*, 153 Mass. 409. A township will be liable in damages to one injured through a defect in a bridge built by a railroad and substituted for the highway at that point: *Dalton v. Upper Tyrone Tp.*, 137 Pa. St. 18.

NEGLECT — CONTRIBUTORY, AS A BAR TO RECOVERY. — When the contributory negligence of the plaintiff is the proximate cause of the injury, there can be no recovery: *Corcoran v. St. Louis etc. R'y Co.*, 105 Mo. 399; 24 Am. St. Rep. 394, and note; note to *Johnson v. Hudson River R. R. Co.*, 75 Am. Dec. 383; extended note to *Henry County Turnpike Co. v. Jackson*, 44 Am. Rep. 276-279.

STREET-RAILROADS — DUTY TO KEEP TRACK IN REPAIR. — A street-railway is liable for its negligence in not keeping its tracks in safe condition, to one injured thereby: *Woodman v. Metropolitan R. R. Co.*, 149 Mass. 335; 14 Am. St. Rep. 427, and note; but the complaint in such an action must aver that the plaintiff was in the exercise of due care at the time of the accident: *Cowan v. Muskegon R'y Co.*, 84 Mich. 583.

STREET-RAILROADS — RIGHT OF PUBLIC TO USE TRACKS OF. — One who enters upon the tracks of a railroad laid in the streets of a city is not a trespasser: *Louisville etc. R'y Co. v. Phillips*, 112 Ind. 59; 2 Am. St. Rep. 155, and note; but the right of such person is subordinate to that of the company, and he must use due care to avoid danger: *Warner v. People's St. R'y Co.*, 141 Pa. St. 615; *Fenton v. Second Ave. R. R. Co.*, 126 N. Y. 625; *Thomas v. Citizens' etc. R'y Co.*, 132 Pa. St. 504.

GARDEMAL v. McWILLIAMS.

[43 LOUISIANA ANNUAL, 454.]

LIBEL. — IN PRIVILEGED COMMUNICATIONS, THE PARTY MAKING THEM IS PROTECTED from the infliction of damages, unless the occasion making them privileged was used as a means of inflicting a willful and malicious injury upon another.

LIBEL. — OCCASION WHICH RENDERS COMMUNICATIONS PRIVILEGED REBUTS ANY INFERENCE OF MALICE arising from a statement prejudicial to another, and casts the burden upon him to prove malice in fact, and also that the party making them was actuated by motives of personal spite and ill-will, independent of the occasion on which the communications were made.

LIBEL. — PRIVILEGE, TO WHOM EXTENDS. — Communications made in the course of duty in judicial or legislative proceedings are absolutely privileged, and free from liability, civil or criminal. This privilege extends to parties, counsel, witnesses, jurors, and judges in judicial proceedings, and to members and attaches in legislative proceedings.

LIBEL. — PRIVILEGED COMMUNICATIONS — JUDICIAL PROCEEDINGS — BURDEN OF PROOF. — If an occasion, such as a judicial proceeding, exists which renders the communication complained of privileged, the only inquiry is, whether or not the matter was pertinent to the occasion. If it was, this is an absolute defense, and depends in no respect upon the good faith of the party complained of. The burden of proof is on the complainant to show want of occasion, or if it existed, that the matter was not pertinent, and that the communication was made with malice in fact, with design to injure the complainant.

Felix Voorhies and J. Hamilton Rills, for the appellant.

Sims and Goudran, and A. Talbot, for the appellee.

McENERY, J. The plaintiff sued the defendant for libel and slander.

The alleged libel and slander is contained in the petition in the suit of Jacob McWilliams v. Justinien Michel.

The object of the suit was to have declared absolutely null and void a certain tax sale of the plaintiff's property.

The language used is of that character which, if not classed as a privileged communication, malice would be presumed and damages assessed, unless justified by the defendant. It will not be necessary to reproduce the language employed in the petition in said suit of McWilliams v. Michel.

The defense is, that the libel and slander is a privileged communication; that it was used in the petition in said suit without malicious intent, upon the advice of counsel, in the prosecution of his legal rights.

The trial was by jury, and there was a judgment and verdict in favor of defendant, from which the plaintiff appealed.

In the suit of McWilliams v. Michel, out of which grew this suit, the plaintiff alleged that he was the owner of certain property, upon which all the taxes had been paid, and that the sheriff illegally and wrongfully sold the same at tax sale, and adjudicated the same to Michel; that said property was confusedly sold with property belonging to Wilbur and Sons, although he held a distinct title to same, which was known to said sheriff and tax collector, Gardemal; that he wrongfully adjudicated said property to said Michel, who forcibly got possession of the same through the pretended tax sale; that his property and that of Wilbur and Sons was sold at said tax sale as the property of Breaux and Duperrier, when said sheriff and tax collector knew that said property was owned by him and Wilbur and Sons; that he knew the taxes had all been paid on said property; that after said sale to Michel, he entered into an agreement with Titus Gardemal, the brother of said Gabriel Gardemal, sheriff and tax collector, to cut down and remove timber from said property.

He alleges that said sheriff, Gardemal, failed to offer said property for sale on the day advertised, because there were many bidders present, and that he postponed said sale to a different day, when it was sold as alleged. In these acts of the sheriff, it is alleged he conspired with his brother, Titus Gardemal, and Justinien Michel, in order, through a pretended tax sale, to get possession of the property of the petitioner.

An injunction was prayed for against Michel, and a judgment was prayed for quieting petitioner in his title to said property.

This is but a brief summary of the many allegations in the petition.

There was evidence introduced on the trial to prove the falsity of the severe charges in the petition.

They may be unfounded and false in fact, and yet defendant may not be responsible in damages for the language used in the petition. In privileged communications, the party is protected from the infliction of damages, unless the occasion was used as a means of inflicting a willful and malicious injury upon the plaintiff.

The occasion on which a privileged communication is made rebuts the inference of malice arising from a statement prejudicial to the character of the plaintiff, and it devolves upon him to prove malice in fact; that the defendant was actuated

by motives of personal spite and ill-will, independent of the occasion on which the communication was made.

Certain communications are absolutely privileged, and no person is liable, either civilly or criminally, in respect of anything published by him in the course of his duty in any judicial proceeding. This privilege extends to parties, counsel, witnesses, jurors and judges in a judicial proceeding, to proceedings in legislative bodies, and to all who, in the discharge of public duty or the honest pursuit of private right, are compelled to take part in the administration of justice or in legislation: Heard on Libel and Slander, secs. 90, 103, 110; Newell on Defamation, p. 423, secs. 26, 27; *Fisk v. Soniat*, 33 La. Ann. 1400; *Vinas v. Merchants' Mut. Ins. Co.*, 33 La. Ann. 1265.

In this class of privileged communications, the occasion is an absolute privilege, and the only question is, whether the occasion existed, and whether the matter complained of was pertinent to the occasion. In judicial proceedings, both criminal and civil, great latitude is allowed parties in the pursuit of private rights, or the prosecution of crimes. Public order necessarily requires this latitude. What, then, is alleged in a judicial proceeding in the effort to enforce a private right is not to be judged by technical rules. The party attempting to enforce his right may be mistaken in his remedy; he may use language which could have been avoided. But after all, the question is one of intent.

"Intent makes the libel in such a case; strong words do not": *Klinck v. Colby*, 46 N. Y. 434; 7 Am. Rep. 360.

If the occasion exists on which the privileged communication is made, and the matter is pertinent to the occasion, it supplies an absolute defense, and depends in no respect upon the *bona fides* of the defendant.

The burden of proof is on the plaintiff. He must show the absence of the occasion, and if the occasion existed, that the matter complained of was not pertinent to the occasion, and that the defendant acted with malice in fact, through hatred, ill-will, with a malicious design to injure the plaintiff: *Fisk v. Soniat*, 33 La. Ann. 1400.

There is no proof of this kind in the record.
Judgment affirmed.

LIBEL — PRIVILEGED COMMUNICATIONS. — Where a communication is privileged, there can be no recovery against the party making it: *Rude v. Nass*, 79 Wis. 321; 24 Am. St. Rep. 717, and note.

LIBEL — PRIVILEGED COMMUNICATIONS — MALICE. — Where a publication is defended as privileged, there is no presumption of malice: *Conroy v. Pittsburg Times*, 139 Pa. St. 334; 23 Am. St. Rep. 188, and note. There is a presumption of malice in an action for libel, which is rebutted by proof of justification: *Riley v. Lee*, 88 Ky. 603; 21 Am. St. Rep. 358, and note. See extended note to *Terrailliger v. Wanda*, 72 Am. Dec. 426.

LIBEL — PRIVILEGED COMMUNICATIONS — JUDICIAL AND LEGISLATIVE PROCEEDINGS. — Parties to an action are privileged from suit for accusations made in their pleadings: *Park v. Detroit Free Press Co.*, 72 Mich. 560; 16 Am. St. Rep. 544, and note; and the same is true as regards all proceedings in courts of justice or legislative proceedings: *Runge v. Franklin*, 72 Tex. 585; 13 Am. St. Rep. 833, and note; *Nissen v. Cramer*, 104 N. C. 574.

COPP v. LOUISVILLE AND NASHVILLE R. R. Co.

[48 LOUISIANA ANNUAL, 511.]

JURISDICTION — INTERSTATE COMMERCE ACT. — One who claims damages for a violation of the interstate commerce act cannot maintain his action in a state court, but must bring it either before the interstate commerce commission or a federal court.

JURISDICTION — REMEDY — STATE OR FEDERAL COURT. — Legal or equitable rights acquired under state laws may be vindicated in a state court, or if the parties reside in different states, in a federal court, or if such rights are acquired under United States laws, in state or federal courts, subject to the qualification that where a right arises under United States law, Congress may give a federal court exclusive jurisdiction.

JURISDICTION OF FEDERAL COURT, WHEN EXCLUSIVE. — Where a United States statute gives a right without specifying a remedy, it may be prosecuted in a state court; but when a right is thus given, and a specific remedy provided, or a new power and the means of executing it are therein granted, such right and power can be enforced only in the method provided by such statute.

B. R. Forman, for the appellant.

Bayne, Denegre, and Bayne, for the appellee.

BERMUDEZ, C. J. This is an appeal from a judgment sustaining a plea to the jurisdiction of a state court, relegating the plaintiff to that of a federal court.

The action arises under the act of Congress known as the interstate commerce act, and is for the recovery of damages for averred unlawful discrimination by defendant injurious to plaintiff, for the transportation of coal from another state for several years: 24 U. S. Stats. at Large, p. 552, sec. 9.

The section relied on is to the effect that any person or persons claiming to be damaged by any common carrier, subject to the provisions of this act, may either make complaint to

the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of damages for which such common carrier may be liable under the provisions of this act in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt.

After referring to the ruling of the United States supreme court in the case of *Clafin v. Houseman*, 98 U. S. 136, 137, which is in point on the question, the district judge has well said: "The general rule is, that where a particular remedy is provided by law, such remedy must be sought to the exclusion of all others, in the cases contemplated by the statute; otherwise a person claiming injury under the act of Congress, instead of being compelled to elect which one of the two methods of procedure provided by the act he will adopt, will be afforded a third alternative not contemplated or provided for by the said act, and this, in violation of its express terms, whereby he is limited to a choice between two remedies."

The authority referred to contains the following language: "A legal or equitable right acquired under the state laws may be prosecuted in the state court, and also, if the parties reside in different states, in federal courts. So rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or in the state courts, competent to decide rights of the like character and class, subject to this qualification: that where a right arises under a law of the United States, Congress may, if it see fit, give to the federal courts exclusive jurisdiction. This jurisdiction is sometimes exclusive by express enactment, and sometimes by implication. If an act of Congress gives a penalty to a party aggrieved without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court."

In the instant case, the right asserted by the plaintiff is claimed under an act of Congress which specifies the remedy for its enforcement.

This circumstance suffices to evidence that Congress saw fit to give the federal courts exclusive jurisdiction. The motive which induced such legislation may have been, and no doubt is, to create one entire and one complete system, and provide

for the necessary uniform machinery to make it effective on an important and vital subject of national interest.

See, further, Sutherland on Stat. Const., sec. 399; *Dudley v. Mayhew*, 8 N. Y. 9; *The Moses Taylor*, 4 Wall. 429; *Martin v. Hunter*, 1 Wheat. 384; *Ex parte McNiel*, 18 Wall. 236. The authorities referred to by the appellant do not sustain his position.

Judgment affirmed.

JURISDICTION — REMEDY — STATE OR FEDERAL COURT. — State courts have jurisdiction to try and determine conflicting claims to lands within its borders, when they arise between citizens of the state, though both claimants are grantees of the United States: *State v. Bachelder*, 5 Minn. 223; 30 Am. Dec. 410, and note. The state courts may exercise jurisdiction in all cases in which such jurisdiction has not been exclusively vested in the federal courts: *King of Prussia v. Kuepper*, 22 Mo. 550; 66 Am. Dec. 639. The circuit court of the United States has jurisdiction where one of the parties to the suit is a citizen of another state or country: *Vose v. Morton*, 4 Cush. 27; 50 Am. Dec. 750, and note. Offenses against the federal law may be punished in the state as well as federal courts, where exclusive jurisdiction has not been conferred upon the latter: *Commonwealth v. Fuller*, 8 Met. 313; 41 Am. Dec. 509, and note.

COURTS — JURISDICTION OF FEDERAL COURTS, WHEN EXCLUSIVE. — Where, by the laws of Indian Territory, the remedy for a wrong is confined to the nearest United States court, the court of another state has no jurisdiction to entertain an action for such wrong: *Holderness v. Pond*, 45 Kan. 410; 23 Am. St. Rep. 734. State courts have no jurisdiction to punish crimes against the United States, as such: *People v. Kelly*, 38 Cal. 145; 99 Am. Dec. 340.

SAVOIE v. SCANLAN.

[48 LOUISIANA ANNUAL, 967.]

SLANDER — WORDS SLANDEROUS PER SE. — A false statement made by one of another, that he is a scoundrel, a rogue, and a damned rascal, and that he has stolen all the property owned by him, uttered in a public place and manner, in the presence of by-standers, is slanderous *per se*.

SLANDER — IMPLIED MALICE JUSTIFYING RECOVERY WITHOUT PROOF. — Malice is implied from the use of opprobrious epithets which are slanderous *per se*; and proof of special injury is not necessary to a recovery of damages.

SLANDER. — BOTH DAMAGE AND MALICE MAY BE INFERRED from the nature and falsity of the words used, and from the circumstances under which they were uttered, without special proof.

SLANDER. — ONE WHO UNLAWFULLY INTERFERES WITH THE RIGHT OF ANOTHER to enjoy that degree of respect, good-will, and social and business distinction to which his own acts and his social and business habits en-

title him, by circulating slanderous reports, renders himself liable to consequential damages.

IN LIBEL AND SLANDER, QUESTIONS OF DAMAGE AND MALICE are mixed questions of law and fact, of which courts are more competent to judge than juries are.

Kenneth Baillio and C. W. Du Roy, for the appellant.

John N. Ogden and E. P. Veasey, for the appellee.

WATKINS, J. Plaintiff is appellant from an adverse judgment based on the verdict of a jury rejecting his demand against the defendant of five thousand dollars damages for slander and defamation of character.

The charge made in the petition is, that at the store of one McClelland, in the parish of St. Landry, on the 20th of October, 1888, same being a public place, the defendant, Michael Scanlan, in a public manner, and in the presence and hearing of the by-standers who had congregated there, "maliciously, wickedly, slanderously, libelously, and with the malicious and wicked intention to defame and slander, publicly called [him] a scoundrel, or, in the vernacular [of the] public, said that [he] was 'a rascal,' 'a damned rascal,' and 'that the property he owned he had stolen, and that [Scanlan] could prove these accusations from the public records.'"

Petitioner avers that he is, and has always been, a citizen of the parish of Acadia, where he has always borne a good name for fair dealing and honesty, and is engaged in farming and mercantile pursuits. He avers that his good reputation is due to his uniform good conduct as an honest man, and that he has thereby attained a position as an honorable citizen and a just man; and that his "good name and fame have acquired [for] him credit in the commercial world, and a position for himself and family in society."

He further avers that the aforesaid "accusations are false, libelous, and slanderous, and [that they] involve great moral turpitude, and were wickedly and maliciously uttered by the defendant with the unlawful and malicious intent to injure and defame him; that these defamations seriously damaged [him] in feeling and reputation; and that he has thereby suffered great mental agony and humiliation."

He further avers that he has never given the defendant any "cause or excuse for the utterance of (said) false, malicious, and wicked slanders, and that said Scanlan was prompted to so utter them through sheer malice, and with intent to defame and injure him."

He places his damages at five thousand dollars, and prays for judgment accordingly.

In his answer, the defendant avers "that if he used any remarks whatever regarding the plaintiff of an injurious character, that the words used were [so] used by him in a moment of temporary irritation, caused by remarks made by the plaintiff derogatory to the Farmers' Alliance, of which defendant is a member; that no words used by him on that occasion were premeditated, or intended to injure the plaintiff, or to damage him, even in the remotest degree; that any transient expression of angry feelings on [his] part, without malice, was made at a small store, in which there were but few persons; and that no currency or circulation was given to said statements by [him], either before or after said meeting at the store; that if any currency or circulation has been given to said words, it was done by the plaintiff, and by his son-in-law, Joseph McClelland, who was one of the parties present at the store."

He charges that plaintiff is actuated by avaricious and unworthy motives in bringing this suit, and is also governed by a desire to harass and annoy him thereby; and he avers that his action is causeless, vexatious, and annoying, and has caused him damage in loss of time, vexation, trouble, and attorney fees, in the sum of three hundred dollars, for which he prays judgment in reconvention.

We have reproduced all of the salient points of the petition and answer as the most appropriate and effective method of stating the case as it was stated to and tried by the jury, and therefrom it will appear that slander is charged distinctly in the former, and not denied, but on the contrary, tacitly admitted, in the latter, and that with a guarded admission is coupled a plea of justification and excuse.

On these pleadings, evidence *pro et con* was introduced, and it may be fairly summarized as follows, viz., that on the date, at the place, and under the circumstances given in plaintiff's petition, and in the course of a conversation had and held by and between the defendant and Boone and McClelland on a business matter, the defendant stated that the plaintiff, "Savoie, was a rogue, and that he had stolen everything that he owned, and that he could prove that he was a rogue by the records at Crowley," i. e., the site of the court-house of the parish of Acadia, where plaintiff lives.

Those two witnesses recite, circumstantially, the origin and

history of the conversation in which the foregoing statement was made, and they affirm that nothing was said or done on that day to irritate the defendant, and that the plaintiff was not present at all. They state that, on the contrary, defendant was a little excited, but did not present the appearance of being angry, though he spoke in a loud tone of voice.

Notwithstanding the defendant and his son (who was in company with him on the occasion) were interrogated as witnesses on the former's behalf, neither of them denied the truthfulness of the testimony of the plaintiff's witnesses, but during the course of the trial, one of the jurors propounded to the defendant this question, viz.: —

"Q. Was the rumor current in the neighborhood concerning what Mr. Savoie had said or done to the members, and those that wished to join the order, that aroused your feelings [and caused you] to use the language charged in the pleadings? A. Yes."

This is a confession of the defendant on oath, under circumstances of alleged mitigation; but the plaintiff emphatically denies the statement he is alleged to have made concerning the Farmers' Alliance, which is referred to in the above interrogatory, and McClelland affirms the truth of plaintiff's statement to that effect. In addition to this, an intimate friend of the defendant testifies that the defendant made the following statement to him, after the suit had been filed, viz.: "I do not recollect if I said these remarks about Mr. Savoie, but if I did, be Jesus I will prove them on him by his kins-folks."

Each of the plaintiff's witnesses admits having repeated to others the charges defendant had made against the plaintiff, and amongst others, one of them repeated them to the plaintiff himself on the day after they were made.

The proof shows that the plaintiff is a gentleman of good standing in the community in which he lives, and that he is a planter and merchant, and gins cotton for the farmers of the neighborhood. It also shows that the plaintiff's family consists of a wife and nine children, that he is over fifty years of age, and that he was born in the parish of St. Landry, and always resided therein until the new parish of Acadia was formed and his property was therein incorporated.

It appears, also, that the defendant is a man of family, fifty-four years old, and a farmer by occupation, and that he is respected and well thought of in the neighborhood.

The testimony clearly establishes all of the averments made in the plaintiff's petition, and that the slanderous utterances of the defendant are libelous and untrue, and that he had not the slightest ground or excuse therefor. The statement, publicly and seriously made, that a reputable citizen is "a rogue, and that he had stolen everything he owned," and that these charges could be proven by simple reference to the parochial archives, constitutes a slander *per se*. They are shown to have been made altogether without provocation on the part of the complainant, who was at his home, nine miles away, at the time. They were made with great apparent deliberation, and not, as is stated in the defendant's answer, "in a moment of temporary irritation."

Considering the plaintiff's station in life, his occupation, age, and family, it is easily perceived that he was much grieved and annoyed, and felt injured in reputation and feeling by these ignominious and slanderous epithets and libelous charges.

In the course of the plaintiff's interrogation as a witness, the following occurred, viz.:—

"Q. Have you not been damaged by these statements, made by Scanlan, as proved here to-day? A. I have.

"Q. In what manner?—please state to the jury. A. In the first place, I feel that I am hurt to have to carry such a name through the public. In the next place, my feelings have been hurt, as these things have been repeated to my wife and children by the public, and fearing that the public would believe them, I would be ashamed to go out in their company. This thing has caused me a great deal of worry of mind, to try and try and vindicate myself to the public in which I live; and it has caused me some mortification.

"Q. What has been your reputation among your fellow-men? A. So far as I know, it has always been good.

"Q. What has been your social position in the parish? A. Always good.

"Q. Have you ever held official position in St. Landry parish, before its division? If so, what? A. Only a member of the police jury, and president of that body.

"Q. Considering the injury to your feelings, mental anxiety, mortification, and injuries which you say these accusations have caused you, [at] what do you estimate your damages, in dollars and cents? A. For what [the] petition calls, as my name is better than money."

We do not cite this testimony as particularly affecting the quantum of damages, but merely for the purpose of characterizing the act and its injurious effects, in respect to the plaintiff. With due deference to, and with proper regard for, the verdict of the jury rejecting the plaintiff's demands, we think he is clearly entitled to some compensation for the damage and injury he has sustained through the effect of the slander which the defendant maliciously propagated against him.

It is true that there is no direct proof of malice on the part of the defendant in giving utterance to the slander; but, on the contrary, the defendant states, as a witness, that he entertained neither malice nor ill-will against the plaintiff at the time it was uttered; yet in such case the law imputes malice to the act on account of its character; for the use of opprobrious epithets implies malice, when they are slanderous *per se*. It suffices to maintain an action to recover damages without proving special injury to the party defamed: *Williams v. McManus*, 38 La. Ann. 161; 58 Am. Rep. 171; 14 La. 198; 28 La. Ann. 280; *Staub v. Benthuyssen*, 36 La. Ann. 469; *Miller v. Holstein*, 16 La. 389; *Feray v. Foote*, 12 La. Ann. 894.

And it was recently ruled by this court in *Spetorno v. Fourichon*, 40 La. Ann. 423, that "both the damage or injury and the malice may be inferred from the nature and falsity of the words, and from the circumstances under which they were uttered, without the necessity of special proof": *Miller v. Holstein*, 16 La. 380; *Daly v. Van Benthuyssen*, 3 La. Ann. 69; *Tresca v. Maddox*, 11 La. Ann. 206; 66 Am. Dec. 198; *Cass v. New Orleans Times*, 27 La. Ann. 214.

The case of *Weil v. Israel*, 42 La. Ann. 955, states a similar doctrine in an analogous case.

With regard to the injurious effects of slanderous utterances, the doctrine of the common law has become a precept of our jurisprudence, *viz.*, "that every person has a right to enjoy that degree of respect, good-will, and social or business distinction to which his own acts and his social or business habits entitle him, and any one who unlawfully interferes with this right by circulating slanderous reports renders himself liable for consequent damages": *Williams v. McManus*, 38 La. Ann. 161; 58 Am. Rep. 171; *Staub v. Van Benthuyssen*, 36 La. Ann. 467; *Perret v. New Orleans Times*, 25 La. Ann. 170; Folkard's *Starkie on Slander and Libel*, 99.

It is just this sort of unwarrantable interference with the plaintiff's rights and privileges that defendant has been guilty

of, and for the consequences of which he has become responsible thereby.

In this as in all cases of this character, the proper measure of damages is difficult to determine, and consequently reliance must be placed upon precedent, as imputed by the circumstances of the case.

In *Green v. Harvey*, 14 La. 202, the compensation allowed plaintiff for the slanderous charge of forgery was \$450; that awarded to the plaintiff in 16 La. 198, for the charge of being a rascal, and of false swearing, was five hundred dollars; that allowed the plaintiff in *Cook v. Tardos*, 6 La. Ann. 779, for being called a thief, was four hundred dollars; the amount awarded to the plaintiff in *Williams v. McManus*, 38 La. Ann. 161, 58 Am. Rep. 171, for being called a "damned whore," was five hundred dollars; the amount allowed the plaintiff in *Spotorno v. Fourichon*, 40 La. Ann. 423, for the circulation of the slanderous report that he was a negro, was five hundred dollars; the amount awarded plaintiff in *Mohrman v. Ohse*, 17 La. Ann. 64, for having been denounced as a damned thief, was one thousand dollars; the amount allowed plaintiff in *Bonnin v. Elliott*, 19 La. Ann. 322, for slanderous and defamatory words, was one thousand dollars.

The slanderous epithets of which the plaintiff complains are not less serious and injurious in character than those employed in either case mentioned.

It is the duty of courts of justice, in proper cases, to punish, and thereby repress, the use of such slanderous and defamatory epithets, to the end that the good name and fair fame of the citizen may be properly protected; and taking into consideration the good character, age, and circumstances of the plaintiff, as well as of the defendant, we are of opinion that the sum of three hundred dollars would be a reasonable and just allowance to plaintiff, and at the same time not too oppressive on the defendant.

In rejecting the plaintiff's demands, the jury doubtless gave too great credence and effect to the defendant's disavowal of malice, and plaintiff's failure to prove specific damages; but we have the less reluctance in revising the verdict, as under the law and jurisprudence appertaining to slander and libel, these are mixed questions of law and fact, of which the courts are more competent to judge than juries are. For the foregoing reasons, the judgment appealed from must be reversed.

It is therefore ordered, adjudged, and decreed that the ver-

dict of the jury, and the judgment of the court thereon based, be and the same is hereby annulled and reversed, and it is now ordered and decreed that there be judgment in plaintiff's favor, and against the defendant, for the sum of three hundred dollars, with legal interest from judicial demand, and all costs of both courts.

SLANDER — WORDS SLANDEROUS PER SE. — A charge that one has committed an indictable offense is slanderous *per se*: *Gudger v. Penland*, 108 N. C. 593; 23 Am. St. Rep. 73, and note; *Davis v. Carey*, 141 Pa. St. 314. As to what words are slanderous and actionable *per se*, see *Hess v. Sparks*, 44 Kan. 465; 21 Am. St. Rep. 300, and note; note to *McFadin v. David*, 41 Am. Rep. 590-592; note to *Coburn v. Harwood*, 12 Am. Dec. 39-46. To charge a butcher with selling diseased meat is actionable *per se*: *Blumhardt v. Rohr*, 70 M.l. 328.

SLANDER — DAMAGE AND MALICE, WHEN INFERRED. — Express malice is presumed and need not be proved when the words are actionable *per se*: *State v. Brady*, 44 Kan. 435; 21 Am. St. Rep. 296, and note; extended note to *Tersilliger v. Wanda*, 72 Am. Dec. 427. Both malice and injury may be inferred from the nature and falsity of the words: *Spotorno v. Fourickon*, 40 La. Ann. 423.

STATE v. QUAID.

[88 LOUISIANA ANNUAL, 1876.]

GAMING. — PIN-POOL IS NOT A GAMBLING GAME within the sense of the constitution and laws of Louisiana, and a municipal ordinance prohibiting it as such is illegal and void.

Buck, Dinkelspiel, and Hart, for the appellant.

Carleton Hunt, city attorney, and *Henry Renshaw*, assistant city attorney, for the state.

WATKINS, J. The defendant is appellant from five different convictions and sentences to pay fines for alleged violations of city ordinance 4034, council series, which denounces as an offense "gambling with dice, cards, or other means," or "keeping a banking game or gambling-house."

The charge made in each of the several cases is as follows, viz.: "That Thomas Quaid did then and there violate ordinance 4034, C. S., by keeping a gambling game known as pin-pool, upon which money is bet, said gambling game being played in the above-mentioned house," etc.

The contention and answer of the defendant are, that "pin-pool is not a gambling game, and therefore [it] is not in the contemplation of [said] ordinance; and in the alternative it

is alleged that if said ordinance was intended to embrace the game of pin-pool, [it] is illegal, null, and void"; that the business of keeping a "pool-table is recognized as legal by the state and city, which impose licenses on same, and that these licenses were paid by defendant."

The proof shows that the game of pin-pool is played on a table on which five pins are set in a small square, one being in the center of the square, and each pin being numbered from 1 to 5, respectively. The game is played by a number of persons, each one of whom uses a cue and balls, whereby the pins are knocked down, and the player is credited on his score with the respective numbers of the pins thus knocked down. At the beginning of the game, the game-keeper puts a number of marbles in a leathern bottle, on each one of which is a number printed, and after thoroughly shaking it up, he casts one to each of the players. These balls indicate the order of preference among the players, and each one is entitled to credit on his score for the number marked on his ball. When, in the progress of the game, one of the players makes a total score of the precise number fixed as the winning number, he is entitled to the pool, and it consists of the total amount the players contributed thereto.

The proprietor of the establishment furnishes the entire paraphernalia, and charges so much per game, according to the number of players, and as soon as the game has been completed, he deducts same from the pool, and the residue goes to the winner.

The players very frequently venture bets on the result of the game, but that is entirely optional with them. In such bets the proprietor has no interest and assumes no risk whatever. It matters not, so far as he is concerned, what the amount or number of the bets may be, the proprietor gets no more nor receives any less a consideration for the game.

The theory of the game is, that the proprietor simply charges for the use of the table and appliances, and it is of no consequence to him whether one or all the players pay for it, or whether the players contribute ratably in money in advance, or agree that the fee be paid out of the pool by the winner. All of these things are purely conventional, and as agreed upon by the parties at the commencement of the game.

This game is not in any correct sense a gambling game, such as is denounced in the constitution and laws. If the argument and reasoning on the subject needed reinforcement,

the necessary aid would be supplied by the acts of the state and city in demanding of and receiving from the defendant licenses for the prosecution of this business.

The "keeping of a gambling game," in the sense of the law, is such as "implies loss or gain between parties" who are participating in the game. But the defendant, as proprietor, is not a participant in the losses or gains incident to the result of the game.

That the players did engage occasionally in betting on the game did not constitute it a gambling game. On the contrary, it is exclusively a game of skill, and does not contain any element of chance.

The ordinance in question does not rightfully apply to or legally embrace the game of pin-pool, and the convictions and sentences of the defendant were illegal.

It is therefore ordered and decreed that the judgments and sentences appealed from be annulled and set aside; and it is further ordered and decreed that the various proceedings and prosecutions against the defendant be abated and discontinued, and that he be relieved from the payment of cost.

CRIMINAL LAW — GAMING. — The keeper of a billiard-table, upon which parties play with the understanding that the loser pay for the game, is guilty of a violation of a statute prohibiting the keeping of a gambling resort: *State v. Beck*, 41 Iowa, 559; 29 Am. Rep. 609. As to what games are lawful and what are not, see note to *State v. Smith*, 33 Am. Dec. 134-136. Playing billiards, the loser to pay for the game and the drinks, is gambling: *Murphy v. Rogers*, 151 Mass. 118.

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CASES
IN THE
SUPREME COURT
OF
MASSACHUSETTS.

RAND v. HANSON.

[154 MASSACHUSETTS, 87.]

JUDGMENTS OF OTHER STATES — SERVICE. — No PRESUMPTION IN FAVOR of the validity of a judgment of another state exists, where it appears from the record that the defendant was a non-resident, and it does not appear affirmatively that service of process was made upon him in that state. In a suit on such judgment, it is a good defense to show that defendant was not a resident, and that no proper service was made on him in the state where the judgment was rendered.

JUDGMENTS OF OTHER STATES — RETURN OF SERVICE OF PROCESS SILENT AS TO THE STATE IN WHICH SERVICE WAS MADE. — Where, in an action in one state against a resident of another, the order for service of process directed it to be made upon defendant by publication, or by giving him a copy personally, or by leaving it at his last or usual place of abode, and the return of the officer showed a personal service on defendant, without stating where it was made, such return does not warrant the inference that service was made in the state in which the action was pending.

APPEAL — PRACTICE — INFERENCE OF FACT — EXCEPTION. — Where it is desired to present to the full court on appeal the question of law whether or not the agreed facts will warrant a particular inference of fact, it can best be done by an exception taken at the hearing in the lower court.

ACTION on a judgment. William Rand commenced an action and recovered judgment in the supreme court of New Hampshire against Sarah E. Hanson, a resident of Massachusetts. In that action, the court issued an order directing service on the defendant as stated in the opinion, and the officer's return on such order showed that it was personally served upon defendant, without disclosing the place of service. Defendant was not in New Hampshire at the date of the issue of the writ, or between that date and its return, nor did she ap-

pear in the action. This action was brought against the administratrix of Sarah E. Hanson, upon the judgment rendered against the latter in New Hampshire, upon an agreed statement "that the court may draw proper and competent inferences of fact from the above agreed facts."

I. E. Pearl, for the plaintiff.

W. H. Moody, for the defendant.

KNOWLTON, J. The judgment rendered against the defendant's intestate by the supreme court of New Hampshire was void for want of jurisdiction, unless a proper process was served on her in that state: *Eliot v. McCormick*, 144 Mass. 10; *Needham v. Thayer*, 147 Mass. 536; *Pennoyer v. Neff*, 95 U. S. 714; *Eaton v. Badger*, 33 N. H. 228. There is a presumption in favor of the regularity of the proceedings of any court of general jurisdiction: *Bissell v. Wheelock*, 11 Cush. 277; *Stockwell v. McCracken*, 109 Mass. 84. But it is always a good defense against a suit brought on a judgment recovered in another state to show that the defendant was not a resident of that state, and that no proper service was made on him there. The presumption in favor of the validity of a judgment does not extend to a case where it appears from the record that the defendant was a non-resident, and it does not appear that service of process was made upon him within the state: *Downer v. Shaw*, 22 N. H. 277; *Morse v. Presby*, 25 N. H. 299. In *Galpin v. Page*, 18 Wall. 350, it is said that "where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the jurisdiction of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record."

The facts agreed by the parties, and the facts disclosed by the record itself, show that the court had no jurisdiction of the defendant's intestate when the order of notice was issued at the February term in 1878. The record showing that there was no jurisdiction without a service of this order upon her in New Hampshire, the question arises whether the agreed statement shows that the order was served there, or whether there is any evidence in the case which, under the stipulation in the agreement that the court may draw inferences of fact, would

warrant the superior court in making a finding to that effect. Unless this question can be answered in the affirmative, the judgment must be for the defendant. The order of notice directed a service, either by publication, or by giving a copy in hand to the original defendant, or by leaving it at her last and usual place of abode. It did not require or contemplate a personal service in the state of New Hampshire, but treated a service by leaving a copy at her place of abode in Massachusetts, or by giving it in hand to her there, as of equal effect with a personal service within the jurisdiction of the court.

The fact that the order was served "either in New Hampshire or Massachusetts" has no tendency to prove that it was served in New Hampshire rather than in Massachusetts. The return of the officer, that he gave the defendant a copy, is entirely silent in regard to the place where the copy was put into the possession of the original defendant, and it has no affirmative force in favor of the proposition which must be established before the judgment can be treated as valid. Nothing is agreed upon outside of the record from which an inference of fact can be drawn in regard to the place where the service was made, and there is nothing in the record itself which furnishes a foundation for such an inference. If the order of notice called for a service within the state, there might be a presumption of regularity in favor of the service, although the language of the return was as consistent with a delivery of the copy in Massachusetts as in New Hampshire. But the order assumed that no personal service within the jurisdiction was necessary to the judgment which was contemplated, and it would have been complied with as well by leaving a copy at the place of abode of the original defendant in Haverhill, or by delivering it to her in hand there, as by a personal service in New Hampshire.

We find nothing in the case to make the stipulation in the agreed statement, that the court may draw inferences of fact, of any importance. Upon the material point, there is nothing but the question what is the true legal construction of a record, which is always a question of law for the court. We therefore have no occasion to determine whether we should further approve the practice which has sometimes been permitted, of presenting to the court certain agreed facts as a case stated, accompanied by a stipulation that the court may draw any proper inferences of fact, and then asking the full court to

treat as a question of law apparent on the record the question whether the facts agreed will warrant an inference of fact that will support the judgment appealed from, on the assumption, without proof, that the court below drew the strongest inferences of fact possible in favor of the result reached. It is clear that such a statement is not like a special verdict, and is not a proper case stated, because it can never be known from the record whether the court below drew any inferences of fact or not. If it is desired to present to the full court the question of law whether the facts agreed will warrant a particular inference of fact, it can best be done by an exception taken at the hearing: See *Hovey v. Crane*, 10 Pick. 440; *Commonwealth v. Cutter*, 13 Allen, 393; *Charlton v. Dannel*, 100 Mass. 229; *Keegan v. Cox*, 116 Mass. 289; *Atlantic Nat. Bank v. Harris*, 118 Mass. 147; *West v. Platt*, 120 Mass. 421; *Powers v. Provident Inst. for Sav.*, 122 Mass. 443; *Fitzsimmons v. Carroll*, 128 Mass. 401; *Old Colony R. R. Co. v. Wilder*, 137 Mass. 536; *Mayhew v. Durfee*, 138 Mass. 584; *Hecht v. Batcheller*, 147 Mass. 335, 339; 9 Am. St. Rep. 708.

In deciding the case on the ground that the plaintiff has failed to show that service was made in New Hampshire, we do not intimate that the court there had jurisdiction, in the absence of a valid attachment of property, to issue a process requiring the defendant to answer in that state, or that the judgment would be good if service of the order had been made there.

Judgment for the defendant.

PROCESS. — If a statute requires a return of service of process to state certain jurisdictional facts, and it fails to do so, no presumption will be indulged in favor of a judgment rendered on such a return: *Shenandoah etc. R. R. Co. v. Abby*, 86 Va. 232; 19 Am. St. Rep. 898, and note; *Hobby v. Bunch*, 83 Ga. 1; 20 Am. St. Rep. 301.

GLOUCESTER ISINGLASS AND GLUE COMPANY v. RUSSIA CEMENT COMPANY.

[154 MASSACHUSETTS, 32.]

CONTRACTS IN RESTRAINT OF TRADE. — A contract between two corporations manufacturing glue from fish skins, under a patent supposed by both to be valid, the object of which was to avoid competition, and to regulate prices, is not void as against public policy, the fish-glue not being an article of prime necessity, or a staple commodity ordinarily bought and sold in the market.

CONTRACTS — SPECIFIC PERFORMANCE — FAILURE OF CONSIDERATION — AFFIRMANCE. — Where a contract to avoid competition and regulate prices, between corporations manufacturing fish-glue under a patent supposed by both of them to be valid, has for its principal consideration a compromise of litigation between them relating to an infringement of such patent, a subsequent discovery of the invalidity of the patent, after part performance of the contract, will not constitute such failure of consideration as to defeat an action for specific performance thereof, especially when the contract has been affirmed after the discovery of the invalidity of the patent.

CONTRACTS — SPECIFIC PERFORMANCE — WHEN WILL BE DECREED. — Where the breach of a contract between corporations engaged in manufacturing an article from material the supply of which is limited will result in depriving one of them of its share of such material, and cause a continuing injury to, and possibly a destruction of, its business, it has no adequate remedy at law in damages, and is entitled to specific performance of the contract.

SPECIFIC PERFORMANCE OF MODIFIED CONTRACT. — When the parties to a contract have modified the execution of it in details by common understanding and mutual consent, specific performance of the modified contract may be decreed, if the rights of the parties under it are still clear.

C. Browne, for the plaintiff.

P. E. Tucker and C. H. Drew, for the defendant.

KNOWLTON, J. The plaintiff and the defendant corporations, which had been engaged in litigation with each other as to the alleged infringement of a patent owned by the plaintiff, supposing the validity of the patent fully established, and believing that they would be able practically to control the profitable manufacture of fish-glue, entered into a contract with each other, by which the defendant was to pay a certain sum for damages, and one half of the costs of the suits, and was to be allowed the use of the patent. Each party was to conduct its own establishment, and they were to unite in the purchase of fish skins, an article of which the supply was limited, and from which the fish-glue was manufactured, so that there should be no competition between them. The plaintiff was to fix the price of all skins purchased, and the parties

were to have certain places assigned to them by two persons named, of which they were respectively to have the product. From the proprietors of certain other places mentioned, the defendant was to have the entire product, and to allow the plaintiff to receive from it one third thereof, and the two parties were to divide equally between them the skins which might be obtained from new producers. They were both to sell the glue at the same price, to be agreed upon from time to time, and the contract contained other stipulations, the effect of which was to prevent competition between them. The contract was made in February, 1884. After they had conducted the business in this manner until early in 1887, it became evident to both that the patent was invalid, although no formal judgment was rendered declaring it so. Thereupon, Brooks, the manager of the defendant company, made a large number of what are known as the long-term contracts, for the purchase of all skins to be produced until the year 1900, with nearly all the producers of fish skins known to the parties. The plaintiff received its share of these skins, and no difficulty arose between the two companies until early in July, 1890, when the defendant notified the producers of skins by whom the plaintiff had been supplied up to that time not to deliver it any more skins, and also notified the plaintiff of its abandonment of the contract. Until then the parties had gone along under the contract as modified by mutual consent, and no intimation had been given the plaintiff of any intention to abandon it. The object of the bill is to compel the defendant to permit the plaintiff to obtain directly from the producers, or through the defendant, what it deems its share of the fish skins. The defendant rests its defense on several grounds. It contends that the contract as originally made was void, as contrary to public policy; that it cannot be enforced, because, the patent being invalid, there was no sufficient consideration for it; that if it is binding, the plaintiff has a complete and adequate remedy at law; that if the plaintiff is entitled to any relief at all, it should be compelled to take its proportion of the waste received by the defendant under the long-term contracts with third parties; and finally, that if the plaintiff had a right to specific performance of the contract, it has lost it, by reason of its own conduct, and the conduct of the defendant to which it has assented since the original contract was made.

The original purpose of the contract was to regulate the business of manufacturing a product under what was supposed

to be a new invention, on which letters patent of the United States had been issued, whereby an article then nearly worthless might be converted into an article of large value. The use to which the fish skins were put under this invention gave them their market value. The plaintiff and the defendant sought to unite with each other in the purchase of the raw material, so that they might not be tempted to overbid each other, and thus to raise it to an unreasonable price, and also to agree on the price at which the manufactured article should be sold, so that they might be secure in a reasonable profit. Even if they hoped for gain by their joint exertions, or by the possession of a patent as to the value of which they were subsequently disappointed, their contract had no relation to an article of prime necessity, or to staple commodities ordinarily bought and sold in the market, but to a particular article, of which both were manufacturers under the same process, and to an article used in the manufacture which was of little value for any other use. That the agreement was not obnoxious to the objection made by the defendant is shown by the case of *Central Shade Roller Co. v. Cushman*, 143 Mass. 353.

The next inquiry is, whether the contract is incapable of enforcement for want of consideration. If there were no consideration for it but a transfer of an interest in a void patent, it would be invalid: *Nash v. Lull*, 102 Mass. 60; 3 Am. Rep. 435; *Harlow v. Putnam*, 124 Mass. 553. The parties had been engaged in extended litigation involving several suits. As between them, and for that litigation, the validity of the patent had been established by a decision of the circuit court of the United States; and a judgment for damages in favor of the plaintiff against the defendant was about to be rendered. An important part of the consideration of the contract was a compromise and adjustment of the controversy which had taken form in the suits then pending, and a liquidation of the damages which the plaintiff was about to recover under the decision of the court. Moreover, the parties were competitors in business, and for mutual advantage they entered into mutual covenants as to the mode of conducting their business, and the covenants of each in that particular were a consideration for the covenants of the other. Before the invalidity of the patent was discovered, they had performed the contract in part, and what each had done in the management of its business was a part of the consideration for what remained to be done by the other. The belief that the patent was valid was

one of the causes of making their agreement, but it was not the consideration of it in any sense in which it can be separated from the other objects and promises which formed a part of the consideration. Both parties are disappointed in regard to a fact upon which they supposed they could rely, but the contract cannot therefore be avoided, so far as it is executory, when so many other elements entered into it, and when the parties have for a long time been deriving advantage from it, not only in their dealings with each other, but with the public.

If it should be held that the right to use the patent formed so large a part of the consideration for the defendant's undertaking that, after the discovery of the mistake of the parties in this particular, a court of equity would decline to decree specific performance against the defendant if it had seasonably sought to avoid the contract on the ground of mistake, there are reasons why such a defense should not avail the defendant in this case. After both parties knew that the patent was void, the defendant still chose to avail itself of the benefits of the contract, and to go on under it. There had been no adjudication that the patent was invalid, and the existence of the patent, and of the arrangement under which the plaintiff and the defendant were acting, was probably somewhat advantageous to the parties long after they discovered that the patent would not protect them if put to the test of litigation.

The report finds that "both parties attempted in good faith to do what the contract called for, and no complaint has ever been made of a breach of any of its provisions by either of them until July, 1890, a few days before the commencement of this suit." In making the long-term contracts, Brooks, the defendant's treasurer and manager, acted without the knowledge of the other officers of either of the corporations, in order that he might make the contracts quickly; but it must be inferred that he intended that the plaintiff should have the benefit of them as well as the defendant, so far as might be necessary to carry out in substance the provisions of the contract existing between them. This is apparent from the fact that before buying the skins of the firms of Shute and Merchant, John Pew and Son, and Cunningham and Thompson, he executed another agreement in the name of the defendant corporation, which was professedly a contract for the protection of the plaintiff in regard to the right to purchase skins after the expiration of the agreement between the plaintiff and the defendant, and until the year 1900. Perkins, who was

president of the plaintiff corporation, and who controlled the sale of the skins and waste of the above-mentioned firms, would not consent to a sale of the skins unless the defendant would sign a contract for the protection of the plaintiff after the expiration of the agreement, and it was assumed by both parties that the plaintiff would have the benefit of these purchases, and would need no protection during the continuance of the original agreement. The report recites: "The action of Brooks in buying the skins was afterwards approved and ratified by the officers of both corporations, and the plaintiff has received skins purchased under some of these contracts, and paid for them at the rate of twenty dollars per ton until July, 1890." The action so ratified and approved must be deemed to have been for the benefit of both corporations, at least until the expiration of their original contract. The conduct of the parties was, in effect, an affirmance and renewal of the contract after the invalidity of the patent was well known. It would be most inequitable to permit the defendant — after having induced the officers of the plaintiff to consent to its purchase of nearly all the skins which would be likely to come into the market for a long term of years, on the faith of an understanding that the plaintiff was to share in the benefits of the purchase — to repudiate the contract, and leave the plaintiff without the means of procuring skins to carry on its business. We are of opinion that if the defendant might successfully have defended against a suit for specific performance on the ground of the invalidity of the patent if it had sought to repudiate the contract on the discovery of the mistake, it has so far affirmed the contract since that it cannot do so now.

The next objection of the defendant is, that even if it violates its contract, it is not shown that the plaintiff has not an adequate remedy at law. The only remedy which the plaintiff could have at law would be by a recovery of damages for the failure of the defendant to deliver, or to allow those to deliver with whom it had made contracts in its own name, but for the benefit of both, the due proportion of fish skins to the plaintiff. It sufficiently appears that the principal market for them is in Gloucester, that most of the skin-producers there are under contract with the defendant, and that fish skins are of very limited production. "If the plaintiff is unable to obtain skins produced by firms which have contracted with the defendant," it is found that "it will be very difficult, if not impossible, for it to carry on its business." This con-

tinuing injury, leading to difficulties in the management of the plaintiff's business, and possibly to its utter destruction, is one that could not be measured in damages. It would be practically impossible to estimate the amount of the injury, or to repair it. The plaintiff's property invested in the manufacture must lose a considerable, but uncertain, amount of its value. The injury thus threatened would be practically irreparable: *Florence S. M. Co. v. Grover and Baker S. M. Co.*, 110 Mass. 1, 11.

It is urged that if the plaintiff is entitled to any relief at all it should be compelled to take its proportion of the waste as well as of the skins, including in the computation the waste and skins of George Perkins and Son. In addition to the fish skins, which were the most valuable product for the manufacture of glue which is left in the business of cutting and packing salt fish, there remain fins, bones, tails, etc., which go by the technical name of "waste." A fish-glue of an inferior character is made therefrom. As to certain firms, including George Perkins and Son, with whom the long-term contracts for fish skins were made by Brooks, it appears that they would not sell the skins unless the defendant would agree to buy the waste also, and pay a fixed price therefor. While the contracts made by Brooks were ratified, so far as the purchase of skins was concerned, the plaintiff has neither recognized nor been required to recognize them so far as waste is concerned. The plaintiff does not use waste, nor has it been requested by the defendant to take it. The defendant has manufactured this itself, and it does not appear that such manufacture is unprofitable. The business was thus conducted, and the plaintiff received its allotted portion of skins, from 1887 until July, 1890, when the defendant announced that it should retain all the skins for which it had made contracts. While there had been no formal fixing of prices at which the skins should be bought, this had been substantially arranged between the parties without disagreement, but it nowhere appears that the waste was at any time made the subject of negotiations. In regard to the mode of delivery of the skins, it had been arranged that the plaintiff should receive, as its fair proportion, those contracted for with Tarr and Brother and with Wanson & Co., paying the producers therefor, the charge being made directly to the plaintiff. It was also arranged that the establishment of Shute and Merchant should be allotted to the plaintiff, the charge for the skins

produced there being made to the defendant, and the payment being made by the plaintiff to the defendant, and by it to Shute and Merchant. Nowhere was there a suggestion that the plaintiff should pay for waste, although there was a provision for the sale of it in the contract with Shute and Merchant. We are opinion that the defendant cannot compel the plaintiff to take any portion of the waste. The conduct of the parties is quite conclusive that there was no bargain between them as to this.

The defendant further contends, that if the plaintiff had a right to have the contract specifically enforced, it has lost it by its own conduct since the contract was made. It is found that both parties have attempted in good faith to do what the contract called for. The licenses granted by the plaintiff to other parties to manufacture under the patent were assented to by the defendant, two of them by giving certificates under seal, and one orally, by its president and general manager, acting in its behalf. The purchase by the plaintiff at one time of four or five tons of extra fish skins in a neighboring state, at a price a little higher than they were paying at home, did not injure the defendant, and it is not contended in argument that the contract can be avoided for that reason. But in some other particulars the parties have not literally followed the terms of the contract, but by a common understanding and mutual consent have modified the execution of it in details. It sometimes happens that by such variations from an agreement the parties leave their rights so uncertain that specific performance of the contract cannot be decreed. But if, after changes are assented to, it is still clear what the rights of the parties are under the contract as modified, there is nothing to prevent the enforcement of those rights by a decree for specific performance. Even if the agreement were wholly oral, it might be specifically enforced: *Somerby v. Buntin*, 118 Mass. 279, 287; 19 Am. Rep. 459. Whatever uncertainties and difficulties might arise if the plaintiff sought literally to enforce the original provisions of the contract, the parties have, by their acts, so applied the contract to the new conditions which they have created as to make it clear that the plaintiff is entitled to have the skins purchased of Tarr and Brother, Wanson & Co., and Shute and Merchant, under the contract as interpreted, modified, and applied by the parties by mutual consent and for their common benefit. Of course, third parties who have made contracts with defendant cannot be

compelled to act otherwise than in conformity with their agreements. But the relief to which the plaintiff is entitled, and all that it asks for, will be obtained by an order that the defendant deliver to the plaintiff on demand the fish skins received from the three firms named, on payment to it of what the skins cost the defendant, so long as these shall not exceed the proportion which the plaintiff is entitled to receive.

Decree accordingly.

CONTRACTS IN RESTRAINT OF TRADE. — As to what contracts are void as in restraint of trade and what are not, see *Western Woodensare Ass'n v. Starkey*, 84 Mich. 76; 22 Am. St. Rep. 686, and note. For a full discussion of this subject, see extended note to *Angier v. Webber*, 92 Am. Dec. 751-755.

SPECIFIC PERFORMANCE. — As to what contracts will be specifically enforced, see note to *Flickinger v. Shaw*, 22 Am. St. Rep. 238; note to *Datz v. Phillips*, 21 Am. St. Rep. 867; *Adams v. Messenger*, 147 Mass. 185; 9 Am. St. Rep. 479; extended note to *Anderson v. Green*, 23 Am. Dec. 423-431. A court of equity will specifically enforce an agreement to assign an interest in a patent: *Blackmer v. Stone*, 51 Ark. 489.

ROCHEFORT v. INHABITANTS OF ATTLEBOROUGH.

[164 MASSACHUSETTS, 160.]

MUNICIPAL CORPORATIONS.—LIABILITY FOR DEFECTIVE HIGHWAYS. — A town is not liable for an injury to a traveler, caused by a defect in a highway culvert, merely because the highway is so constructed that such defect is likely to occur in the remote future, when such defect has not existed for such period of time prior to the injury as to make the town chargeable with notice thereof, the road having been in good repair during heavy travel for more than a year previously, and there being no apparent probability that the culvert would break down all at once and without previous warning.

TORT against the defendant town to recover for personal injuries caused by a defective highway, which it was bound to keep in repair. The plaintiff was traveling in a carriage along the highway at six o'clock in the morning, when his horse put a foot into a hole in the traveled part of the highway over a culvert, and fell, throwing plaintiff out of the carriage and causing him the injuries complained of. The evidence did not show the existence of such hole in the culvert before the day of the accident, and plaintiff and others had passed over the culvert the previous night without seeing any hole therein. A hole had existed in the culvert, and had been repaired more than a year prior to the accident in ques-

tion. Other facts appear in the opinion. Verdict was rendered for the defendant by order of the lower court, and the case brought here for final determination.

A. J. Jennings, for the plaintiff.

O. W. Clifford, for the defendant.

ALLEN, J. The ground on which the plaintiff seeks to maintain his case is, that the culvert was built in an improper manner, so that the earth above it was likely to subside and make a hole in the road; and that under these circumstances, greater diligence was required on the part of the town authorities in guarding against injury or damage to travelers than otherwise might have been sufficient: *Olson v. Worcester*, 142 Mass. 536. There was, however, no evidence that the hole which caused the injury to the plaintiff had actually existed for any such length of time before the accident as to make the town chargeable with notice thereof, and there had been no hole in the road at that place for more than a year previously, although there was much heavy travel over the road, and one of the plaintiff's witnesses went so far as to testify that he had himself driven heavy loads across there thousands of times. Under such circumstances, although the culvert was not so well built as to be likely to stand many years without repairs, it could not properly be held that the danger of a subsidence of the road was so imminent as to warrant holding the town chargeable with actionable neglect. It would throw too heavy a burden upon towns for the court, without more explicit legislation looking to that end, to hold them responsible merely because a road is so constructed that a defect therein of this character is likely to occur in the remote future. There was no apparent probability that the culvert would break down all at once, and without previous warning, thus making it dangerous to pass over it at all: *McGaffigan v. Boston*, 149 Mass. 289; *Adams v. Chicopee*, 147 Mass. 440; *Hanscom v. Boston*, 141 Mass. 242; *Post v. Boston*, 141 Mass. 189. In the opinion of a majority of the court, the entry must be, judgment on the verdict.

MUNICIPAL CORPORATIONS — LIABILITY FOR DEFECT IN HIGHWAY — NOTICE. — A municipal corporation cannot be held liable for damages occurring by reason of some defect in one of its highways, if it had no notice thereof, or if the defect had not existed a sufficient length of time to charge

the city with notice: *Mayor v. Wilson*, 82 Ga. 206; 14 Am. St. Rep. 150, and note; *Dundas v. City of Lansing*, 75 Mich. 499; 13 Am. St. Rep. 457; *Stoddard v. Winchester*, 154 Mass. 149, *infra*. A city is not liable for injuries caused by a defective covering to a culvert, in the absence of notice of the existence of such defect: *Galveston v. Smith*, 80 Tex. 69.

STODDARD v. INHABITANTS OF WINCHESTER.

[154 MASSACHUSETTS, 149.]

MUNICIPAL CORPORATION — LIABILITY FOR DEFECTIVE HIGHWAY. — The fact that a highway is so constructed that it is not likely to keep in good condition for a great length of time will not impose liability on a town bound to keep it in repair for injury caused by the sudden softening of the earth therein, of which the town had no notice, unless the danger was so imminent as to show a want of reasonable care and diligence in guarding against it at the time of the accident.

TORT to recover for injuries sustained through the softening of the earth in a highway which the defendant town was bound to keep in repair. Verdict for plaintiff, and defendant excepted.

J. T. Wilson, for the plaintiff.

S. J. Elder, for the defendant.

ALLEN, J. The softening of the earth in the road, under the influence of a heavy storm, appears to have been due to the digging of a trench for a water-pipe about six months previously to the time of the accident. The street had been used meanwhile, and there was no evidence that the earth had softened, or that any danger or defect existed, until within an hour of the plaintiff's accident; and there was no claim that the town had notice, or might by the exercise of reasonable care and diligence have had notice, of the actual softening of the earth.

Under these circumstances, we think the case should have been withdrawn from the jury. In order to hold a town responsible on the ground of implied notice of a defect in the road, there should be such a condition of things as fairly to indicate that there may at any time be danger in using the road. It is not necessary that roads should be built according to the highest standards of engineering; and the practical rule that must be adopted in order to impose liability in such cases is, that the condition of the road must be such that danger may reasonably be apprehended at any time, and therefore

ought to be guarded against: See *Rockfort v. Attleborough*, 154 Mass. 140; *ante*, p. 221. The fact that a road is so constructed that it is not likely to keep in good condition for a great length of time will not impose liability on the town which is bound to keep it in repair, unless the danger is so imminent that it can fairly be said to show a want of reasonable care and diligence to omit guarding against it at once. Such was not the present case. In the opinion of a majority of the court, the entry must be, exceptions sustained.

MUNICIPAL CORPORATIONS. — Liability for defects in highway, in the absence of notice of such defects: See *Rockfort v. Attleborough*, 154 Mass. 140; *ante*, p. 221, and note.

BICKFORD v. RICHARDS.

[154 MASSACHUSETTS, 153.]

CONTRACTS — PRIVACY — NEGLIGENCE OF SUBCONTRACTOR. — The subcontractors of one who has agreed with the owner to move and fit up a building in a workmanlike manner are liable to the owner for negligent injury to the building in doing the work, although there is no privity of contract between them. The gist of the action is the breach of duty owed by the subcontractors to the owner, not to negligently injure his property, and such duty does not depend on nor grow out of the contract.

TORT for negligently moving a building. Plaintiff entered into a written contract with one Powers to move certain buildings, and fit them up in a workmanlike manner. Powers then contracted with the defendants to perform the work, and this action is brought to recover damages for injury to the buildings, caused by the negligent manner in which the defendants performed the work. The trial court ordered a verdict for the defendants, on the ground of want of privity of contract between the parties to the action, and the plaintiff excepted.

G. A. Perkins, for the plaintiff.

J. H. Cotton and H. W. B. Cotton, for the defendants.

MORTON, J. It is immaterial whether the defendants are to be regarded as the servants and agents of the plaintiff, or as contractors under Powers, which the defendants contend was the case. In either instance, they owed to the plaintiff the duty of not injuring his property by their negligent or wrong-

ful acts. If they were the plaintiff's servants, and their negligent actions caused injury to his building, they would be liable to him for the damage: *Bac. Abr.*, tit. Master and Servant, M; *Smith on Master and Servant*, 4th ed., 184, and cases cited; *White v. Phillipston*, 10 Met. 108; *Walcott v. Swampscott*, 1 Allen, 101. If they were contractors in possession of the building under Powers, or were his servants, it was also their duty not to injure the plaintiff's property by their negligent acts. Whether servants or contractors, they were liable for the damage caused to the plaintiff's property by their tortious acts or misfeasance: *Hewett v. Swift*, 3 Allen, 420; *Wright v. Wilcox*, 19 Wend. 343; 32 Am. Dec. 507.

The plaintiff's right of action does not depend on the existence of a contract between himself and the defendants, as would be the case if he were suing for damages resulting from some non-feasance on their part, but on the fact that they have wrongfully and negligently done, or caused to be done, something to his property which has injured it. The gist of the action is the breach by the defendants of the duty which they owed to the plaintiff not to injure his property by any wrongful or negligent acts of theirs. That duty did not depend on or grow out of contract: *Bretherton v. Wood*, 3 Brod. & B. 54; *Smith v. Seward*, 3 Pa. St. 342; *Coggs v. Bernard*, 2 Ld. Raym. 909. It may be that Powers is liable to the plaintiff for a breach of the contract, caused by the acts of the defendants, and that they may also be liable to Powers for a breach of their contract with him; but that does not relieve the defendants from liability to the plaintiff for the damage to his property resulting from their negligent and wrongful acts: *Stock v. Boston*, 149 Mass. 410, 414; 14 Am. St. Rep. 430.

Nor does it follow, as contended by the defendants, that because the plaintiff may not be liable for the acts of the defendants, as their master or otherwise, they are not liable to him. The two liabilities stand on different grounds. The case of *Davidson v. Nichols*, 11 Allen, 514, 516, relied on by the defendants, was put by the court on the ground that there was not only no contract between the plaintiff and the defendant, but that the latter owned the former no duty, and is therefore readily distinguishable from this.

Exceptions sustained.

CONTRACTS — PRIVILEGE — NEGLIGENCE. — A third person cannot maintain an action for injuries resulting from a breach of a contract between two other contracting parties: *Roddy v. Missouri Pac. Ry Co.*, 104 Mo. 234; 24 Am. St. AM. ST. REP., VOL. XXVI—15

Rep. 333, and note. A contractor who departs from the specifications in building a house is liable to the owner for any inherent weakness, but will not be liable for any injury to a third person caused thereby: *Curtis v. Somersett*, 140 Pa. St. 70; 23 Am. St. Rep. 220, and note. A water company under contract with a city to supply water to extinguish fires will not be liable to a citizen injured by its failure to do so: *Ferris v. Carson Water Co.*, 16 Nev. 44; 40 Am. Rep. 485. Where no privity of contract exists, there can be no liability: *Rossmann v. Townsend*, 17 Wis. 95; 84 Am. Dec. 733.

SHINNERS v. PROPRIETORS OF LOCKS AND CANALS.

[154 MASSACHUSETTS, 188.]

PRACTICE — EXCLUSION OF EVIDENCE. — Error in excluding a question cannot be reviewed, when the bill of exceptions fails to show what the evidence of the witness would have been if admitted, or what was offered to be proved thereby.

NEGLIGENCE — EVIDENCE OF SUBSEQUENT ACTS. — When an accident has happened through the alleged negligence of a person, his subsequent acts in taking additional precautions to prevent other accidents are not admissible in evidence against him for the purpose of showing that such precautions were needed at the time of the accident.

EVIDENCE PROPERLY EXCLUDED, BUT RENDERED COMPETENT by the admission of subsequent evidence, must be again offered in rebuttal, to become available.

C. Cowley, for the plaintiff.

G. F. Richardson, for the defendant.

LATHROP, J. This in an action, under the Statutes of 1887, c. 270, sec. 2, brought by the widow of Matthew Shinnars, to recover damages sustained by her in consequence of the death of her husband, caused by the falling upon him of a portion of a bank of earth, while he was working as a day-laborer in the employ of the defendant corporation, and engaged in digging a trench in Lowell. He died without conscious suffering. The bank was eighteen feet high, and was composed of hard gravel, clay, and marl. The plaintiff contended that the fall of the bank took place in consequence of the unreasonable neglect of the defendant to have the bank properly shored up.

At the trial in the superior court, the jury returned a verdict for the defendant; and the case comes before us on the plaintiff's exception to the exclusion of the following question, put by the plaintiff to one of her witnesses, who worked in the trench before, after, and at the time of the accident: "What, if anything, was done by the defendant to said bank after the accident?"

There is nothing in the bill of exceptions to show what the testimony of the witness would have been if admitted, or what the plaintiff offered to prove thereby, and for this reason an exception to the exclusion of the question cannot be maintained: *Hathaway v. Tinkham*, 148 Mass. 85, 87, and cases cited; *Crowley v. Appleton*, 148 Mass. 98, 101; *Smethurst v. Barton Square Church*, 148 Mass. 261, 267; 12 Am. St. Rep. 550; *Farnum v. Pitcher*, 151 Mass. 470, 475. As, however, the point of law sought to be presented by the exception is an important one, arising constantly in trials at *nisi prius*, and as it has been elaborately argued by counsel, we are disposed to rest our judgment upon a broader ground than the one above stated.

The plaintiff contends that when an accident has happened through the alleged negligence of a person, the subsequent acts of this person in taking additional precautions to prevent other accidents are admissible in evidence, in an action against him for the injuries occasioned, for the purpose of showing that such prosecutions were needed at the time of the accident. If such acts are admissible, it must be on the ground that the conduct of the person amounts to an admission of negligence; and this is the ground upon which such evidence has been sometimes held to be admissible: *Pennsylvania R. R. Co. v. Henderson*, 51 Pa. St. 315; *West Chester etc. R. R. Co. v. McElwee*, 67 Pa. St. 311; *McKee v. Bidwell*, 74 Pa. St. 218. And in *Dale v. Delaware etc. R. R. Co.*, 73 N. Y. 468, it is said by Judge Rapallo, speaking of repairs made by a railroad corporation immediately after an accident: "In such a case the making of the repairs may be regarded as some evidence that they were needed, and consequently that the road was out of repair." This remark was, however, *obiter*, and although in accord with some decisions of the supreme court of the state of New York, which we need not further refer to, is contrary to what is now the well-established doctrine of the court of appeals of that state, as will presently appear.

The Pennsylvania doctrine was at first followed by the supreme court of Minnesota: *O'Leary v. Mankato*, 21 Minn. 65; *Phelps v. Mankato*, 23 Minn. 276; *Kelly v. Southern Minnesota R'y Co.*, 28 Minn. 98. But these cases were deliberately overruled in *Morse v. Minneapolis etc. R'y Co.*, 30 Minn. 465, in an elaborate opinion, in which the question is fully and carefully considered.

Such evidence has also been held to be inadmissible by the

highest tribunals in New York, Connecticut, Indiana, Illinois, and Iowa: *Dougan v. Champlain Transp. Co.*, 56 N. Y. 1; *Baird v. Daly*, 68 N. Y. 547; *Corcoran v. Peekskill*, 108 N. Y. 151; *Nalley v. Hartford Carpet Co.*, 51 Conn. 524; 50 Am. Rep. 47; *Terre Haute etc. R. R. Co. v. Clem*, 123 Ind. 15; 18 Am. St. Rep. 303; *Hodges v. Percival*, 132 Ill. 53; *Cramer v. Burlington*, 45 Iowa, 627; *Hudson v. Chicago etc. R'y Co.*, 59 Iowa, 581; 44 Am. Rep. 692. See also *Hart v. Lancashire etc. R'y Co.*, 21 L. T., N. S., 261.

In a recent case in this commonwealth (*Menard v. Boston etc. R. R. Co.*, 150 Mass. 386,) the plaintiff was struck by a locomotive-engine of the defendant at a highway crossing. At the time of the accident no flagman was stationed there; but the jury, when they took a view, found one there. The plaintiff's counsel in argument proposed to comment upon this fact, and was stopped by the court. On exceptions, this action of the court was held to be correct, and Mr. Justice Knowlton, in delivering the opinion of the court, said: "The defendant's method of managing its business before or after or at the time of the accident was not evidence of what due care required. The defendant, or any other corporation, might at any time do more or less, in some particular, than a reasonable regard for the safety of the public demanded. Its adoption of a particular safeguard at any time, whether an accident had previously occurred or not, could not be deemed an admission that taking any less precaution would be negligence, any more than its use of a more dangerous system would indicate that it considered that reasonably safe."

The plaintiff relies upon the case of *Readman v. Conway*, 126 Mass. 374, where the fact that the defendants repaired a platform after an injury occasioned to the plaintiff by a defect therein was held to be admissible as an admission "that it was their duty to keep the platform in repair." This case is readily distinguishable from the case at bar. The defendants were the owners of a building containing a number of shops, each let orally to a separate tenant. The building stood back from a street, and had a wooden platform in front of it, which extended to the sidewalk of the street. The question was, whether the landlords or the tenants were bound to keep the platform in repair. The act of the defendants in making the repairs was an act of dominion exercised by them, which the jury might well find was inconsistent with their defense that the tenants were under an obligation to keep the platform

in repair. For the same reason, the fact that a city makes repairs upon a highway after an accident thereon has been held to be admissible to show an acceptance of the highway as dedicated: *Manderschid v. Dubuque*, 29 Iowa, 73; 4 Am. Rep. 196. See also *Sewell v. Cohoes*, 75 N. Y. 45, 54; 31 Am. Rep. 418; *Lafayette v. Weaver*, 92 Ind. 477.

The plaintiff further contends that if this evidence was not admissible in an action at common law, it was admissible in an action under the Statutes of 1887, c. 270, because, by section 3, the amount of compensation, in case of death, is to be assessed "with reference to the degree of culpability of the employer herein, or the person for whose negligence he is made liable." But if evidence is not admissible to show culpability, we fail to see how it can be admissible to show the degree of culpability.

At the trial, after the question above referred to had been excluded, one of the defendant's witnesses testified to the manner in which the bank was shored up before the accident, namely, by placing a plank fourteen inches wide horizontally along the bank, about midway between the top and the bottom, he having observed a fissure near the top of the bank, about six feet long and a quarter of an inch wide. He and other witnesses testified that they saw no other signs of weakness in the bank before the accident, which was caused by earth falling from below the plank. The plaintiff contends that the evidence excluded would tend to qualify the statements of these witnesses. Without intending to intimate that such would be its effect, it is enough to say that as, in our opinion, the question asked was, both upon principle and the great weight of authority, properly excluded when offered, if it became competent, in consequence of evidence put in by the defendant, the plaintiff should have offered it in rebuttal.

As we are of opinion that in any aspect of the case the question put to the plaintiff's witness was properly excluded, the order must be, exceptions overruled.

NEGLECT — EVIDENCE — SUBSEQUENT PRECAUTIONS. — In an action for injury by negligence in not providing safeguards at a point of danger, evidence that defendant subsequently placed them there is incompetent: *Nelson v. Hartford Carpet Co.*, 51 Conn. 524; 50 Am. Rep. 47, and note; *Getty v. Town of Hamlin*, 127 N. Y. 636. It is error to predicate the existence of an actionable defect in a sidewalk upon the fact of subsequent repairs: *Lombard v. East Tawas*, 86 Mich. 14. Evidence that danger signals were placed in a shop after an accident has occurred is inadmissible: *Fox v. Peninsular* etc.

Works, 84 Mich. 676. *Contra*, see *St. Louis etc. R'y Co. v. Weaver*, 35 Kan. 412; 57 Am. Rep. 176, and extended note discussing this subject.

TRIAL — EVIDENCE. — It is proper to admit irrelevant testimony when it appears from the record that the evidence became relevant by its connection with other testimony subsequently offered; *Lawson v. State*, 20 Ala. 65; 54 Am. Dec. 182, and note.

HILL v. JEWETT PUBLISHING COMPANY.

[154 MASSACHUSETTS, 172.]

CORPORATIONS — LIABILITY ON FORGED CERTIFICATES OF STOCK. — Where the by-laws of a corporation provide that all certificates of stock shall be signed by its president and treasurer, and such president, who is not the proper officer to issue certificates, makes a fraudulent issue thereof to himself, forging the name of such treasurer thereto, affixing the corporate seal, and pledging them for his individual debt, the corporation is not liable for his criminal fraud, as for an act made possible by its negligence, although he was allowed to have access to its seal and certificate-book after his previous misconduct in violating an agreement to pledge certain stock to the corporation.

ACTION against the defendant company upon two certificates of its stock pledged to plaintiffs by C. F. Jewett, the president of such company, for the payment of his individual debt. Verdict ordered for the defendant, and the plaintiffs excepted. The remaining facts are stated in the opinion

R. M. Morse, Jr., and C. E. Hellier, for the plaintiffs.

S. J. Elder and W. C. Wait, for the defendant.

ALLEN, J. The by-laws of the defendant corporation provide that "each stockholder shall be entitled to a certificate of his stock under the seal of the corporation, and signed by its president and treasurer." The certificates taken by the respective plaintiffs each called for these two signatures, and purported to bear them. The plaintiffs were therefore apprised of the necessity for two signatures. In point of fact, however, the certificates did not bear the signature of the treasurer, his name having been forged by the president. There was no special provision in the by-laws giving the president anything to do in respect to the issuing of certificates of shares, except a requirement that he should sign all such certificates. Transfers were to be recorded by the clerk. The purchaser named in a transfer so recorded was entitled to a new certificate upon producing the transfer to the treasurer, and delivering to him the former certificate. There was no actual or

ostensible authority in the president to issue certificates. He was only to sign them. The certificates taken by the plaintiffs were invalid for want of the two signatures required by the by-laws.

But the plaintiffs contend that the defendant is nevertheless bound to make the certificates good, or is responsible for their being bad, on the ground that, in view of his previous known misconduct, it was negligent in permitting Jewett to remain president of the corporation, and to have control of its certificate-book and seal, and that the cases fall within the principle that where one of two innocent persons must suffer a loss from the fraud of a third, the loss must be borne by the one whose negligence enabled the third person to commit the fraud.

In order to reach this conclusion, it must be made to appear that the frauds and forgeries of Jewett were such natural and probable results of his continuance in the office of president of the corporation that the defendant ought to have anticipated and guarded against them, and also that the plaintiffs on their part exercised due diligence and precaution in accepting the certificates from him.

In the absence of any previous misconduct on Jewett's part, it could hardly be maintained that there was any negligence on the part of the corporation in keeping its seal and book of certificates of shares where the president could have access to them, so as to be able to remove blank certificates from the end of the book, and impress the corporate seal upon them. We are not aware that it is customary for corporations in this country to keep their seals or books of certificates in such a way that access to them can only be had when two or more officers are present. The chief safeguard in respect to the certificates is the necessity of two signatures. And accordingly, when one who has had confidence reposed in him has availed himself of his opportunity to commit a fraud upon others by means of forgery, it has usually been held in England that the loss was not a natural or probable result of the confidence thus reposed, even though it showed carelessness, and that it was too remote to be properly chargeable upon those who were thus careless in reposing the confidence: *Bank of Ireland v. Evans's Charities*, 5 H. L. Cas. 389; *Staple of England v. Bank of England*, L. R. 21 Q. B. D. 160, 176; *Swan v. North British Australasian Co.*, 2 Hurl. & C. 175, 189. See also *Vagliano v. Bank of England*, L. R. 22 Q. B. D. 103, 117; on appeal, L. R. 23 Q. B. D. 243, 255, 263.

The plaintiffs rely much on *Shaw v. Port Philip Gold Min. Co.*, L. R. 13 Q. B. D. 103, which in many of its general features much resembles the present case, but with certain differences. In that case the secretary of the defendant company issued a certificate of shares, with the name of a director forged by himself. The person to whom it was issued bought shares on the market, through a broker, who received a transfer signed by the secretary, accompanied by what purported and in all respects appeared to be a regularly issued certificate of those shares. These were deposited at the company's office, with the request for the issue of a new certificate, in the usual way. The new certificate was issued in the usual form by the secretary, but the signature of a director, which was required, was forged. It was a part of the regular and authorized duty of the secretary to receive and examine transfers and certificates of shares, to have transfers registered, to procure the preparation, execution, and signature of certificates with all requisite and prescribed formalities, and thereupon to issue them to the persons entitled to receive them. Moreover, the company after the issue of the certificate paid a dividend thereon, by check signed by the secretary and two directors. The decision of the case, which was not heard before the court of appeal, was placed on the ground that the company had made it the duty of the secretary to procure the preparation, execution, and signature of certificates with the prescribed formalities, and thereupon to issue them to the person entitled to receive them. The principal facts upon which the decision turned are wanting in the case before us. The president of the defendant corporation was not the proper officer to issue certificates, and the certificates which the plaintiffs received did not come from the office of the defendant in regular course of business, but they were received by the plaintiffs under private and personal transactions between themselves and Jewett, the president.

The plaintiffs, however, contend that the previous and known misconduct of Jewett had been such that it distinguishes the present case from others, and that by reason thereof the defendant should be held responsible for his acts. This misconduct consisted in pledging his shares to Evans & Co., when he had agreed to pledge them to his associates in the corporation. According to the original understanding, when the corporation was formed, Estes and Lauriat subscribed and paid for the

whole of the stock, but there was an agreement under which Jewett was to have the option of buying one half of the stock at a certain price, at any time within one year. Jewett was president of the company, and Jackson, one of the firm of Estes and Lauriat, was treasurer. In the absence of the two senior members of the firm, Jewett elected to take his half of the stock, but stated that he could not very easily pay for it then, and Jackson consented to issue the certificates to him, with the understanding that he was to give his notes for them, and that the firm would hold the stock as collateral. The stock was accordingly issued to Jewett, who took the certificates, and did not pledge them to the firm, but afterwards pledged them to Evans & Co. There is no distinct statement how it happened that Jewett was allowed to take away the certificates, instead of pledging them on the spot to the firm, nor how soon afterwards he pledged them to Evans. Apparently, confidence was reposed in him, and at any rate there is nothing to show that any steps were taken to compel him to pledge the shares to the firm according to his promise. What Jackson did in consenting to the issue of the stock to Jewett without retaining them in pledge was within his power as a member of the firm.

On the whole, we find nothing to show that the corporation or its other members had reason to suppose from what Jewett had done that he would be likely to issue forged certificates of shares, if allowed access to the certificate-book and seal of the corporation; and accordingly, it is not to be held responsible for his criminal fraud, as for an act made possible by its negligence.

In the cases heretofore determined by this court, where a corporation was held responsible for the fraudulent issue of shares, the certificates were in fact signed by the proper officers whose signatures were required, and there was carelessness on the part of the president in leaving with the treasurer certificates signed in blank by himself, and also carelessness on the part of other officers of the company: *Allen v. South Boston R. R. Co.*, 150 Mass. 200; 15 Am. St. Rep. 185.

In each case the entry must be, judgment on the verdict.

CORPORATIONS — FRAUDULENT ISSUE OF STOCK — LIABILITY FOR. — Where the stock of a corporation is fraudulently issued by one of its officers as security for a private debt, the corporation is not estopped, as against such a creditor, to deny the validity of the stock, if he knew that the surrender of

the former certificate was essential to the lawful issue of the new one: *Farrington v. South Boston R. R. Co.*, 150 Mass. 406; 15 Am. St. Rep. 222, and note. But where the plaintiff was a purchaser of the stock, the rule was different: *Allen v. South Boston R. R. Co.*, 150 Mass. 185; 15 Am. St. Rep. 185, and note.

LILIENTHAL v. SUFFOLK BREWING COMPANY.

[154 MASSACHUSETTS, 185.]

SALE — CONDITION SUBSEQUENT — EVIDENCE. — Where a purchaser from the agent of the vendor signs an unconditional memorandum for the purchase of a quantity of hops at a certain price, with an oral reservation of a condition that if it is subsequently discovered that the price named is not the market price, there is to be no sale, and the vendor confirms the memorandum of sale, after which the purchaser informs him by letter that as the agent misrepresented the market price, the hops will not be accepted unless a concession is made, without mentioning the oral condition, the sale is a present sale, and the condition is a condition subsequent, parol evidence of which is inadmissible as a defense, or to vary the terms of the memorandum, in an action to recover the price of the hops after a refusal to accept.

SALES — FRAUDULENT REPRESENTATION BY VENDOR, WHEN NO DEFENSE — Where a vendor of hops fraudulently states the market price thereof to an experienced prospective purchaser, who says he does not believe the statement, and subsequently signs an unconditional memorandum for the purchase of a certain quantity of hops at a certain price, orally reserving the right, if the price named is subsequently found not to be the market price, to disaffirm the sale, it will be presumed that he relied upon the oral condition, and not the fraudulent statement of the vendor.

L. D. Brandeis, for the plaintiffs.

A. Hemenway, for the defendant.

HOLMES, J. This is an action of contract, for refusing to accept and pay for seventy bales of hops, bought of the plaintiffs by the defendant. The defenses are, that the defendant was induced to make the contract by the fraudulent representations of the plaintiffs' agent, one Horst, as to the market price of hops, and that the agreement was made subject to a condition on the same matter which was not satisfied. According to the testimony of Smith, the defendant's president, who made the bargain with Horst, Horst called on him several times, trying to sell hops. On a Saturday, Horst said that hops were worth twenty-five cents, and Smith told him he did not care; he did not believe hops were worth twenty-five cents. On the next Monday, September 10, 1888, Horst called again, and said that hops had advanced very much since last week;

that they were now thirty cents a pound. Smith said he did not care; he was not in want of hops; but being urged, said, "If hops are going, as you say, very high, I will buy ten bales, and run the risk, at thirty cents a pound." Horst refused, and, pulling out some telegrams written in hieroglyphics, stated that hops before a week would be thirty-five cents. Smith told him he had no means of information; at all events, he was not in the market for hops; but after a good deal of urging, he told him he would sign a memorandum for a carload of seventy bales, on the condition that "when I return from Canada and find out that it was not the market price, it will be no sale." At the same time, Smith signed and delivered a memorandum for the defendant: "We have this day bought of Lilienthal Brothers seventy (70) bales," etc., stating the terms of the bargain, and mentioning no condition. On the 13th, the plaintiffs wrote, confirming the sale, and thanking the defendant. Smith further testified that on his return from Canada, on September 24th, he found that the best hops in Boston were offered for twenty-five cents on September 10th, and we will assume there was other evidence that that, or about that, was the market price. On September 25th, Smith wrote to the plaintiffs, acknowledging their letters, and saying nothing of the alleged condition, but complaining that although "of course I had no business to be ignorant of the true state of the market," Horst had misrepresented it, and that unless there was some concession, he should not accept the hops. Later, the hops were refused.

So far as the alleged condition goes, it seems to us impossible to construe it as a condition precedent to the existence of the contract, as in *Wilson v. Powers*, 181 Mass. 539. The language testified to imports that a contract has been made, or is about to be made, which is to be off in a certain event thereafter, not that the defendant will make a contract with the plaintiffs at some time in the future, in case Smith finds Horst's statement to be true. The common sense of the thing, and the correspondence of the parties, if consistent with the existence of any condition at all, lead to the same result. The plaintiffs assume, in their letter, that a sale has taken place. The defendant, in his answer, does the same thing. He says he gave Horst an order for seventy bales, and his suggestion that Horst misrepresented the market price, as a ground for a concession, is quite inconsistent with the notion that the mo-

ment only then had arrived for making a contract, and that its existence depended on what he should then have discovered for himself touching the market price.

It is admitted that if the alleged condition was a condition subsequent, the defendant was not entitled to prove or to rely upon it. There could be no argument that it was a subsequent modification of the written memorandum. It was strictly contemporaneous talk: *Clark v. Houghton*, 12 Gray, 38, 41. This being so, of course the defendant could not modify by spoken words the effect of a writing signed by it, which purported to set forth all the terms of the bargain, and to bind the defendant unconditionally to accept the hops: *Davis v. Randall*, 115 Mass. 547; 15 Am. Rep. 146; *Batchelder v. Quon Ins. Co.*, 185 Mass. 449; *Gordon v. Niemann*, 118 N. Y. 152; *Daly v. W. W. Kimball Co.*, 67 Iowa, 132. As the foregoing considerations justify the ruling of the court below, that the alleged condition was no defense, we need go no further.

Next as to fraud. *Prima facie*, a statement to an experienced dealer in hops as to the market value of the article he is asked to buy is dealer's talk on a subject about which the seller has a right to assume that the buyer will make up his mind for himself, the means of information being equally open to both: *Manning v. Albee*, 11 Allen, 520, 522; *Poland v. Brownell*, 131 Mass. 138; 41 Am. Rep. 215; *Deming v. Darling*, 148 Mass. 504; *Foley v. Cowgill*, 5 Blackf. 18; 32 Am. Dec. 49; *Cronk v. Cole*, 10 Ind. 485; *Grafenstein v. Epstein*, 23 Kan. 443; 33 Am. Rep. 171. Assuming, for the sake of argument, that a case might be supposed in which a jury would be warranted in finding, from other facts beside the mere making of the representation, that the buyer reasonably surrendered his judgment to the seller (*Whiteside v. Brawley*, 152 Mass. 133), this is not such a case. There were no such other facts. Moreover, Smith's answer to Horst on Saturday was direct, that he did not believe Horst's statement. So on Monday, Smith's answer to Horst, that he had no means of information, imported in polite terms that he did not rely upon Horst, and if, as he says, Smith made a condition that if he found the price given was not the market price, the sale was to be off, he told Horst, in effect, that he did not rely upon him, but meant to find out for himself. The only fair inference from the evidence for the defendant is, that its agent

relied, not upon Horst's statements, but upon an oral condition, which fails for the reasons which we have given.

Judgment on the verdict.

SALES — FALSE REPRESENTATIONS BY VENDOR AS TO VALUE. — False and fraudulent representations by a vendor of a chattel as to its value will not relieve the vendee, when he could have ascertained its price for himself: *Chrysler v. Canaday*, 90 N. Y. 272; 43 Am. Rep. 166, and note; *Ellis v. Andrews*, 56 N. Y. 83; 15 Am. Rep. 379, and extended note; *Page v. Parker*, 43 N. H. 363; 80 Am. Dec. 172, and note; *Prie v. Overholser*, 75 Mo. 646; *Watson v. Doyle*, 120 Ill. 415; see *Blackwell v. Rowland*, 108 N. C. 554.

WILSON v. WILSON.

[184 MASSACHUSETTS, 194.]

DIVORCE — CONNIVANCE — ADULTERY. — A husband who suspects his wife of having committed adultery, and who, without throwing any opportunities in her way, merely suffers her, in a single instance, to avail herself to the full extent of an opportunity to indulge her adulterous disposition, is not guilty of connivance, even though he hopes he may obtain proof which will entitle him to a divorce, and purposely refrains from warning her for that reason.

W. B. Orcutt and E. J. Jenkins, for the plaintiff.

J. G. Holt, for the defendant.

MORTON, J. This case turns on the question whether the finding of the court was correct, that the libelant was, upon the evidence, guilty of connivance.

The libelant did nothing to encourage his wife to commit adultery, and did not, directly or indirectly, throw opportunities in her way. Until the day he detected her, the report does not show that any unusual or improper acts had occurred in his presence between her and any other man. He had suspected and had watched her, but had not obtained proof of her guilt, and had not till the day he caught her had the assistance of a detective or police-officer. On that day he came from his home in Dorchester, and waited, suspecting she might come to Boston also, and might leave the Dorchester Street car at the corner of Federal Street and Beach Street, in Boston, which she did. She met a man by the name of Andrews, whom there is nothing to show the libelant had ever seen or heard of before, and went with him to a hotel. The libelant followed her, and after waiting in the hotel an

hour, and listening ten or fifteen minutes at the door of the room where they were, burst it open and found them in bed together. He hoped she would commit adultery, so that he could get a divorce, and he gave her plenty of time so that she might do it, and did not warn her. He thought before this that she had committed adultery.

We think, as matter of law, it cannot be said, on this state of facts, that the libellant was guilty of connivance. It is true that he could have prevented his wife from committing adultery, and did not; on the contrary, he wished she would, that he might have evidence on which he could get a divorce. But he did not make, or aid in any way in making, the opportunity. He did no overt act, unless keeping still was one, which it clearly was not. It was not a case where he supposed his wife was about to commit adultery for the first time, and where it would have been his duty to give her the assistance which husband and wife are mutually expected to give to each other. It certainly cannot be held that a husband who suspects his wife of infidelity can take no means to ascertain the truth of his suspicions without being deemed guilty of connivance. "There is a manifest distinction," says the court in *Robbins v. Robbins*, 140 Mass. 528, 531, 54 Am. Rep. 488, "between the desire and intent of a husband that his wife, whom he believes to be chaste, should commit adultery, and his desire and intent to obtain evidence against his wife, whom he believes already to have committed adultery, and to persist in her adulterous practices whenever she has opportunity." Merely suffering in a single case a wife whom he already suspects of having been guilty of adultery to avail herself to the full extent of an opportunity to indulge her adulterous disposition, which she has arranged without his knowledge, does not constitute connivance on the part of the husband, even though he hopes he may obtain proof which will entitle him to a divorce, and purposely refrains from warning her for that reason. He may properly watch his wife, whom he suspects of adultery, in order to obtain proof of that fact. He may do it with the hope and purpose of getting a divorce if he obtains sufficient evidence. He must not, however, make opportunities for her, though he may leave her free to follow opportunities which she has herself made. He is not obliged to throw obstacles in her way, but he must not smooth her path to the adulterous bed: 2 Bishop on Marriage

and Divorce, 5th ed., sec. 9; *Timmings v. Timmings*, 3 Hagg. Ecc. 76; *Stone v. Stone*, 1 Rob. Ecc. 99, 101; *Phillips v. Phillips*, 10 Jur. 829.

The law does not compel a husband to remain always bound to a wife whom he suspects, and it allows him, as it does other parties who think they are being wronged, reasonable scope in their efforts to discover whether the suspected party is or is not guilty, without themselves being adjudged guilty of conniving at the crime which they are seeking to detect: *Robbins v. Robbins*, 140 Mass. 528, 531; 54 Am. Rep. 488. In a libel for divorce for desertion, the willingness or even the desire of the deserted party to be deserted, so long as it is not expressed in conduct or acts to the other party, will not bar a divorce: *Ford v. Ford*, 143 Mass. 577. Of course, as the court says in that case, there is always the difficulty of believing that the desire or willingness did not manifest itself in conduct or acts expressive of it to the other party. But nothing of the sort appears here.

In *St. Paul v. St. Paul*, L. R. 1 P. & D. 739, the court held that the neglect of the husband which would justify the court in withholding a decree in his favor, under a statute which provided that the court might do so where the husband was guilty of "such willful neglect or misconduct as . . . conduced to the adultery," must be such neglect as conduced to the wife's fall, and not neglect conducing to any particular act of adultery subsequent to her fall.

The case of *Morrison v. Morrison*, 136 Mass. 310, referred to by the libelee, differs from this. In that case the husband, after he had been cautioned to watch his wife, made opportunities for her and her suspected paramour to be together alone, witnessed without objection acts of considerable familiarity between them, said nothing whatever to his wife intimating any disapproval of her conduct, and in other ways acted in such a manner as to induce the adultery for which he was watching.

In the opinion of a majority of the court, there must therefore, according to the reservation of the report, be a new trial, and it is so ordered.

MARRIAGE AND DIVORCE — CONNIVANCE. — Connivance by a husband at his wife's adultery, on the ground of which an action of divorce is dismissed, is not a bar to an action of divorce for a prior act of adultery: *Morrison v. Morrison*, 142 Mass. 361; 56 Am. Rep. 688. Where a husband deceives his

wife as to his going away, in order to catch her in an act of adultery, this is not a connivance on the part of the husband: *Robbins v. Robbins*, 140 Mass. 928; 54 Am. Rep. 498, and note. Where the conduct of the husband indicates an intent to have his wife transgress, or to let her do so undisturbed, this constitutes a connivance, and will act as a bar to his suit for divorce: *Bourgeois v. Chauvin*, 89 La. Ann. 216.

BANK OF NORTH AMERICA v. RINDGE.

[154 MASSACHUSETTS, 208.]

CONFLICT OF LAWS—ENFORCEMENT OF PERSONAL LIABILITY OF STOCKHOLDER IN A FOREIGN CORPORATION.—A resident of New York cannot maintain an action in Massachusetts against a resident of California to establish his personal liability for the debt of a corporation having no place of business in Massachusetts, and organized under the laws of Kansas, providing for special and limited liability of a stockholder, when his liability as such stockholder has not been judicially determined in the latter state.

H. S. Dewey, for the plaintiff.

H. Wheeler, for the defendant.

ALLEN, J. The plaintiff is a corporation of the state of New York. The defendant is a resident of California, who owned fifty shares of stock in the Haddam State Bank, a corporation of Kansas. The plaintiff recovered judgment in Kansas for \$5,343 and costs, against the Haddam State Bank, and took out execution thereon, but could find no property of the bank whereon to levy, and so the execution was returned unsatisfied. No steps were taken in Kansas to charge the defendant as a stockholder in the bank, but he being found in Massachusetts, the plaintiff brings this action against him here, seeking to charge him personally for the judgment against the bank, to the amount of the par value of his shares therein, namely five thousand dollars. This is sought to be done by virtue of the laws of Kansas, respecting which the averment in the declaration is as follows: "And the plaintiff further says, that by the laws of the state of Kansas, if any execution shall have been issued against the property or effects of a corporation, except a railway or religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together

with any amount unpaid thereon; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment, and such plaintiff may maintain an action at law against any one or more of the stockholders of such corporation, to recover a debt due by the corporation."

The declaration was demurred to, and we have to determine whether the plaintiff states a case upon his declaration.

The declaration does not in terms set forth any statute of Kansas, nor show to what extent the laws of Kansas above set forth are statutory, or rest merely in judicial decisions. It is to be regretted that we are not at liberty to determine the case upon an examination of the statute of Kansas, with the assistance of any construction which may have been put upon it by the courts of that state. But we must take the case as the parties present it to us.

The question can hardly be considered as an open one in this commonwealth. This court has often declined to exercise jurisdiction to enforce a liability imposed upon stockholders in corporations established in other states under statutes of those states. In *Post v. Toledo etc. R. R. Co.*, 144 Mass. 341, 345, 59 Am. Rep. 86, it is said: "This court does not take jurisdiction of a suit to enforce this liability of stockholders in a foreign corporation, not because it would be a suit to enforce a penalty, or a suit opposed to the policy of our laws, but because it is a suit against a foreign corporation which involves the relation between it and its stockholders, and in which complete justice only can be done by the courts of the jurisdiction where the corporation was created." See also *New Haven Horse Nail Co. v. Linden Spring Co.*, 142 Mass. 349, 353, and cases cited.

The case at bar furnishes a strong illustration of the propriety of this course. If the plaintiff, as a creditor of the Kansas corporation, without obtaining any previous judgment in Kansas establishing the defendant's liability as a stockholder, can maintain an action directly and in the first instance against him in Massachusetts, for the purpose of charging him as a stockholder under the qualified liability set forth in the declaration, then it would follow that the plaintiff might also institute a similar action against him in California, or in any number of other states where service upon him could be obtained. The plaintiff might also institute similar actions for the same debt in different states against other stockholders. In such case, it is probable that a judg-

ment against one stockholder without satisfaction would be no bar to actions against others, but it is obvious that the defendants in such actions might be put to great inconvenience in ascertaining, and indeed might find it practically impossible to ascertain, what steps the plaintiff might have taken against other stockholders in other states. A dishonest creditor might possibly recover several times over against different stockholders in different states, before they respectively could ascertain the facts. Likewise, the defendant, if compelled to pay under a judgment recovered in one state, would find it difficult, if not impossible, to enforce contribution from other stockholders residing elsewhere. Moreover, if the plaintiff might maintain such actions against the defendant and against other stockholders in different states, until he should finally recover satisfaction, other creditors of the Kansas corporation might also do the same. If every creditor of a Kansas corporation which has no property with which to respond to a judgment obtained by such creditor against it in Kansas, may thereupon, without any further proceedings in that state to charge the stockholders, maintain an action against every stockholder in every state in the Union where service can be obtained, and pursue such action until satisfaction is obtained from some stockholder in some state, it is obvious that a large amount of litigation might ensue, under which substantial justice as among the stockholders could not be worked out. The liability of the stockholder, as set forth in the declaration, is not a general liability for all the debts of the corporation. The execution against the stockholder which can be issued in Kansas in the action against the corporation, as set forth in the declaration, is only "to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon." Probably, by the true construction of the laws of Kansas, the action at law to charge stockholders, which is given as an alternative remedy, would be limited to the same amount as the execution; though, according to the averment of the declaration, the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment, without any other limitation being expressed. The present plaintiff does not contend that it can recover against the defendant the full amount of its judgment, but only the par value of the defendant's stock in the bank. The liability sought to be enforced is a strictly limited one. It seems to us that a *bona fide*, or at any rate a compulsory, payment to

one creditor would discharge a stockholder to that extent from liability to others; and a payment of the full par value of his stock would, according to the view which has been expressed by this court, be a full discharge: *Halsey v. McLean*, 12 Allen, 438, 442; 90 Am. Dec. 157; though as to this other courts might hold otherwise: *Fowler v. Robinson*, 31 Me. 189; *Gross v. Hilt*, 36 Me. 22. There is no averment in the declaration that the defendant has not been thus discharged from liability, and perhaps this is not necessary, as it would be more properly a matter of defense; but in case of several actions in different states, questions of priority of the claims of creditors might arise, upon which the decisions of the courts of the different states might not be uniform, and thus the defendant might be held liable more than once. The cases cited by the defendant appear to show that in some states the creditor first bringing suit has priority: *Ingalls v. Cole*, 47 Me. 530; *Thebus v. Smiley*, 110 Ill. 316. In Missouri, the creditors rank in the order in which they respectively obtained judgment: *State Sav. Ass'n v. Kellogg*, 63 Mo. 540. In other states no priority among the creditors is recognized: *Pfohl v. Simpson*, 74 N. Y. 137; *Wright v. McCormack*, 17 Ohio St. 86; *Eames v. Doris*, 102 Ill. 350; *Chicago v. Hall*, 103 Ill. 342. See Thompson on Liability of Stockholders, secs. 420-426; 2 Morawetz on Private Corporations, 2d ed., sec. 897. Even a compulsory payment might not avail to protect him. Moreover, the defendant might, by way of set-off, present claims which he holds either against the corporation in Kansas, or against the creditor who sues him, and different decisions in respect to his right of set-off might be made in different states.

These considerations are suggested to illustrate the practical difficulty of enforcing a liability such as that set forth in the declaration in other states than that where the corporation is established, in such a way as to secure substantial justice. This difficulty is far greater in cases where no steps have been taken in the state where the corporation is established to ascertain and determine the amount of each stockholder's liability. There the whole amount of debts can be ascertained, and the proper proportion assessed upon each stockholder; or his liability can be otherwise determined in a manner which will avoid many of the objections which exist against the maintenance of actions like the present. We remain satisfied with the conclusions heretofore reached by this court, that such an action, under the circumstances which appear here,

ought not to be entertained in this state. Limiting our decision to the facts now before us, it is this: That a resident of the state of New York cannot maintain in the courts of this state an action against a resident of the state of California to establish his personal liability as a stockholder of a corporation organized in the state of Kansas, and having no place of business in this state, for a debt of that corporation to the plaintiff, under laws of Kansas, such as are set forth in the declaration, providing for a certain special and limited liability on the part of stockholders, when no judicial proceedings have been taken in Kansas to ascertain and establish the liability of the defendant as such stockholder.

Whether the same result might not be reached on the ground that the subsidiary liability of stockholders such as is set forth is matter of remedy only, and does not follow the stockholder outside of the state, there being no averment of a different construction of the statute by the Kansas courts, we need not consider: *Brown v. Eastern State Co.*, 134 Mass. 590.

Judgment for the defendant affirmed.

CONFLICT OF LAWS—ACTION TO ENFORCE STOCKHOLDER'S LIABILITY IN A FOREIGN CORPORATION.—A corporation has a right to be protected by the remedial limitations of its jurisdiction: *Wooden v. Western New York etc. R. R. Co.*, 125 N. Y. 10; 22 Am. St. Rep. 803, and note. A contract made with a foreign corporation, if void in the state to which such corporation owes its existence, cannot be enforced elsewhere: *Rue v. Missouri Pac. R'y Co.*, 74 Tex. 474. The contract of a corporation is affected by the law of the state creating it: *Achill v. Huntington*, 70 Md. 191; 14 Am. St. Rep. 344, and extended note; *Jessup v. Carnegie*, 80 N. Y. 441; 26 Am. Rep. 642.

FREELAND v. RITZ.

[184 MASSACHUSETTS, 257.]

STATUTE OF FRAUDS—EXECUTORY CONTRACT.—It is no objection to a written contract that some of its terms remain to be fixed by something to be done in the future, if that something is done before an action is brought; and if the contract is then in writing, the statute of frauds is complied with.

STATUTE OF FRAUDS—MEMORANDUM OF LEASE.—A written agreement to sublet rooms, the lease therefor "to be in substantial accordance with the blank form herewith annexed, and to be made subject, in all respects, to the terms and conditions of" an agreement and lease between the owner of the building and the sublessor, is a sufficient memorandum of the terms of such sublease to satisfy the statute of frauds, after the lease to such sublessor has been executed.

CONTRACT FOR LEASE — EVIDENCE OF COMPLIANCE BY LESSOR AND WAIVER BY LESSEE. — In an action to recover for a breach of an agreement to execute a lease, evidence that the lessor wrote to the lessee in regard to the lease, and subsequently sent him a copy of a lease for his signature, which copy he retained without signing and without objection, shows a compliance by the lessor with the agreement to execute a lease, and an unwillingness on the part of the lessee to accept a lease in any form, as well as his waiver of a strict compliance by the lessor with the terms of the agreement.

PLEADING. — WHERE CONTRACT SUED ON IS INCOMPLETE in itself and depends upon another agreement, the terms of such agreement, so far as they are material to complete the contract in suit, should be set forth with appropriate allegations; and if a waiver is also relied upon, it should be pleaded as an excuse for non-performance by the plaintiff.

C. Brown and G. A. O. Ernst, for the plaintiffs.

H. W. Bragg and W. S. Slocum, for the defendants.

LATHROP, J. This is an action of contract brought by the members of the firm of Freeland, Loomis, & Co. against the members of the firm of Ritz and Glines, for the breach of an agreement under seal and signed by the parties, to accept a lease of certain rooms in a building.

The agreement declared on recited that a building was then in process of erection by the Boylston Market Association, on the corner of Washington Street and Boylston Street, in Boston; that Freeland, Loomis, & Co. had entered into an agreement with said association for a lease of said building as soon as the same should be completed; and that Ritz and Glines were desirous of obtaining from Freeland, Loomis, & Co. a lease of part of said building, "to wit, rooms on the sixth floor thereof, as marked on plan of said floor, in the possession of Freeland, Loomis, & Co., containing about twenty-five hundred (2,500) square feet, more or less, and situated in the northeasterly corner of said building, for the purpose of there conducting the photographing business." Freeland, Loomis, & Co. agreed, as soon as the building should be ready for occupancy, and a lease thereof executed and delivered to them, to execute and deliver, and Ritz and Glines agreed to accept, "a lease of the rooms aforesaid, to be used solely and exclusively for the business aforesaid, for a period of five (5) years from the date of the completion of said building, at an annual rental of twenty-five hundred dollars (\$2,500), payable in equal monthly installments, the lease to be in substantial accordance with the blank form hereunto annexed, and to be made subject in all respects to the terms and conditions of the said agreement

and lease between said Freeland, Loomis, & Co. and said Boylston Market Association."

1. The defendants contend that inasmuch as the agreement provides that the lease is "to be made subject in all respects to . . . the said agreement and lease between" the plaintiffs and their lessor, which lease was not then in existence, there is no sufficient agreement or memorandum to satisfy the statute of frauds: Pub. Stats., c. 78, sec. 1, cl. 4.

The agreement declared on is dated April 17, 1888, and it is clear that, considered alone, it is insufficient to satisfy the statute, for some of its terms were then uncertain, and might never be made certain: *May v. Ward*, 134 Mass. 127; *Ashcroft v. Butterworth*, 136 Mass. 511. What was then uncertain has, however, since been made certain, as it appears by the report upon which the case comes before us that in January, 1889, before this action was brought, a lease in writing of the entire building was delivered to the plaintiffs by their lessor.

It is a well-settled rule of law, that while the memorandum must express the essential elements of the contract with reasonable certainty, these may be gathered either from the terms of the memorandum itself, or from some other paper or papers therein referred to. If one of a series of papers which appear to have relation to the same contract is signed by the party to be charged, this is enough, as all the papers are to be considered together, as forming one contract or memorandum. There is no doubt, also, that parol evidence is admissible to identify any paper referred to: *Atwood v. Cobb*, 16 Pick. 227, 230; 26 Am. Dec. 657; *Lerned v. Wannemacher*, 9 Allen, 412; *Rhoades v. Castner*, 1½ Allen, 130; *Beckwith v. Talbot*, 95 U. S. 289; *Grafton v. Cummings*, 99 U. S. 100; *Ryan v. United States*, 136 U. S. 68, 83; *Peck v. Vandemark*, 99 N. Y. 29; *Louisville Asphalt Varnish Co. v. Lorick*, 29 S. C. 533; *Ridgway v. Wharton*, 6 H. L. Cas. 238; *Fitzmaurice v. Bayley*, 9 H. L. Cas. 78, 102; *Baumann v. James*, L. R. 3 Ch. 508; *Shardlow v. Cotterell*, L. R. 18 Ch. Div. 280; L. R. 20 Ch. Div. 90; *Studds v. Watson*, L. R. 28 Ch. Div. 305; *Oliver v. Hunting*, L. R. 44 Ch. Div. 205; *Long v. Millar*, L. R. 4 C. P. D. 450; *Cave v. Hastings*, L. R. 7 Q. B. D. 125.

The defendants, however, contend that these principles apply only to papers already in existence when the instrument signed by the party sought to be charged is executed; and in support of this view, rely upon the case of *Wood v. Midgley*, 2 Smale & G. 115; on appeal, 5 De Gex., M. & G. 41.

This was a bill for specific performance of a contract of sale of land. Some of the terms had been reduced to writing, but not signed. The purchaser paid his deposit money to the auctioneer who sold the land, and he signed the following receipt: "Memorandum. Mr. Thomas Midgley has paid to me the sum of fifty pounds as a deposit and in part of payment of one thousand pounds, for the purchase of the Ship and Camel Public House, at Dockhead, the terms to be expressed in an agreement, to be signed as soon as prepared." Vice-Chancellor Stuart overruled a demurrer to the bill, on the ground that the memorandum to be prepared and signed was only the fair copy of the draught as settled and agreed to. On appeal, the demurrer was sustained by Lord Justice Turner and Lord Justice Knight-Bruce, on the ground that the agreement referred to, although it fixed the price, left other points to be determined. "The conditions of sale were to be adapted to a sale by private contract, and were to be subject to a future agreement." The case is therefore one of an agreement incomplete when made, and which never was completed. See also *Ridgway v. Wharton*, 6 H. L. Cas. 238; *Fitzmaurice v. Bayley*, 9 H. L. Cas. 78; *Rummens v. Robins*, 3 De Gex, J. & S. 88.

In *Brown v. Bellows*, 4 Pick. 179, the plaintiff and the defendant were owners of a water privilege, with the building thereon, etc. The plaintiff agreed to sell his interest, and the defendant agreed to buy it, "at such prices as shall be agreed on and awarded by three men, one chosen by the plaintiff, one by the defendant, and the third by the two thus chosen, which award shall be final and binding on the parties." After the price had been thus determined in writing, the defendant refused to perform his agreement. The plaintiff brought an action for covenant broken, to which the defendant set up the statute of frauds, contending that the referees were not named in the agreement, and that it depended wholly upon parol evidence to determine who they were. This objection was disposed of by the court saying that the contract had been performed in this respect. The defendant further contended that the price should have been fixed by the agreement, whereas it was to be ascertained by the referees. But this objection was overruled. The last point decided in this case, therefore, is a direct authority for the proposition that it is no objection to a written contract that some of its terms are to be fixed by something to be done in the future, if that something is done

before action is brought; and that if it is in writing, the provisions of the statute of frauds are complied with.

We are therefore of opinion that the statute of frauds is no defense to this action.

2. The defendants further contend that the plaintiffs are not entitled to recover, because they have not performed their part of the agreement. It appears from the report that the plaintiffs, on February 11, 1889, sent to the defendants a letter in regard to the rooms in the new building, and in regard to their lease, to which letter the defendants made no reply. There was evidence that duplicate leases were sent to the defendant Ritz about February 15, 1889; that he afterward sent one of them to the defendant Glines; that these leases were in the possession of the defendants at the time of the trial; that the plaintiffs had not seen or heard from Ritz after sending the leases; that two or three weeks after February 15th, Glines had called on the plaintiffs and said that he was ready to sign, but Ritz would not, and that Ritz would not go in company with him; and that neither defendant had signed the lease, or offered to sign any form of lease. Glines, who was called as a witness by the plaintiffs, testified that Ritz declined to have anything to do with him in this matter; and that he, Glines, had said that he could not sign, because Ritz would not, as he had not the money to carry it out if he did sign. It was agreed that prior to the bringing of the action the defendants had said to the plaintiffs that they should not sign the lease, and the plaintiffs might go ahead and let the rooms.

The defendants' counsel pointed out, at the argument, several particulars in which, as they contended, the lease sent to the defendants differed from the form annexed to the agreement. We do not find it necessary to consider these, as we are of opinion that, on the evidence, the jury might well have found that the defendants made no objection to the lease sent them, were not willing to accept a lease in any form, and therefore waived a strict compliance by the plaintiffs with the terms of the agreement: See *Gerrish v. Norris*, 9 Cush. 167, as modified by *Holdsworth v. Tucker*, 143 Mass. 369, 375; *Brewer v. Winchester*, 2 Allen, 389; *Curtis v. Aspinwall*, 114 Mass. 187, 193; 19 Am. Rep. 362; *Lowe v. Harwood*, 139 Mass. 133.

3. At the trial, the presiding judge ruled that the action in its present form could not be maintained, and ordered a verdict for the defendants, reserving the right to the plaintiffs to

move to amend, upon such terms as the superior court might order, if, in the opinion of the supreme judicial court, the plaintiffs, upon the evidence, would have the right to recover in any form of action at law, in which event the verdict was to be set aside, and the case to stand for trial. At the argument in this court, no objection was made either to the form of the action or to the declaration. We have not, therefore, carefully scrutinized either. It is obvious, however, that, as the contract declared on is incomplete in itself, the terms of the lease to the plaintiffs from their lessor, as far as they are material to complete the contract, should be set forth with appropriate allegations; and that if the plaintiffs rely upon a waiver by the defendants, it should be pleaded as an excuse for non-performance: *Palmer v. Sawyer*, 114 Mass. 1, 15. Whether the substitute declaration, so called, sufficiently sets forth a waiver need not be considered, as the point has not been argued.

The result is, therefore, that the verdict is to be set aside, and the case stand for trial.

STATUTE OF FRAUDS — SUFFICIENCY OF THE MEMORANDUM. — The memorandum of a contract required by the statute of frauds need not give all of its details, but must express its substance, either directly or by reference to some other instrument by which reasonable certainty as to its contents is attainable: *Atwood v. Cobb*, 16 Pick. 227; 26 Am. Dec. 657, and extended note. The statute does not require that trusts of realty should be created by instruments in writing, but only that they should be proven in that way, and for this purpose reference may be had to letters and documents referring thereto: *Hankirk v. Place*, 47 N. J. L. 477.

DUMPHY v. CHAMBERS.

[104 MASSACHUSETTS, 389.]

MASTER AND SERVANT — RATIFICATION AND IMPOSING LIABILITY FOR VOLUNTEER'S ACT. — Where one, who is not at the time a servant of a coal dealer, undertakes to deliver coal ordered of the latter, as his servant and for his benefit, the dealer, by subsequently ratifying such delivery, establishes the relation of master and servant between them, so as to make himself liable for the negligence of such servant in delivering the coal.

J. P. Sweeney and H. R. Dow, for the plaintiff.

W. S. Knox, for the defendant.

HOLMES, J. This is an action of tort to recover damages for the breaking of a plate-glass window. The glass was broken

by the negligence of one McCullock, while delivering some coal which had been ordered of the defendant by the plaintiff. It is found as a fact that McCullock was not the defendant's servant when he broke the window, but that the "delivery of the coal by McCullock was ratified by the defendant, and that such ratification made McCullock in law the agent and servant of the defendant in the delivery of the coal." On this finding the court ruled "that the defendant, by his ratification of the delivery of the coal by McCullock, became responsible for his negligence in the delivery of the coal." The defendant excepted to this ruling, and to nothing else. We must assume that the finding was warranted by the evidence, a majority of the court being of opinion that the bill of exceptions does not purport to set forth all the evidence on which the finding was made. Therefore the only question before us is as to the correctness of the ruling just stated.

If we were contriving a new code to-day, we might hesitate to say that a man could make himself a party to a bare tort, in any case, merely by assenting to it after it had been committed. But we are not at liberty to refuse to carry out to its consequences any principle which we believe to have been part of the common law, simply because the grounds of policy on which it must be justified seem to us to be hard to find, and probably to have belonged to a different state of society.

It is hard to explain why a master is liable to the extent that he is for the negligent acts of one who at the time really is his servant, acting within the general scope of his employment. Probably master and servant are "fained to be all one person," by a fiction which is an echo of the *patria potestas* and of the English frank-pledge: *Byington v. Simpson*, 134 Mass. 169, 170; 45 Am. Rep. 314; Fitz. Abr., tit. Corone, pl. 428. Possibly the doctrine of ratification is another aspect of the same tradition. The requirement that the act should be done in the name of the ratifying party looks that way: *New England Dredging Co. v. Rockport Granite Co.*, 149 Mass. 381, 382; *Fuller and Trimwell's Case*, 2 Leon. 215, 216; Sext. Dec. 5. 12, De Reg. Jur., Reg. 9; D. 43. 26. 13; D. 43. 16. 1, sec. 14, gloss. See also cases next cited.

The earliest instances of liability by way of ratification in the English law, so far as we have noticed, were where a man retained property acquired through the wrongful act of another: Y. B. 30 Edw. I. 128, Rolle's ed.; 38 Lib. Ass. 223, pl. 9; 38 Edw. III. 18, Engettement de Garde. See Plow., 8 ad

fin., 27, 31; Bract., fol. 158 b, 159 a, 171 b; 12 Edw. IV. 9, pl. 23. But in these cases the defendant's assent was treated as relating back to the original act, and at an early date the doctrine of relation was carried so far as to hold that where a trespass would have been justified if it had been done by the authority by which it purported to have been done a subsequent ratification might justify it also: Y. B. 7 Hen. IV. 34, pl. 1. This decision is qualified in Fitz. Abr., tit. Baylye, pl. 4, and doubted in Bro. Abr., tit. Trespass, pl. 86; but it has been followed or approved so continuously, and in so many later cases, that it would be hard to deny that the common law was as there stated by Chief Justice Gascoigne: Godb. 109, 110, pl. 129; 2 Leon. 196, pl. 246; *Hull v. Pickersgill*, 1 Brod. & B. 282; *Muskett v. Drummond*, 10 Barn. & C. 153, 157; *Buron v. Denman*, 2 Ex. 167, 188; *Secretary of State in Council of India v. Kamachee Boye Sahaba*, 13 Moore P. C. 22, 86; *Cheetham v. Mayor of Manchester*, L. R. 10 Com. P. 249; *Wiggins v. United States*, 3 Ct. of Cl. 412.

If we assume that an alleged principal, by adopting an act which was unlawful when done, can make it lawful, it follows that he adopts it at his peril, and is liable if it should turn out that his previous command would not have justified the act. It never has been doubted that a man's subsequent agreement to a trespass done in his name and for his benefit amounts to a command so far as to make him answerable. The *ratihabitio mandato comparatur* of the Roman lawyers and the earlier cases (D. 46. 3. 12, sec. 4; D. 43. 16. 1, sec. 14; Y. B. 30 Edw. I. 128) has been changed to the dogma *equiparatur* ever since the days of Lord Coke: 4 Inst. 317; see Bro. Abr., tit. Trespass, pl. 113; Co. Lit. 207 a; Wingate's Maxims, 124; Com. Dig., tit. Trespass, C, 1; *Eastern Counties Railway v. Broom*, 6 Ex. 314, 326, 327; and cases hereafter cited.

Doubts have been expressed, which we need not consider, whether this doctrine applied to the case of a bare personal tort: *Adams v. Freeman*, 9 Johns. 117, 118; Anderson and Warberton, JJ., in *Bishop v. Montague*, Cro. Eliz. 824. If a man assaulted another in the street out of his own head, it would seem rather strong to say that if he merely called himself my servant, and I afterwards assented, without more, our mere words would make me a party to the assault, although in such cases the canon law excommunicated the principal if the assault was upon a clerk: Sext. Dec. 5. 11. 23. Perhaps the application of the doctrine would be avoided on the ground

that the facts did not show an act done for the defendant's benefit: *Wilson v. Barker*, 1 Nev. & M. 409; 4 Barn. & Adol. 614 et seq.; *Smith v. Lovo*, 42 Mich. 6. As in other cases, it has been on the ground that they did not amount to such a ratification as was necessary: *Tucker v. Jervis*, 75 Me. 184; *Hyde v. Cooper*, 28 Vt. 552.

But the language generally used by judges and text-writers, and such decisions as we have been able to find, is broad enough to cover a case like the present when the ratification is established: *Perley v. Georgetown*, 7 Gray, 464; *Bishop v. Montague*, Cro. Eliz. 824; *Sanderson v. Baker*, 2 Black. 832; 3 Wils. 309; *Barker v. Braham*, 2 Black. 868, 869; 3 Wils. 308; *Badkin v. Powell*, Cowp. 476, 479; *Wilson v. Tunnan*, 6 Man. & G. 236, 242; *Lewis v. Read*, 13 Mees. & W. 884; *Buron v. Denman*, 2 Ex. 167, 188; *Bird v. Brown*, 4 Ex. 736, 739; *Eastern Counties Railway v. Broom*, 6 Ex. 314, 326, 327; *Ree v. Birkenhead etc. Railway*, 7 Ex. 96, 41; *Ancona v. Marks*, 7 Hurl. & N. 686, 695; *Condit v. Baldwin*, 21 N. Y. 219, 225; 78 Am. Dec. 137; *Erum v. Brister*, 35 Miss. 391; *Gabesten etc. R'y Co. v. Denahoe*, 56 Tex. 162; *Murray v. Lovejoy*, 2 Chiff. 191, 195; see *Lovejoy v. Murray*, 3 Wall. 1, 2; Story on Agency, secs. 455, 456.

The question remains, whether the ratification is established. As we understand the bill of exceptions, McCulloch took on himself to deliver the defendant's coal for his benefit and as his servant, and the defendant afterwards assented to McCulloch's assumption. The ratification was not directed specifically to McCulloch's trespass, and that act was not for the defendant's benefit if taken by itself, but it was so connected with McCulloch's employment that the defendant would have been liable as master if McCulloch really had been his servant when delivering the coal. We have found hardly anything in the books dealing with the precise case, but we are of opinion that consistency with the whole course of authority requires us to hold that the defendant's ratification of the employment established the relation of master and servant from the beginning, with all its incidents, including the anomalous liability for his negligent acts: See *Coomes v. Houghton*, 102 Mass. 211, 213, 214; Cooley on Torts, 128, 129. The ratification goes to the relation, and establishes it *ab initio*. The relation existing, the master is answerable for torts which he has not ratified specifically, just as he is for those which he has not commanded, and as he may be for those which he has expressly

forbidden. In *Gibson's Case*, Lane, 90, it was agreed that if strangers, as servants to Gibson, but without his precedent appointment, had seized goods by order of his office, and afterwards had misused the goods, and Gibson ratified the seizure, he thereby became a trespasser *ab initio*, although not privy to the misusing which made him so. And this proposition is stated as law in *Com. Dig.*, tit. Trespass, C, 1; *Elder v. Bemis*, 2 Met. 599, 605. In *Coomes v. Houghton*, 192 Mass. 211, the alleged servant did not profess to act as servant to the defendant, and the decision was, that a subsequent payment for his work by the defendant would not make him one. For these reasons, in the opinion of a majority of the court, the exceptions must be overruled.

MASTER AND SERVANT — VOLUNTEER — RATIFICATION. — To constitute a servant, there must be some contract or act on the part of the master which recognizes the person as a servant, either express or implied: *Rhodes v. Georgia R. R. etc. Co.*, 84 Ga. 320; 39 Am. St. Rep. 262, and note. In order to constitute one a wrong-doer by ratification, the original act must have been done or intended to be done in the master's interest: *Dillingham v. Russell*, 73 Tex. 47, and note. One whose servants, acting under his direction, assisted by a gratuitous volunteer, perform work in an unskillful manner is liable for any injury caused thereby, though such volunteer was not his servant: *Andrews v. Boardman*, 126 Ill. 606; 9 Am. St. Rep. 642, and note; note to *Moss v. Sanford*, 67 Am. Dec. 597.

DANIELS v. NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

[124 MASSACHUSETTS, 99.]

RAILROADS — NEGLIGENCE — TURN-TABLES. — Where a railroad company leaves its turn-table unlocked and unguarded upon its own premises, near a public highway, or in an open and exposed position near the accustomed or probable place of resort of children, it is not liable to a child, eleven years of age, injured while at play upon such turn-table, and attracted there without any invitation or inducement, express or implied, from the company. In such case, the child is a trespasser, to whom the company does not owe the duty of ordinary care.

ACTION to recover for personal injuries to a child eleven years of age, received while he was at play upon a railroad turn-table.

E. W. Burdett and C. A. Snow, for the plaintiff.

R. D. Weston-Smith, for the defendant.

LATHROP, J. The plaintiff does not contend that he had any express invitation from the defendant to enter upon its premises, but that he was enticed or allured by the attractiveness of the turn-table; and the proposition of law upon which he relies is, that if a railroad company leaves a turn-table unlocked or unguarded upon its own premises, near a public highway, or in an open or exposed position near the accustomed or probable place of resort of children, it is for the jury to determine, even in the absence of other evidence as to the attractive nature of the turn-table, whether it is, in and of itself, calculated to attract children, and whether a child injured upon it was in fact attracted or allured by it; that if so allured or attracted, the child comes upon the premises of the railroad company through its implied invitation or inducement, and is not a bare licensee or trespasser; and that the company owes to such child the duty to refrain from ordinary negligence with respect to the condition and management of its turn-table.

The turn-table is stated in the exceptions to have been five or six hundred feet from a highway crossing the railroad, and six hundred feet from another highway crossing. Shortly before the accident, the plaintiff and some other boys were at a station on the railroad, which appears by a plan used at the trial to have been about one thousand feet from the turn-table; that they then asked some train-men, who were switching cars on the tracks adjacent to the turn-table, to let them ride on the cars, and on being refused, went to the turn-table. The only thing stated in the exceptions to show that the turn-table was attractive is, that it had large upright standards or guys, twelve to fifteen feet in height, which could be seen from a considerable distance.

The cases upon which the plaintiff relies may be divided into two classes. Those of the first class rest upon the proposition that if a turn-table is of a dangerous nature and character when unlocked or unguarded, in a place much resorted to by the public, and where children are wont to go and play, it is the duty of the railroad company owning the turn-table to keep the same securely locked or fastened, so as to prevent it from being turned or played with by children, or to keep the same guarded: *Stout v. Sioux City etc. R. R. Co.*, 2 Dill. 294; *sub nom. Railroad Co. v. Stout*, 17 Wall. 657. The decision of the supreme court of the United States was apparently approved in *Atchison etc. R. R. Co. v. Bailey*, 11 Neb. 332; and

followed in *Evansich v. Gulf etc. R'y Co.*, 57 Tex. 123; *Houston etc. R'y Co. v. Simpson*, 60 Tex. 108; *Gulf etc. R'y Co. v. Styron*, 66 Tex. 421; and *Gulf etc. R'y Co. v. McWhirter*, 77 Tex. 356; 19 Am. St. Rep. 755. See also *Bridger v. Asheville etc. R. R. Co.*, 25 S. C. 24; *Ferguson v. Columbus etc. R'y Co.*, 75 Ga. 637; 77 Ga. 102.

The second class of cases proceeds upon the doctrine of constructive invitation; that is, that if a person is allured or tempted by some act of a railroad company to enter upon its land, he is not a trespasser, and it is held that leaving a turntable unguarded is such an act: *Keffe v. Milwaukee etc. R'y Co.*, 21 Minn. 207; 18 Am. Rep. 393; *O'Malley v. St. Paul etc. R'y Co.*, 43 Minn. 289; *Kansas Cent. R'y Co. v. Fitzsimmons*, 22 Kan. 686; 31 Am. Rep. 203; *Nagel v. Missouri Pac. R'y Co.*, 75 Mo. 653; 42 Am. Rep. 418.

The decision of the supreme court of the United States in *Railroad Co. v. Stout*, 17 Wall. 657, rests upon the proposition stated by Mr. Justice Hunt, "that while a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts."

The cases cited in support of this proposition are *Lynch v. Nurdin*, 1 Q. B. 29; *Birge v. Gardner*, 19 Conn. 507; 50 Am. Dec. 261; *Daley v. Norwich etc. R. R. Co.*, 26 Conn. 591; 68 Am. Dec. 413; and *Bird v. Holbrook*, 4 Bing. 623.

With the exception of *Daley v. Norwich etc. R. R. Co.*, 26 Conn. 591, 68 Am. Dec. 413, all of these cases come within other rules, or within well-defined exceptions to the general rule, that a land-owner owes no duty to a trespasser, except that he must not wantonly or intentionally injure him or expose him to injury.

Lynch v. Nurdin, 1 Q. B. 29, rests upon the doctrine that if a person unlawfully places an obstruction in a way, he is liable to a child who is injured thereby, although the child wrongfully meddles with the obstruction. The contrary, however, was held in *Hughes v. Macfie*, 2 Hurl. & C. 744, and in *Mangan v. Atterton*, L. R. 1 Ex. 239. In *Lane v. Atlantic Works*, 111 Mass. 136, the plaintiff was found to be without fault, and not a trespasser. See also *Clark v. Chambers*, 3 Q. B. Div. 327; *Powell v. Deveney*, 3 Cush. 300; 50 Am. Dec. 738.

Birge v. Gardner, 19 Conn. 507, 50 Am. Dec. 261, rests upon the doctrine that an owner of land has no right to use his land near a highway in such a manner as to make it a public nuisance. To the same effect is *Hydraulic Works Co. v. Orr*, 83 Pa. St. 332.

Bird v. Holbrook, 4 Bing. 628, decides that a land-owner cannot lawfully, without giving notice, set traps upon his own land for the purpose of injuring trespassers; and that if a person is injured by such a trap, he may recover. And in Connecticut the rule is held to be the same, though no notice is given: *Johnson v. Patterson*, 14 Conn. 1; 85 Am. Dec. 96. This, as pointed out by Morton, J., in *Marble v. Ross*, 124 Mass. 44, 49, proceeds upon the ground that the owner of land cannot wantonly injure a trespasser. The case of a trespasser injured by a vicious animal stands upon the same footing: *Marble v. Ross*, 124 Mass. 44.

The owner of land adjoining a public street is undoubtedly liable for an excavation made by him therein, if the land, with his consent, has for a long time been used by the public as a street: *Larus v. Farren Hotel Co.*, 116 Mass. 67; *Beck v. Carter*, 68 N. Y. 283; 23 Am. Rep. 175.

The case of *Daley v. Norwich etc. R. R. Co.*, 26 Conn. 591; 68 Am. Dec. 413, so far as it tends to support the result reached in *Railroad Co. v. Stout*, 17 Wall. 657, must be considered as overruled by *Nolan v. New York etc. R. R. Co.*, 53 Conn. 461.

The court of appeals of New York has stated, in a well-considered case, that it does not uphold the decision in *Railroad Co. v. Stout*, 17 Wall. 657, and although it seeks to distinguish that case from the one before it, the difference between the two cases is not very apparent: *McAlpin v. Powell*, 70 N. Y. 126; 26 Am. Rep. 555. In this case the plaintiff's intestate, a boy in his tenth year, stepped out of a window of the house in which he lived, upon the platform of a fire-escape, and fell through a trap-door therein which was insecurely fastened. The defendant was the landlord of the house, and it was his duty to keep the fire-escape in order. It was held that he owed no duty to one who was using the fire-escape for his own pleasure, and that the defendant was not liable.

In *Frost v. Eastern R. R.*, 64 N. H. 220, 10 Am. St. Rep. 396, the plaintiff, a boy seven years of age, was injured while playing upon a turn-table of the defendant's railroad. The ground upon which he sought to recover was, that he was attracted to the turn-table by the noise of boys playing upon it.

The turn-table was on the defendant's land, about sixty feet from a public street, in a cut with high, steep embankments on each side, and was insecurely fastened. It was held that the plaintiff was but a trespasser, and that, under the circumstances, the defendant owed him no duty. The court expressly refused to follow the case of *Railroad Co. v. Stout*, 17 Wall. 657. On the question whether the defendant was liable on the ground of an implied invitation, Clark, J., in delivering the opinion of the court, said: "One having in his possession agricultural or mechanical tools is not responsible for injuries caused to trespassers by careless handling, nor is the owner of a fruit-tree bound to cut it down or inclose it, or to exercise care in securing the staple and lock with which his ladder is fastened, for the protection of trespassing boys who may be attracted by the fruit. Neither is the owner or occupant of premises upon which there is a natural or artificial pond, or a blueberry pasture, legally required to exercise care in securing his gates and bars to guard against accidents to straying and trespassing children. The owner is under no duty to a mere trespasser to keep his premises safe; and the fact that the trespasser is an infant cannot have the effect to raise a duty where none otherwise exists."

Subject to the exceptions we have before stated, and to some others which it is not necessary more particularly to refer to, an owner of land may use his land in such manner as he sees fit; and if a trespasser or mere licensee is injured, he cannot complain that if the owner had used it in a more careful manner, no injury would have resulted: *Hounsell v. Smyth*, 7 Com. B., N. S., 731, and cases cited; *Clark v. Manchester*, 62 N. H. 577; *Klix v. Nieman*, 68 Wis. 271; 60 Am. Rep. 854; *Gramlich v. Wurst*, 86 Pa. St. 74; 27 Am. Rep. 684; *Cawley v. Pittsburgh etc. R'y Co.*, 95 Pa. St. 398; 40 Am. Rep. 664; *Gillespie v. McGowan*, 100 Pa. St. 144; 45 Am. Rep. 365; *Hargreaves v. Deacon*, 25 Mich. 1. See also *Sweeney v. Old Colony etc. R. R. Co.*, 10 Allen, 368; 87 Am. Dec. 644; *Metcalf v. Cunard Steamship Co.*, 147 Mass. 66, and cases cited; *Barstow v. Old Colony R. R. Co.*, 143 Mass. 535.

In *Johnson v. Boston etc. R. R. Co.*, 125 Mass. 75, the plaintiff bought a ticket of the defendant corporation which entitled her to be carried from Boston to Lawrence. She went as far as Somerville, a way-station, and there left the cars and went to a house near by, intending to take a later train for Lawrence. After remaining at the house for a while, she returned to the

station, and while crossing the tracks to the station of another railroad corporation to meet her son, was injured. The space between the two stations was partly planked and partly filled in with earth, so as to form a convenient passage-way; and evidence was offered that a large number of passengers were in the habit of using this space as the plaintiff was using it, and that no notice or warning to the contrary had been posted. It was held that the evidence failed to show that the defendant held out any inducement to the plaintiff to enter its premises; that the use of the premises as a passage-way by strangers was a matter in which the defendant was absolutely passive, and from which nothing was to be inferred in favor of or in aid of the plaintiff; and that the plaintiff was a mere intruder, and could not recover. See also *Wright v. Boston etc. R. R. Co.*, 129 Mass. 440.

In *Morrissey v. Eastern R. R.*, 126 Mass. 377, 80 Am. Rep. 686, a child four years of age was run over by the cars of a railroad corporation while using the track as a play-ground. There was a footpath across the track which was used by persons, but in which the plaintiff had no rights, and by which he got upon the track. Evidence was offered that the defendant had been notified that the place was dangerous for children, and had been requested to place a fence across the path. The court held that the plaintiff was a mere trespasser upon the track; that no inducement or implied invitation had been held out to him; and that he could not recover. There was some evidence in this case that the engineer acted maliciously, or with gross and willful carelessness; and this question was submitted to the jury, who found for the defendant.

In *Wright v. Boston etc. R. R. Co.*, 142 Mass. 296, there was a well-defined path leading to a railroad track, and an opening in the ridge near the track, and a passage-way for the path through the ridge. There was no fence or obstruction to prevent persons from going on the track from the path, and when freight-cars stood on the track an opening opposite the path was sometimes left. This path had been used by persons to cross the track, and no objection had been made by the defendant's servants to persons crossing there, except when cars were approaching. The plaintiff, a boy between six and seven years of age, was injured while going to school and crossing the track by the path. It was held that these facts would not warrant the jury in finding that the defendant had held out

an inducement or invitation to the plaintiff to use the path to cross the track.

The case of *McEachern v. Boston etc. R. R. Co.*, 150 Mass. 515, came up on a demurrer to the declaration, which alleged, in substance, that the defendant, a railroad corporation, left a car standing on one of several side-tracks adjoining a public street; that the defendant knew that one of the doors of the car was insecurely fastened, and was liable, upon receiving a slight touch, to fall to the ground; that the defendant well knew that said car "then was, and would be, an enticing, attractive, and inviting object to children, and well knowing that children then were, and long prior thereto had been, accustomed to play in, upon, around, and about such cars as might happen from time to time to be placed upon any of said side-tracks"; that the plaintiff, being then upwards of eleven years of age, was traveling upon the street in the vicinity of the side-track upon which the car was standing, "and saw said car with its open door, and was thereby enticed and invited to look into said car, and thereupon did undertake to look into said car, exercising therein as much care as could reasonably be expected of a child of his years and capacity; and that in attempting to look into said car he carefully touched said door, and immediately said door fell upon him," and injured him. The demurrer was sustained, on the ground that the plaintiff was a trespasser committing an unlawful act in meddling with the defendant's car; that he was not invited or enticed there by the defendant; and that the defendant owed him no duty to have the car safe for him to visit.

In *McCarty v. Fitchburg R. R. Co.*, 154 Mass. 17, a child about five years old strayed from the yard of the house in which it lived, on to a street, and thence into the freight-yard of a railroad corporation, where it was injured. The freight-yard was parallel with the street, and there was no fence between. It was held, in the absence of evidence that a fence was required by the Public Statutes, c. 112, sec. 115, that it did not appear that there was any evidence of a breach of any duty which the defendant owed the plaintiff.

The cases which we have last cited are conclusive of the one at bar, whatever may be the rule elsewhere. The plaintiff was a mere trespasser upon the land of the defendant. We find no evidence of any invitation by the defendant or inducement held out to him to go there, and no evidence of a breach

of any duty which it owed him. The superior court rightly directed a verdict for the defendant.

Exceptions overruled.

RAILROADS — NEGLIGENCE — TURN-TABLES. — The weight of authority is against the principal case. A railroad company leaving a turn-table in an exposed and unprotected position will be liable for any injuries to children injured by riding thereon: *Barrett v. Southern Pac. Co.*, 91 Cal. 236; 25 Am. St. Rep. 166, and note. The sufficiency of the fastening to a turn-table maintained in an exposed place by a railroad, in order to prevent injury to children trespassing thereon, is a question of fact for the jury: *Bates v. Railway Co.*, 30 Tenn. 36; 25 Am. St. Rep. 65, and note.

KRELL v. CODMAN.

[184 MASSACHUSETTS, 484.]

VOLUNTARY COVENANT — ENFORCEMENT OF, AFTER DEATH OF COVENANTOR. —

A voluntary covenant in an indenture under seal, executed by a testatrix in a foreign country, but which would be enforceable if executed in the state where she subsequently dies domiciled, and by which she binds her executors, within six months after her death, to pay to parties named a specified sum upon certain trusts, with interest from the day of her death, will be enforced in the state where she was domiciled at the time of her death.

C. K. Cobb and F. E. Brooks, for the plaintiffs.

R. Codman, Jr., for the defendant.

HOLMES, J. This is an action on a voluntary covenant in an indenture under seal, executed by the defendant's testatrix in England, that her executors, within six months after her death, should pay to the plaintiffs, upon certain trusts, the sum of two thousand five hundred pounds, with interest at four per cent from the day of her death.

It is agreed that by the law of England such a covenant constitutes a debt of the covenantor legally chargeable upon his or her estate, ranking after debts for value, but before legacies. But it is contended by the defendant that a similar instrument executed here would be void. The testatrix died domiciled in Massachusetts, and the only question is, whether the covenant can be enforced here. If a similar covenant made here would be enforced in our courts, the plaintiffs are entitled to recover; and in the view which we take on that question it is needless to examine with nicety how far the case

is to be governed by the English law as to domestic covenants, and how far by that of Massachusetts.

In our opinion, such a covenant as the present is not contrary to the policy of our laws, and could be enforced here if made in this state. If it were a contract upon valuable consideration, there is no doubt it would be binding: *Parker v. Coburn*, 10 Allen, 82. We presume that, in the absence of fraud, oppression, or unconscionableness, the courts would not inquire into the amount of such consideration: *Parish v. Stone*, 14 Pick. 198, 207; 25 Am. Dec. 378. This being so, consideration is as much a form as a seal. It would be anomalous to say that a covenant, in all other respects unquestionably valid and binding (*Comstock v. Son*, 154 Mass. 389, and *Mather v. Corliss*, 103 Mass. 568, 571), was void, as contravening the policy of our statute of wills, but that a parol contract to do the same thing in consideration of a bushel of wheat was good.

So, again, until lately, an oral contract founded on a sufficient consideration to make a certain provision by will for a particular person was valid: *Wellington v. Apthorp*, 145 Mass. 69. Now, by statute, no agreement of that sort shall be binding unless such agreement is in writing, signed by the party whose executor is sought to be charged, or by an authorized agent: State. 1888, c. 372. Again, it would be going a good way to say, by construction, that a covenant did not satisfy this statute.

The truth is, that the policy of the law requiring three witnesses to a will has little application to a contract. A will is an ambulatory instrument, the contents of which are not necessarily communicated to any one before the testator's death. It is this fact which makes witnesses peculiarly necessary to establish that the document offered for probate was executed by the testator as a final disposition of his property. But a contract which is put into the hands of the adverse party, and from which the contractor cannot withdraw, stands differently: See *Perry v. Cross*, 132 Mass. 454, 456, 457. The moment it is admitted that some contracts which are to be performed after the testator's death are valid without three witnesses, a distinction based on the presence or absence of a valuable consideration becomes impossible with reference to the objection which we are considering. A formal instrument like the present, drawn up by lawyers, and executed in the most solemn form known to the law, is less likely to be a vehicle for fraud than a parol contract based on a technical detriment to the

promisee. Of course, we are not now speaking of the rank of such contracts *inter sese*. *Stone v. Gerrish*, 1 Allen, 175, cited by the defendant, contains some ambiguous expressions, but was decided on the ground that the instrument did not purport to be, and was not, a contract. *Cover v. Stem*, 67 Md. 449, 1 Am. St. Rep. 406, was to like effect. The present instrument indisputably is a contract. It was drawn in English form by English lawyers, and must be construed by English law. So construed, it created a debt on a contingency from the covenantor herself, which, if she had gone into bankruptcy, would have been provable against her: *Ex parte Tindal*, 8 Bing. 402; 1 Deac. & C. 291; Mont. 375, 462; Robson's Bankruptcy Practice, 5th ed., 274. The cases of *Parish v. Stone*, 14 Pick. 198, 25 Am. Dec. 378, and *Warren v. Durfee*, 126 Mass. 338, were actions on promissory notes, and were decided on the ground of a total or partial want of consideration.

There is no question here of any attempt to evade or defeat rights of third persons, which would have been paramount had the covenantor left the sum in question as a legacy by will. There is no ground for suggesting an intent to evade the provisions of our law regulating the execution of last wills,—if such intent could be material when an otherwise binding contract was made: See *Stone v. Hackett*, 12 Gray, 227, 232, 233. There was simply an intent to make a more binding and irrevocable provision than a legacy could be, and we see no reason why it should not succeed.

Judgment for the plaintiffs.

COVENANTS—ENFORCEMENT AFTER DEATH OF COVENANTOR.—A party making a contract is presumed to intend to bind his executors or administrators. Where, therefore, a testator binds himself to rebuild certain premises leased by him in case of their destruction by fire, such an agreement can be enforced after his death against his executors: *Chamberlain v. Dunlop*, 126 N. Y. 45; 22 Am. St. Rep. 807, and extended note, in which the enforcement of contracts after the death of the contractor is discussed.

MORSE v. ELY.

[154 MASSACHUSETTS, 458.]

INFANCY — RESCISSION OF CONTRACT — RETURN OF CONSIDERATION. — When an infant employee agrees with his employer, by contracts fairly made, for reasonable prices, and beneficial to the infant, to take in lieu of his wages the difference between the price of a horse and cow exchanged, and further sums for the services of a stallion and a bull, for a calf purchased, and for pasturage received, he may, after selling the cow, and the colt resulting from the service of the stallion, disaffirm the contracts during his minority, and recover his full wages, without returning the consideration received, or putting his employer in *status quo*.

INFANCY — CONTRACTS — PAYMENT. — An employer cannot avail himself of nor enforce, by way of an allegation of payment, contracts with his infant employee, which he could not enforce by direct suit.

ACTION by an infant to recover wages due. Verdict for plaintiff, and defendant excepted.

J. B. Carroll, for the plaintiff.

C. L. Gardner, for the defendant.

BARKER, J. The plaintiff, when of the age of twenty years, and in the employment of the defendant, agreed with him that there should be applied toward the payment of his wages a sum of ten dollars, the difference between the price of a horse and that of a cow which he received in exchange from the defendant, and also further sums for the services of a stallion and of a bull, and for a calf which he bought of the defendant, and for the pasturage of a horse. These items were credited by the minor in his account with his employer. The contracts from which they resulted were fairly made, the prices were reasonable, and all the contracts were in fact beneficial to the minor. The cow, and a colt resulting from the service of the stallion, have been sold by him at their full value, for cash. Whether he is yet in the possession of the calf does not appear. He has elected to avoid his contracts with the defendant, and has brought this action to recover for his wages, without deduction for any of the items. The question raised by the bill of exceptions is, whether, under the circumstances, the defendant is entitled to be credited with their amount.

None of the contracts were for necessities. The plaintiff had therefore a right to avoid them, at his election, and it was not necessary for him, in order so to do, to return the consideration received, or to put the other party in *status quo*: *Chandler v. Simmons*, 97 Mass. 508, 514; 93 Am. Dec. 117; *Bartlett v. Drake*, 100 Mass. 174, 177; 97 Am. Dec. 92; 1 Am. Rep.

101; *Walsh v. Young*, 110 Mass. 396, 399; *Dubé v. Beaudry*, 150 Mass. 448; 15 Am. St. Rep. 228; *Boody v. McKenney*, 23 Me. 517; *Price v. Furman*, 27 Vt. 268; 65 Am. Dec. 194.

If the sums which the defendant seeks to apply in payment had been actually paid to him in money, the plaintiff, upon rescinding his contracts, could recover them back: *McCarthy v. Henderson*, 138 Mass. 310; *Pyne v. Wood*, 145 Mass. 558. The defendant cannot avail himself of and enforce, by way of an allegation of payment, contracts which he could not enforce by a direct suit: *McCarthy v. Henderson*, 138 Mass. 310. To allow him to do so would be to affirm and enforce against the minor contracts which for his protection the law allows him to rescind.

Exceptions overruled.

INFANCY — RESCISSION OF CONTRACT — RETURN OF CONSIDERATION. — A minor may avoid his contract without putting the other party in *status quo* or returning the consideration, if the contract was not for necessities or necessarily beneficial to him: *Dubé v. Beaudry*, 150 Mass. 448; 15 Am. St. Rep. 228; *Briggs v. McCabe*, 27 Ind. 327; 89 Am. Dec. 503, and note; extended note to *Manning v. Johnson*, 62 Am. Dec. 734-735. An infant may, in general, disaffirm his contract without restoring the consideration received by him: *Stall v. Harris*, 51 Ark. 294. A minor may avoid his contract without a return of consideration, but he must make it wholly void, in order that he may be protected in retaining the consideration: *Chandler v. Simmons*, 97 Mass. 506; 93 Am. Dec. 117, and note. A person who elects to disaffirm his contract made during infancy must return the consideration if he has it in his possession at the time of the disaffirmance: *Harvey v. Briggs*, 68 Miss. 60; *Tuft v. Pike*, 14 Vt. 405; 39 Am. Dec. 223, and note.

MILES v. WORCESTER.

[14 MASSACHUSETTS. 511.]

MUNICIPAL CORPORATIONS — LIABILITY FOR NUISANCE — ENCROACHMENT OF WALL. — A city cannot enlarge its school-grounds by taking the land of an adjoining owner by means of an encroaching wall or fence, without first making compensation; and if, by the action of the elements, or otherwise, without the adjoining owner's fault, the city's wall comes upon his land and continues there, it becomes a nuisance for which the city is liable.

ACTION to recover damages for the encroachment upon plaintiff's land of a division wall belonging to the defendant city. The encroachment was caused by the bulging out of such wall, and this was caused either by the pressure of the earth

behind it, or by the action of surface water or of frost. Verdict for plaintiff, and defendant excepted.

W. S. B. Hopkins and F. B. Smith, for the plaintiff.

F. P. Goulding, for the defendant.

ALLEN, J. It is obvious that the defendant's wall, in its present position upon the plaintiff's land, must be deemed an actionable nuisance, unless the defendant can claim exemption from responsibility on some special ground: *Codman v. Evans*, 7 Allen, 431; *Nichols v. Boston*, 98 Mass. 39, 48; 93 Am. Dec. 132; *Fay v. Prentice*, 1 Com. B. 828. The defendant suggests that it is not liable, because the wall was built and maintained solely for the public use, and with the sole view to the general benefit and under the requirement of general laws; and that the case cannot be distinguished in principle from the line of cases beginning with *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332, and ending with *Howard v. Worcester*, 153 Mass. 426; 25 Am. St. Rep. 651. We are not aware, however, that it has ever been held that a private nuisance to property can be justified or excused on that ground. The verdict shows a continuous occupation of the plaintiff's land by the encroachment of the defendant's wall. The question of negligence in the building of the wall is not material. The erection was completed, and was accepted by the defendant, and is now in the defendant's sole charge; and if it is a nuisance, the defendant is responsible: *Staple v. Spring*, 10 Mass. 72, 74; *Nichols v. Boston*, 98 Mass. 39; 93 Am. Dec. 132. Such an occupation of the plaintiff's land cannot be excused, for the reasons assigned. A city cannot enlarge its school-grounds by taking in the land of an adjoining owner by means of a wall or fence. The public use and the general benefit will not justify such a nuisance to the property of another. If more land is needed, it must be taken in the regular way, and compensation paid, but if, by the action of the elements or otherwise, without the plaintiff's fault, the defendant's wall comes upon the plaintiff's land and continues there, it becomes a nuisance for which the defendant is responsible; and so are the authorities: *Gorham v. Gross*, 125 Mass. 232, 239; 28 Am. Rep. 224; *Kiron v. Brock*, 144 Mass. 516; *Eastman v. Meredith*, 38 N. H. 284, 296; 72 Am. Dec. 302; *Hay v. Cohoes Co.*, 2 N. Y. 159; 51 Am. Dec. 279; *Tremain v. Cohoes Co.*, 2 N. Y. 163; 51 Am. Dec. 284; *Weet v. Brockport*, 16 N. Y. 161, 172, note; *St. Peter v. Denison*, 58 N. Y. 416, 421; 17 Am. Rep.

258; *Mayor etc. of Cumberland v. Willison*, 50 Md. 138; 33 Am. Rep. 304; *Harper v. Milwaukee*, 30 Wis. 365; *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 181; *Dillon on Municipal Corporations*, sec. 985.

The case is distinguishable from *Middlesex Co. v. McCue*, 149 Mass. 103, 14 Am. St. Rep. 402, where soil from the defendant's land upon a hillside was washed into the plaintiff's mill-pond by the rains, when the defendant had built no artificial structure, and had done nothing more than to cultivate his land in the ordinary way.

Exceptions overruled.

MUNICIPAL CORPORATIONS — LIABILITY FOR NUISANCE. — A city is liable in damages for an improperly constructed privy-well on its school property, which creates a nuisance to the adjoining owners: *Briegel v. Philadelphia*, 135 Pa. St. 451; 20 Am. St. Rep. 885, and note. A city is liable for nuisance in keeping a dump-yard in such a condition as to be a nuisance to adjoining owners: *Fort Worth v. Crawford*, 74 Tex. 404; 15 Am. St. Rep. 840, and extended note discussing the liability of a municipal corporation for creating and maintaining nuisances.

FRANKLIN v. FRANKLIN.

[154 MASSACHUSETTS, 514.]

MARRIAGE — VALIDITY — AGREEMENT TO LIVE APART. — The validity of a marriage regularly solemnized is not affected by a preliminary or collateral agreement of the parties not to live together.

MARRIAGE — VALIDITY — COITION. — When a marriage is regularly solemnized, its consummation by coition between the parties is not necessary to its validity.

DIVORCE — AGREEMENT TO LIVE APART — ADULTERY. — The fact that husband and wife live apart by mutual agreement is no bar to a suit for divorce brought by either against the other on the ground of adultery.

DIVORCE — RESIDENCE — JURISDICTION. — When the husband has resided in the state for the statutory period of time before bringing his action for divorce, the court has jurisdiction, although the parties have never lived together as husband and wife within the state where the action is brought.

ACTION for divorce on the ground of adultery. Plaintiff, Hugh Franklin, had sexual intercourse with the defendant, Delia M. Franklin, before his marriage to her. He then married her in regular form. The parties had a preliminary agreement between themselves not to live together as husband and wife, and after the marriage they lived separate and apart. The wife, Delia M. Franklin, committed adultery, as

charged in the libel for divorce. This libel was dismissed, and plaintiff excepted.

W. S. B. Hopkins and F. B. Smith, for the plaintiff.

KNOWLTON, J. The libelant and libelee became husband and wife by virtue of a lawful marriage. The agreement that they would not live together had no effect upon the marriage contract entered into in regular form in the presence of a magistrate or minister authorized to solemnize marriages. It is against the policy of the law that the validity of a contract of marriage, or its effect upon the *status* of the parties, should be in any way affected by their preliminary or collateral agreements: *Barnett v. Kimmell*, 35 Pa. St. 13; *Harrod v. Harrod*, 1 Kay & J. 4, 16.

The consummation of a marriage by coition is not necessary to its validity. The *status* of the parties is fixed in law when the marriage contract is entered into in the manner prescribed by the statutes in relation to the solemnization of marriages: *Eaton v. Eaton*, 122 Mass. 276; *Jackson v. Winne*, 7 Wend. 47; 22 Am. Dec. 563; *Dumaresly v. Fishly*, 3 A. K. Marsh. 368; *Patrick v. Patrick*, 3 Phillim. 496; *Dalrymple v. Dalrymple*, 2 Hagg. Const. 54.

The libelant is not guilty of such a marital wrong as will prevent him from obtaining a divorce on the ground of his wife's adultery. The parties lived apart by mutual consent, and, on the facts reported, neither could have obtained a divorce from the other on the ground of desertion. In such a separation there was no desertion within the meaning of the word in the statutes in relation to divorce: *Lea v. Lea*, 8 Allen, 418, 419; *Thompson v. Thompson*, 1 Swab. & T. 231; *Cooper v. Cooper*, 17 Mich. 205; 97 Am. Dec. 182. Living apart by agreement is no bar to a suit for divorce brought by either against the other on the ground of adultery. A voluntary separation is not a license to commit adultery; and it has uniformly been held that in case of adultery under such circumstances, the innocent party may have a remedy against the other in a suit for a divorce: *Morrall v. Morrall*, L. R. 6 P. D. 98; *Beeby v. Beeby*, 1 Hagg. Const. 142, note; *Mortimer v. Mortimer*, 3 Hagg. Const. 310; *J. G. v. H. G.*, 33 Md. 401; 3 Am. Rep. 183; *Anderson v. Anderson*, 1 Edw. Ch. 380.

The court has jurisdiction, notwithstanding that the parties have never lived together as husband and wife within this commonwealth. The continuous residence of the libelant in

the commonwealth for more than five years next preceding the filing of his libel brings the case within the exception stated in the Public Statutes, c. 146, sec. 5.

On the facts stated in the bill of exceptions, the divorce should have been granted, and the entry must be, exceptions sustained.

MARRIAGE AND DIVORCE — AGREEMENT FOR SEPARATION — EFFECT OF, ON THE MARRIAGE. — Voluntary agreements for separation between husband and wife are not sanctioned by law: *Rogers v. Rogers*, 4 Paige, 516; 27 Am. Dec. 84, and note. A voluntary separation under the Spanish law does not effect a legal separation: *Lathe v. Abot*, 2 La. 553; 22 Am. Dec. 151, and note. An agreement between a husband and wife for separation does not dissolve the marriage: *Holms v. Francisca*, 2 Bland, 544; 30 Am. Dec. 402; note to *Squires v. Squires*, 38 Am. Rep. 670.

MARRIAGE AND DIVORCE — AGREEMENT FOR SEPARATION AS A BAR TO DIVORCE. — An agreement for separation between husband and wife does not bar the right of either to maintain an action for divorce: *Clark v. Foodick*, 118 N. Y. 7; 16 Am. St. Rep. 733, and note.

MARRIAGE AND DIVORCE — NECESSITY FOR COHABITATION. — Marriage is in law complete, and nothing more is necessary, when parties able and willing to contract actually have contracted according to the forms and solemnities required by law: *State v. Patterson*, 2 Ired. 346; 38 Am. Dec. 699; *Jackson v. Wims*, 7 Wend. 47; 23 Am. Dec. 563, and note, in which the necessity for cohabitation is discussed.

FLEMING v. SPRINGFIELD.

[154 MASSACHUSETTS, 520.]

EXCEPTIONS NOT RAISED AT TRIAL are deemed to be waived on appeal.

EVIDENCE. — STATEMENT BY INJURED PARTY TO HIS PHYSICIAN, purporting to be a description of his symptoms, made for the purpose of medical advice and treatment, is admissible in evidence in an action to recover for the injury, although it was made only a day or two before, or possibly during, the trial.

MUNICIPAL CORPORATIONS — EVIDENCE OF NEGLIGENCE IN REPAIR OF STREETS. — In an action to recover for injuries received in a public street, caused by the sinking of the road-bed over a defective sewer-pipe, evidence that the sewer was constructed of a cheap grade of pipe, laid in soil which tended to eat it rapidly, and of which the superintendent was informed at the time; that a few months before the accident, and near the place thereof, a depression in the street over the pipe was filled by the city, without examination as to its cause; that two weeks before the accident, and near the place thereof, the city repaired a break in the pipe by taking up the defective pipe and replacing it with a new one; and that, upon examination, the pipe, at the place of the accident, as well as at the other places mentioned, was found to be in bad condition and full of holes, — should be submitted to the jury, and is sufficient to support a finding that the city was guilty of negligence in failing to use reasonable diligence to keep its streets in repair.

ACTION to recover for injuries received in a public street. Dr. Rice, who treated plaintiff for his injury, was called as a witness for him, and asked to state when he last saw plaintiff, and if at that time he made any complaint as to present symptoms. The witness, answering against objection, stated that he saw plaintiff the last time three days before, and that at that time "I asked him how his arm was. 'Why,' said he, 'I don't notice any particular difference; I cannot get it up,' or something to that effect." The other facts are stated in the opinion. Verdict and judgment for plaintiff, and defendant excepted.

J. B. Carroll, for the plaintiff.

G. L. Long, for the defendant.

MORROW, J. 1. If the exceptions raise any question regarding the notice, none was brought to the attention of the court at the trial, and the defendant has not argued any such question to us. It would have been too late to raise it here, and the defendant must be deemed to have waived it if there was one: *Talbot v. Taunton*, 140 Mass. 552.

2. The testimony of Dr. Rice was properly admitted. The statement made by the plaintiff purported to be a description of his symptoms at the time it was made, and not a narration of something that was past; and it may be fairly inferred that it was made for the purpose of medical advice and treatment. At any rate, although it was only a day or two before, or possibly during, the trial, it does not appear that such is not the case: *Barber v. Merriam*, 11 Allen, 822.

3. We also think the case was properly submitted to the jury on the question of the defendant's liability. The injury was caused by a defect in a way which the defendant was bound to keep in repair. The question was, whether the defendant did or did not fail to use reasonable care and diligence in preventing the defect. The accident occurred in consequence of the washing out of the earth under the surface of the road-bed, and that was due to the escape of water through a defective sewer-pipe. There was evidence that the pipe which was put in was "a very cheap grade of cement, and good for nothing," and that the effect of such soil as that in which it was laid was to eat it up in from three or four to nine or ten years; that it was put down in 1885; and that the defendant's superintendent of streets was told at the time by a witness that he did not think the pipe was right, or would stand it.

There was also testimony tending to show that about four or five months before the accident, a depression came in the street over the pipe, about fifty feet easterly of the place of the accident, which was filled up by the defendant without making any examination; and that on another occasion, about a fortnight before the accident, a break came in the way at a point about twenty feet east of the place of the accident, and that the city dug down there, and took up and replaced all the pipe which appeared to be defective, and examined the projecting ends of the pipe that was left, and found them all right; but it does not appear that it made any further examination. There was also testimony tending to show that the pipe was dug up after the accident at the place of the accident, as well as at the place where the depression and break had occurred, and found to be in bad condition and full of holes.

It was for the jury to say, upon this evidence, whether the defendant had exercised reasonable care and diligence in keeping the way in repair. The knowledge of the superintendent of streets was its knowledge, and it was for the jury to decide whether, in view of that fact, and of the depression and break which had occurred in the way so short a time before, and so near to the place of the accident, the defendant had not reason to apprehend the danger, and to guard against it. The jury, under instructions as to the obligations of the defendant to which no exception was taken, have decided the question adversely to the defendant, and we think there was evidence to warrant their finding: *Post v. Boston*, 141 Mass. 189.

Exceptions overruled.

EVIDENCE — STATEMENTS TO PHYSICIAN — WHETHER ADMISSIBLE IN. — In an action to recover for personal injury, statements made by the plaintiff as to his symptoms, the locality and character of his pain, without reference to the manner of the occurrence which caused it, are admissible in evidence: *Birmingham etc. Ry Co. v. Hale*, 90 Ala. 8; 24 Am. St. Rep. 748, and note.

MUNICIPAL CORPORATIONS — LIABILITY FOR DEFECT IN STREET. — Where there is a defect in a street known to officers of a municipal corporation, or which might have been discovered with reasonable diligence, one injured thereby may recover damages for such injury: *Bradford v. Mayor of Anneton*, 92 Ala. 349; 25 Am. St. Rep. 60, and note; *Kansas City v. Bradbury*, 45 Kan. 381; 23 Am. St. Rep. 731, and note.

DONAHUE v. HUBBARD.

[154 MASSACHUSETTS, 507.]

ENTIRETY IN ENTIRETY — CONVEYANCE OF HUSBAND'S INTEREST TO WIFE — RIGHT OF WIFE TO SUE. — When husband and wife hold an estate in entirety, the husband may convey his interest therein, through a third person, to his wife. The wife may then mortgage the estate and maintain a suit in relation thereto in her own name.

ACTION by Daniel Donahue and Anna, his wife, jointly, against the assignee of a mortgage made by her, to recover the surplus proceeds received by such assignee upon a sale of the mortgaged premises. The remaining facts are stated in the opinion. Judgment for defendant. Plaintiffs appealed.

H. L. Parker, for the plaintiffs.

E. J. McMahon, for the defendant.

ALLEN, J. Prior to the Statutes of 1885, c. 237, a conveyance of land to husband and wife created the peculiar title sometimes called an estate by entireties, or in entirety. Neither could sever this title so as to defeat or prejudice the title of the survivor: *Pray v. Stebbins*, 141 Mass. 219; 55 Am. Rep. 462, and cases cited. We find nothing, however, to show that it has ever been considered that a husband could not convey his title through a third person to his wife. On the other hand, the peculiar feature of this kind of estate is, that each is secure against an impairment of rights through the sole act of the other: 2 Bla. Com. 182; Cruise's Digest, tit. 18, c. 1, secs. 44-49; 1 Preston on Estates, 131; 2 Kent's Com. 132; 4 Kent's Com. 362; 1 Washburn on Real Property, 3d ed., 425. There is nothing in this to prevent the wife's acquiring the title of her husband, and in *Meeker v. Wright*, 76 N. Y. 262, 272, it was held that this might be done. This part of the decision in *Meeker v. Wright*, 76 N. Y. 262, was not questioned in *Bertles v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 361, or in *Zornlein v. Bram*, 100 N. Y. 12, and we have found nothing in any of the books denying the doctrine.

Such a transfer of the husband's title appears to have been made in the present case by the deeds of Daniel Donahue to Keane, and of Keane to Mrs. Donahue. It is true that the statement of facts does not show in express terms that both of these deeds were a part of one and the same transaction, as it properly should have done. But the plaintiffs in their brief recite that the husband had released all his rights to his wife

through a conduit. The deeds were both executed on the same date; the consideration expressed was one dollar and other valuable considerations; the statement of facts recites that both of these conveyances were made with the knowledge and oral assent of Mrs. Donahue. We believe we should defeat the intention of the parties if we did not assume that the deeds were parts of one transaction, since the counsel for both parties have so assumed in their arguments.

The effect was, that the title vested in Mrs. Donahue. Her subsequent mortgages to George E. Hubbard were therefore valid, and he, upon a sale made under the power of sale contained in the first mortgage, might legally retain from the proceeds the sums due to himself under the two subsequent mortgages.

This would still leave a small balance of \$19.64 in his hands, to be paid over to Mrs. Donahue. This, however, cannot be recovered in an action brought by her husband and herself jointly. Application may be made in the superior court for leave to amend, by striking out the name of Daniel Donahue as co-plaintiff, and if granted, Mrs. Donahue may have judgment for said sum: *Fay v. Duggan*, 135 Mass. 242; otherwise the order must be, judgment affirmed.

ESTATES IN ENTIRETY — CONVEYANCE OF HUSBAND'S INTEREST TO WIFE. — A husband may make a valid conveyance of his interest in an estate in entirety to his wife, which will convert her estate into an estate in fee and in severalty: *Myers v. Kepler*, 118 Ind. 34; 10 Am. St. Rep. 94, and note. See extended note to *Des v. Hardenbergh*, 18 Am. Dec. 377-389, in which the subject of estates in entirety is discussed.

POOR v. SEARS.

[184 MASSACHUSETTS, 289.]

NEGLIGENCE — LIABILITY OF LANDLORD TO TENANT'S SERVANT — DEFECTIVE MACHINERY. — Where the owner of a building leases part of it, and then undertakes for a consideration to transmit power to the leased premises for the use of his tenant, he is bound to exercise reasonable care that the pulleys and shafting used for that purpose are in a suitable condition to do the work without danger to persons rightfully on the leased premises, and themselves in the exercise of due care; and if a servant of the tenant so on the premises is injured by the negligence of the landlord in the use of such shafting and pulleys, the latter is liable therefor, although by the terms of the lease the tenant is bound to keep such appliances in repair.

NEGLECTANCE — EVIDENCE — DEFECTIVE APPLIANCES. — In an action against the owner of a building, engaged for a consideration in transmitting power to an adjoining building by means of shafts and pulleys, evidence that the shaft which broke and caused the injury sued for to a person rightfully on the premises, and in the exercise of due care, was not sufficiently supported, and should have had an additional hanger; that a shelf underneath it would have tended to afford protection, and was often placed under shafts similarly located; and that safety would have been promoted by a larger shaft, — is admissible to show negligence and want of ordinary care and prudence in the use of the shafting by the owner thereof.

NEGLECTANCE — EVIDENCE — DEFECTIVE APPLIANCES. — In an action against the owner of a building engaged in transmitting power to an adjoining building by means of shafts and pulleys, evidence that a subsequent examination of the broken shaft causing the injury sued for disclosed that it contained dark streaks, as though there had been a flaw or previous crack in it, and that rust extended from one third to one half way through it, is admissible to show negligence and want of ordinary care and prudence by the owner in its use.

NEGLECTANCE OF LANDLORD TOWARDS TENANT'S SERVANT — DEFECTIVE APPLIANCES — EVIDENCE OF CONTROL. — In an action against the owner of a building, who, after leasing part thereof, continued to furnish his tenant with power, by means of belting and a defective shaft, on the leased premises, causing injury to a servant of such tenant, evidence that prior to the accident such landlord continued to oil the defective shaft and to lace the belting thereon, and that subsequently to the accident he repaired the damage done to a stairway by the fall of such shaft, and caused belting to be sheathed, is competent to show that, after leasing part of the building, he continued to use and exercise control over the shafts and belting therein.

NEGLECTANCE OF LANDLORD TOWARDS TENANT'S SERVANT — DEFECTIVE APPLIANCES — CONTRIBUTORY NEGLIGENCE. — Where the owner of a building, after leasing part thereof, continues to furnish his tenant with steam-power, by means of defective appliances, on the leased premises, thereby causing an injury to a servant of the tenant, the negligence of such tenant or of his employees in failing to warn such servant of danger cannot be imputed to the latter so as to constitute contributory negligence on his part, nor relieve the landlord of the negligence of himself or his servants. The question of due care on the part of the injured servant is to be determined by his own action under the existing circumstances, so far as they were known to him.

NEGLECTANCE OF LANDLORD TOWARDS TENANT'S SERVANT — DEFECTIVE APPLIANCES — CONTRIBUTORY NEGLIGENCE QUESTION FOR JURY. — When the owner of a building leases part thereof, and continues to furnish his tenant with steam-power by means of defective appliances, thereby causing injury to a servant of such tenant, for which the landlord is sued, the question of contributory negligence on the part of the injured servant is properly left to the jury to decide, if the circumstances attending the accident are sufficiently developed in evidence to enable the jury to pass fairly upon the question of due care on his part.

ACTION to recover for personal injuries caused by the fall of shafting in defendant's building. Defendant, Sears, owned the

whole building in which the accident occurred, and after leasing part of it to Rockwell and Churchill, continued under an agreement with them to furnish them with steam-power for hire. The engine which furnished the power was owned by defendant, and situated in the unleased part of his building. The shafting, belting, and pulleys in the building, by means of which the power was transmitted, were also owned by him. The defective shaft which caused the injury was situated in the portion of the building leased to Rockwell and Churchill. The plaintiff was in the employ of these tenants at the time of the accident. Judgment for plaintiff. Defendant excepted. Other facts appear in the opinion.

F. E. Snow and C. E. Todd, for the plaintiff.

L. S. Dabney and H. Wheeler, for the defendant.

MORTON, J. The ruling of the court, that in consequence of the lease to Rockwell and Churchill, the defendant was not liable to the plaintiff by reason of his ownership of the premises, was, to say the least, sufficiently favorable to the defendant. We need not consider carefully whether, under the terms of the lease, the shafting, belting, and pulleys, by means of which power was transmitted from the engine in the basement of 41 Arch Street to 39 Arch Street and the building beyond, belonging to Mr. Amory, remained in the control of and were to be kept in repair by the defendant, or passed under the demise to Rockwell and Churchill, and were to be kept in repair by them. The plaintiff's case does not depend on that question; but rests on the proposition that the defendant, having undertaken for a consideration to transmit to 39 Arch Street, and the building beyond, power for the use of the tenants in those buildings, from the engine operated by him in the basement of his own building, was bound to exercise reasonable care to see that the pulleys and shafting which he used for that purpose were in a suitable condition to perform the work for which he was using them, without danger to persons rightfully on the premises, and themselves in the exercise of due care; and that if the defendant, or his servants or agents, were negligent in their use of the shafting and pulleys, or their management of the appliances by which power was transmitted from the engine in the basement of 41 Arch Street, and the plaintiff, being herself in the exercise of due care, and rightfully upon the premises, was injured thereby, then she is entitled to recover of the defendant for

the injuries so sustained. In this view of the case, it is immaterial whether, under the terms of the lease, Rockwell and Churchill or the defendant were to keep the belting, shafting, and pulleys in repair. If Rockwell and Churchill were to keep them in repair, and did not, still their negligence did not excuse the defendant for the want of due care on his part. It was his duty, as an ordinarily prudent man, to see that, as against persons rightfully on the premises, and in the exercise of due care, the shafting and pulleys which he was using were suitable and safe for the purpose, and that the appliances used by him for transmitting power were properly managed by his servants, and he cannot excuse his own want of care, or that of his servants, by showing that Rockwell and Churchill were bound to keep the shafting and pulleys in repair, and that if they had done so the accident to the plaintiff would not have happened: *Blessington v. Boston*, 153 Mass. 409, and cases cited. He used them as they were, and he must be held to have taken the risk attending their use: *Gill v. Middleton*, 105 Mass. 477; 7 Am. Rep. 548; *Priest v. Nichols*, 116 Mass. 401.

These considerations dispose of the second, third, and fourth requests for rulings by the defendant, and also of his objections to the introduction of the evidence by the plaintiff, tending to show that the shaft was not sufficiently supported, and should have had an additional hanger; that a shelf underneath it would have tended to afford protection, and was often placed under shafts similarly located, and that safety would have been promoted by a larger shaft. This testimony bore directly upon the question whether the defendant was justified, as a man of ordinary prudence and care, in using the shaft and pulleys as they were, and was plainly admissible upon that issue. The defendant also objected to the admission of testimony by the plaintiff, tending to show that an examination of the broken ends of the shaft was made after its fall, and that there were dark streaks, as though there had been a flaw or previous crack in it, and rust extending from one third to one half way through. The objection was put on the ground that it was not admissible under the declaration. But it was clearly allowable under the second count. This count was not demurred to, and though imperfectly drawn, no objection, so far as the exceptions show, was taken to it at the trial: *Eaton v. Fitchburg R. R. Co.*, 129 Mass. 364. The defendant also further objected to testimony on the part of the plaintiff, tend-

ing to show that after the accident he (the defendant) repaired the stairs where the fall of the shaft broke and damaged them, and caused some wooden sheathing to be placed just under the belt which ran across the room just below the ceiling of the fifth floor; and he objected, after the lease had been admitted, to the introduction of testimony that the defendant's engineer oiled the shafting that fell, and the other shafting in the second, third, and fourth floors in 41 Arch Street, and laced the belts on this shafting when necessary, and that Rockwell and Churchill did not take any care of it. But this was all competent for the purpose of showing that the defendant was using and exercising control over the shafting and pulley that fell, for the purpose of transmitting power to 39 Arch Street and the building beyond, from his engine in the basement of 41 Arch Street. The vital question in the case was, whether the defendant was using and exercising control over the shafting and pulley that fell for that purpose, and this testimony tended to show that he was: *Readman v. Conway*, 126 Mass. 374. Whether a portion of it was admitted before or after the lease was introduced could make no difference, and work no harm to the defendant. The lease from the defendant to Rockwell and Churchill could not bar the plaintiff from showing that the defendant was in fact using and exercising control over the shafting, belting, and pulleys for the purpose of transmitting power to other premises: *Gill v. Middleton*, 105 Mass. 477; 7 Am. Rep. 548.

The defendant asked the court, in the fifth, sixth, and seventh requests which he presented, to rule, in substance, that if Rockwell and Churchill were in control of the stairway, or if they were not, and it had become apparent or known to them or their employees before the shaft fell that it was dangerous to pass under it or to use the stairs, and they knew of this in season to have prevented the plaintiff from passing over the stairs under the shaft, or with ordinary care on their part might have warned and prevented her from passing over the stairs, then the defendant was not liable. The court declined to rule as thus requested, and instructed the jury that no negligence of any employee of Rockwell and Churchill in omitting to give the plaintiff warning was to be imputed to her as her negligence, but the question of her due care was to be determined by her own action under the circumstances that existed, so far as these circumstances were known to her. We think that the court was right in refusing to instruct the

jury as requested by the defendant. Neither Rockwell and Churchill nor any of their employees owed to the defendant the duty of warning the plaintiff against the danger. Their failure to warn her does not constitute contributory negligence or a want of due care on her part, or relieve the defendant from the consequences of his own carelessness or that of his servants. If the omission of one co-servant to warn another co-servant of an impending danger could be said in any case to be the proximate cause of the injury to the latter, it is sufficient to say that the plaintiff and the other employees of Rockwell and Churchill were not co-servants under the defendant, but under that firm: *Swards v. Edgar*, 52 N. Y. 28; 17 Am. Rep. 295; *Gelman v. Mayor etc. of New York*, 112 N. Y. 223.

The only question remaining is that of due care on the part of the plaintiff, which arises under the first ruling asked for by the defendant, that, upon all the evidence, the plaintiff was not entitled to recover. The plaintiff was a type-setter, and worked at a frame on the fourth floor, and when she had filled a galley with type, it was her duty to carry it to the fifth floor. She testified that she remembered starting to go upstairs with a galley of type to put it on the press, but remembered nothing more till she found herself in the hospital. It appeared that several of the employees of Rockwell and Churchill noticed a wobbling of the shaft shortly before it fell, and had heard a grating noise from it; and Woods, a foreman in their employ, sent a boy to the engineer to notify him that something was wrong about the shaft, and, a few seconds before the shaft fell, called out from the top of the stairs on the fifth floor to keep off the stairs. Several persons working near the plaintiff heard him tell the boy to go for the engineer, for the shafting was loose. It did not appear that the attention of the plaintiff was called by any one to the condition of the shaft, or that she heard any remark about it. She was attending to her work, and a want of due care cannot be imputed to her in failing to hear what was not addressed to her. At the time of the injury she was rightfully on the stairs, and no warning was given her specially. There was no reason why she should observe the condition of the shaft and pulleys, and if there had been, it was no more strange that she, with the galley of type in her hands, on which her attention was no doubt fixed, should not have noticed the shaft and

pulley, or have heard the warning of Woods, than that Woods, standing at the top of the stairs and watching the shaft, and warning people to keep off the stairs, should not have seen her as she was in the act of mounting them. Notwithstanding the blank in the memory of the plaintiff, the circumstances attending the accident were developed sufficiently to enable the jury to pass fairly upon the question of due care on her part, and it was properly left to them to do so: *Maguire v. Fitchburg R. R. Co.*, 146 Mass. 379.

Exceptions overruled.

LANDLORD AND TENANT—LANDLORD'S LIABILITY FOR DEFECTS IN PREMISES. — A landlord is answerable for defects in the premises of which he has no actual knowledge, and through which his tenants are injured: *Lindsey v. Leighton*, 150 Mass. 235; 15 Am. St. Rep. 199, and note. Defendant rented a floor in a building to L., and supplied him with machinery for his business. The plaintiff was injured while attempting to pass the shaft of the machinery. There was no cause of action against the defendant: *Ryan v. Wilson*, 87 N. Y. 471; 41 Am. Rep. 384. A landlord is not liable to a tenant, or one on the premises at the tenant's request, for the explosion of a boiler thereon: *Jaffe v. Hartman*, 56 N. Y. 398; 15 Am. Rep. 438. A landlord is not liable to one on the premises at the request of the tenant: *McKenzie v. Chatham*, 83 Me. 543. A landlord is not liable to a tenant for injuries caused by defects in premises, in the absence of a stipulation for repair: *Willson v. Treadwell*, 81 Cal. 58. The lessors of a defective wharf will be liable for injuries sustained by a laborer while working thereon, caused by such defects: *Stevens v. Edgar*, 59 N. Y. 28; 17 Am. Rep. 295, and note; extended note to *Godley v. Hagerty*, 59 Am. Dec. 733-740.

PETITION OF THURSTON.

[154 MASSACHUSETTS, 506.]

TRUSTS—VOLUNTARY SETTLEMENT—REVOCATION. — A voluntary settlement, completely executed, with no power of revocation reserved, cannot be set aside, except upon proof of mental incapacity, mistake, fraud, undue influence, or the accomplishment of the purposes of the trust, or the consent of all parties. Consequently, if a married woman voluntarily conveys her property in trust, to place it beyond her husband's control, with no power of revocation reserved, the trustee to hold for her during her life, and upon her death as she may appoint by will, or in default of appointment, to her issue, her children have a beneficial interest in the trust fund, and she is not entitled, after divorce, to have the trust revoked without her children's consent.

PETITION to revoke a trust. The petitioner was formerly the wife of one Billings, and to place her property beyond his

control, she conveyed it to a trustee, to hold in trust for her for her life, and upon her death as she might appoint by will, or in default of such appointment, to her issue surviving, or in default of issue, to her heirs. She reserved no power of revocation in the trust deed, and after its execution, obtained a divorce from Billings, and married one Thurston. She had three children by her first marriage, all of whom were minors at the time of filing the petition, and therefore unable, on account of their infancy, to give a valid consent to the revocation of the trust. The trustee, who had converted the trust property into money, gave his assent to the petition. Judgment dismissing the petition, and the petitioner appealed.

J. J. Feely, for the petitioner.

LATHROP, J. The general rule in this commonwealth undoubtedly is, that a voluntary settlement which is completely executed, with no power of revocation reserved, cannot be revoked or set aside, except upon proof of mental incapacity, mistake, fraud, or undue influence: *Hildreth v. Eliot*, 8 Pick. 293; *Viney v. Abbott*, 109 Mass. 800; *Sewall v. Roberts*, 115 Mass. 282.

Where, however, "the whole objects and purposes of the trust have been accomplished, the interests created under it have all vested, the parties request it, and the trustee consents," a court of equity may decree the determination of the trust: *Hoar, J.*, in *Bowditch v. Andrew*, 8 Allen, 339; see also *Smith v. Harrington*, 4 Allen, 566; *Inches v. Hill*, 106 Mass. 575; *Petition of Stone*, 138 Mass. 476; *Gannon v. Ruffin*, 151 Mass. 204.

The case at bar falls within the rule, and not within the exception. The children of the petitioner have a beneficial interest in the trust fund, and they have not assented to the termination of the trust.

The petitioner contends that, where no motive exists for not inserting a power of revocation, the absence of such power is *prima facie* evidence of a mistake. But if she had retained such a power, it would have defeated the object of the settlement, which was, as she alleges, to place the property beyond the interference or control of her then husband: *Keyes v. Carleton*, 141 Mass. 45; 55 Am. Rep. 446.

The decree of the justice of the superior court dismissing the bill must be affirmed.

TRUSTS — REVOCATION. — An absolute and unconditional trust created by a father in favor of his children cannot be revoked by him by undertaking to annex thereto special terms not expressed in the original declaration of trust: *Dickerson's Appeal*, 115 Pa. St. 193; 2 Am. St. Rep. 547, and note. It may be revoked by a renunciation by the cestui que trust: *Shipwell v. Cunningham*, 8 Leigh, 271; 31 Am. Dec. 648; *Orus v. Giddens*, 58 N. J. L. 270. A voluntary trust perfectly created, and resting on a meritorious consideration, is irrevocable: *Hatch v. St. Joseph*, 68 Mich. 220; *Gaylord v. Lafayette*, 115 Ind. 422.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

OLNEY v. GERMAN INSURANCE COMPANY.

[33 MICHIGAN, 24.]

INSURANCE. — CONDITION AVOIDING POLICY if the property insured shall become encumbered by a chattel mortgage is reasonable and valid.

INSURANCE — CHANGE IN INTEREST. — THE EXTENSION OF A CHATTEL MORTGAGE BY A PARTNER on the partnership chattels, and insured for the benefit of the firm, is such a change in interest in the subject of insurance as will render it void.

George W. Bates, for the appellants.

Howard and Roos, for the defendant.

LOMA, J. The plaintiffs were partners, carrying on a grocery business in the city of Detroit.

On the first day of May, 1890, they procured a policy of insurance of \$400 in the defendant company, — \$250 on a stock of flour, feed, and other goods, and \$150 on hay, etc. The policy was for one year. After the insurance was procured, it appears one of the plaintiffs gave a chattel mortgage upon the property described to secure an individual debt of his. On July 12, 1890, the goods caught fire, and were destroyed and injured to the extent of \$319.87. The defendant company had no knowledge of the chattel mortgage until after the fire. It refused to pay the loss, and on the trial in the circuit court the jury was instructed to find a verdict for the defendant. Plaintiffs bring error.

The policy sued upon is what is known as a "Michigan Standard Policy," and contains this clause: "This entire policy, unless otherwise provided by agreement indorsed hereon

or added hereto, shall be void . . . if the subject of insurance be personal property, and be or become encumbered by a chattel mortgage; or if any change other than by the death of the insured takes place in the interest, title, or possession of the subject of insurance, whether by legal process or judgment, or by voluntary act of the insured, or otherwise."

The defense to the action is based upon the proposition that the placing of the chattel mortgage by one partner upon the partnership property for his individual benefit works a change in the interest of the insured, so that the policy becomes void under the stipulations above quoted, contained in the policy.

This stipulation in the policy in regard to giving chattel mortgages is valid and reasonable, and we think the court below not in error in directing verdict for defendant. The placing of the chattel mortgage by one partner for his individual benefit upon the partnership chattels works a change of interest therein. In *Hicks v. Farmers' Ins. Co.*, 71 Iowa, 119, 60 Am. Rep. 781, it was held that "a condition in a fire insurance policy issued to a firm, that the property should not afterwards be in any manner encumbered, was violated by the execution of a mortgage by one of the partners on his undivided one-third interest in the property, and by a judgment against him, which became a lien to his said interest."

We think the company discharged from liability on the policy by such an encumbrance without its knowledge, or any notice to it, and its assent thereto. The placing of the chattel mortgage thereon by one partner may not have changed the title or possession, but there was a change of interest, which was provided against by the policy.

The court was not in error in directing verdict and judgment for defendant.

The judgment of the court below will be affirmed, with costs.

INSURANCE — CHANGE IN INTEREST — MORTGAGE. — A condition in a fire insurance policy that the property should not afterwards, in any manner, be encumbered is violated by the execution of a chattel mortgage by one of the partners on his undivided interest in the property: *Hicks v. Farmers' Ins. Co.*, 71 Iowa, 119; 60 Am. Rep. 781. If an insurance policy on real and personal property is conditioned to be void if property be encumbered, and the realty is mortgaged, the policy is void, unless the risk on the personalty is not affected by the mortgage: *McGowan v. People's etc. Ins. Co.*, 54 Vt. 211; 41 Am. Rep. 843; *Etina Ins. Co. v. Reak*, 44 Mich. 55; 38 Am. Rep. 223, and note.

CHADDOCK v. PLUMMER.

[88 MICHIGAN, 225.]

NEGLECTOR. — IF A FATHER BUYS AN AIR-GUN FOR HIS SON, nine years of age, and provides him with shot commonly used in such a toy, charging him not to let other boys have it, and the son leaves it in an out-house, where it is found by another boy, ten years of age, who is allowed, with the permission of its owner's mother, to use it, and it is by the latter boy shot off, and the shot with which it is loaded hits a man standing in a public street and destroys his eye, the father is not chargeable with negligence in purchasing the gun and giving it to his son, nor is he answerable, for any reason, to the person thus injured.

N. A. Hamilton, for the appellant.

George M. Valentine and George S. Clapp, for the defendant.

MORSE, J. Plaintiff brought this suit in the Berrien circuit court to recover damages for the loss of his right eye, which was destroyed by a shot from an air-gun in the hands of a boy named Roscoe Tabor. The circuit judge directed a verdict for the defendant.

The facts proven are substantially as follows: During the last of July or first of August, 1890, the defendant bought an air-gun and gave it to his son, Harry Plummer, a lad aged about nine years. Defendant also bought at the same time some shot, such as are used in air-guns. Defendant cautioned his son to be careful in using the gun. The shot were all used in about two days, and some time later, defendant bought his son more shot, which were used in half a day. No other shot were bought or furnished by the defendant, or by his order, or with his knowledge. Mrs. Plummer, the wife of the defendant, bought her son Harry some shot, which he also fired, except four shot, by one of which plaintiff was injured. On the morning of the accident, September 3, 1890, Harry fired the shot bought by his mother, except the four shot, and put the gun in the storm-house, which was a part of the dwelling, and put the four shot on a table-cloth, and went to school. Mr. Plummer was not at home. The Tabor boy came there with some rutabagas, and began looking and traveling about the premises, and found the gun in the storm-house, and then asked Mrs. Plummer for some shot, and she handed him the four shot which Harry had left on the table. She directed him to shoot at the hen-coop in the rear of the house. The boy fired one shot at the hen-coop, one at an apple-tree, and then he went around to the north side of a new house which Mr. Plummer was building, to a point about a rod east of the

front of the new house, and eight or ten feet north of it. The boy was facing the west, and the street was to the west of him, and the street runs northwest and southeast. He put a grape on a plank, and looked to see if any one was in the street, and seeing no one, he held the muzzle of the gun about two and a half feet from the grape, and the gun was pointed down, and fired. The distance west to the street from where the boy was when he shot is from seventy to one hundred feet. Mr. Chaddock at the time the shot was fired was standing in the street, looking at this new house of the defendant. The shot glanced from the board and struck him in the eye, destroying it. The street was a frequently traveled highway in the village of Benton Harbor, then containing about three thousand seven hundred inhabitants, and at a point where defendant had long resided. Defendant's boy Harry was nine years of age when the gun was purchased, and the Tabor boy was ten years old when the shot was fired. The gun was the common make of toy air-gun for children, breaking in the middle for the insertion of the shot, and when closed again, operating with a spring, compressing the air and expelling the shot. The shot used were "BB," or "double B." Harry was told by his father not to lend the gun to other boys, as they might break it. The Tabor boy lived out in the country, and occasionally visited at defendant's. It does not appear that the defendant knew of the purchase of shot by his wife, or that his boy had used all the shot purchased for him by defendant.

The contention of the plaintiff is, that the air-gun in question is a dangerous weapon, and that the defendant did not use sufficient care in the keeping of it upon his premises; that, at any rate, the question whether he did use such care or not should have been submitted to the jury. But as the facts are, the defendant cannot be held responsible for the injury to plaintiff, unless it was negligence sufficient to support this action in buying the gun and allowing his son to use it. He cannot be considered negligent in any other respect. He cautioned his boy to be careful in its use, and no carelessness of his own son was shown at any time in his use of it. The defendant and his son were neither of them responsible in any way, except owning the gun, for the use of it by the Tabor boy. It was kept inside the house, for the storm-door was an inclosure. If it came into the hands of Tabor through the negligence of any one, it was the negligence of the wife, for which the defendant is not liable.

This air-gun may be a dangerous weapon in a certain sense. The shot fired from it will not penetrate clothing, but it will put out the eye of a person, and will kill small birds and some small animals. These guns are in common and every-day use by children; over four hundred of them were sold in one season by a dealer at Benton Harbor. But it is not more dangerous in the hands of children than a bow and arrow and many other toys. It would hardly be good sense to hold that this air-gun is so obviously and intrinsically dangerous that it is negligence to put it in the hands of a child nine years of age, and that such negligence would make the person so putting it in the hands of the child responsible for the act of another child getting possession of it without defendant's consent or knowledge. Even if the gun had been left lying on the ground in the yard of the defendant, and the Taber boy had picked it up outside the house, and used it, the defendant would not have been responsible for the damage done by the boy. An ax is considered a dangerous weapon, but if one leaves an ax by his wood-pile, and a child comes into the yard, picks it up, and injures another with it, is the owner of the ax liable for damage because he has not put this deadly weapon under lock and key?

And if it be granted that this air-gun loaded is a dangerous weapon, as is a gun loaded with powder and ball, would this fact make the defendant liable? I think not. Suppose a person, owning a shot-gun, should put the same, unloaded, within the storm-door of his house, and a neighbor's boy, ten years of age, without the knowledge or consent of the owner, should pick up the gun, and obtain from the wife or some other member of the household a loaded cartridge, and take the gun out and discharge it, accidentally wounding some one, would the owner of the gun be responsible for the damage resulting to the injured person? To so hold him responsible would necessitate the keeping of unloaded fire-arms under lock and key, with the key in the possession at all times of the owner. This is not a case of leaving a torpedo or dynamite where it may be expected that children will find and play with it. An unloaded gun is harmless; a torpedo or dynamite is not, but is dangerous anywhere and under all circumstances to those not acquainted with the proper method of handling it, and liable to explode even in the hands of those who are expert in using it.

In my opinion, it was not negligence per se for the defendant

to buy this toy gun and place it in the hands of his boy, nine years of age; and there were too many intervening causes, without the act or knowledge of the defendant, between the buying of the gun and the injury, to hold the defendant liable for its use in this case. If his own son had, in any manner, contributed to the accident, a different question would arise, upon which I express no opinion.

The judgment must be affirmed, with costs.

PARENT AND CHILD — NEGLIGENCE. — The father of a child eleven years old is not liable for negligently allowing him to have a loaded pistol, with which he carelessly shot another child: *Hagerty v. Powers*, 66 Cal. 368; 56 Am. Rep. 101, and note. A father is not liable where a minor son, without his consent, took his horse and buggy and left it standing on the street, and it ran away and caused damage: *Maddox v. Brown*, 71 Me. 432; 36 Am. Rep. 336, and note. A father permitting his young children to commit acts on his premises likely to cause injury to persons passing is responsible therefore: *Hoverson v. Noker*, 60 Wis. 511; 50 Am. Rep. 381, and note.

AMERICAN BRONZE COMPANY v. GILLETTE.

[88 MICHIGAN, 231.]

SALES. — WHEN THE SUBJECT OF A SALE IS NOT IN EXISTENCE at the time of the contract, the agreement that it shall, when existing, possess certain qualities is not a mere warranty, but is a condition the performance of which is precedent to any obligation upon the vendee under the contract.

SALE, EXECUTORY CONTRACT OF, RIGHT TO RESCIND CONTRACT ON MISPERFORMANCE. — If a contract is to furnish a monument with certain inscriptions, and it is furnished with one of such inscriptions omitted, the purchaser may for that reason not only reject the monument, but rescind the order, and the vendor has not thereafter the right to make, furnish, and require the purchaser to accept another monument conforming to the original order.

J. J. Van Riper and Edward Bacon, for the appellant.

Theo. G. Beaver and George S. Clapp, for the defendants.

MORSE, J. March 28, 1888, Henry Gitchel, deceased, gave to the plaintiff's agent, Charles C. Sherrill, of Niles, Michigan, an order for a monument, with certain inscriptions thereon, among which was the following: "Lower tablet: 'Rosanna Gitchel, wife of James Miller. Died July 30, 1876. Age 30 yrs. 11 months.'"

The order provided that the shipment was to be made to Mr. C. C. Sherrill, Niles, "as soon as convenient after June 1,

1888. Payment to be made in cash after work is set in the cemetery. . . . This monument is fully warranted in every respect to be just as represented in our circulars."

The contract price was eight hundred dollars. The monument was shipped June 30, 1888. It arrived at Niles July 14, 1888, and was erected upon Henry Gitchel's lot in the cemetery at that place. The inscription above noted was not perfect, the age being left out, so that it read: "Rosanna Gitchel, wife of James Miller. Died July 30, 1876."

This defect was discovered by Sherrill, the agent of plaintiff, who notified the company thereof some time prior to August 8, 1888. Mr. Henry Gitchel died before the trial of the suit in the court below, and we are therefore deprived of his evidence, but the following notice, served by him upon the plaintiff, shows that at its date plaintiff had made some proposal to him in regard to remedying this omission:—

"To AMERICAN WHITE BRONZE Co., Chicago, Ill.

"You having failed to comply with my order, dated March 28, 1888, for a white bronze monument, you are notified that I hereby rescind and revoke said order, and I decline to accept the proposition made by you in relation to the same under date of August 8, 1888. Yours, etc.,

"Dated NILES, Aug. 8, 1888.

"HENRY GITCHEL."

The plaintiff offered no testimony to show what this proposal was. It is contended by the plaintiff that this notice was not sufficient, in that it did not point out the defects of which Gitchel complained, or in what respect the monument did not conform to the order. But it is evident that this omission in the inscription was known to both plaintiff and Gitchel, and the notice was therefore sufficient as regards this defect. On receiving the notice, plaintiff consulted an attorney as to its rights in the premises, and after such consultation, concluded to furnish Gitchel with an entirely new monument. This new monument was shipped to Niles, arriving in the cemetery December 11, 1888. It was found that the base was broken, and it was thereupon shipped to the plaintiff at Chicago, by its agent, and another or third monument forwarded, which was put up on Gitchel's lot, without his knowledge or consent, January 14, 1889. The plaintiff claims that this last monument conforms in every respect to the order, and is complete and perfect. The defendants deny this, and claim defects in it. In my view of the case, this contention is im

material. There is no proof tending to show that Henry Gitchel ever agreed to take a new monument in the place of the first one erected on his lot; but when monument No. 2 was brought to the cemetery, it is shown that he notified Sherrill, plaintiff's agent, not to trespass upon his lot, and gave a written notice to the sexton, Mr. Laffer, which Laffer read to Sherrill on the day of its date. The notice was as follows:—

“NILES, December 13, 1888.

“MR. C. H. LAFLEW.

“I hereby order you to forbid Mr. Sherrill, or any member or agent of the American Bronze Company, to put up any monument on the lot of David Gitchel estate, in Silver Brook Cemetery, as I shall consider it a trespass if they do.

“HENRY GITCHEL.”

✓ The material composing the first monument, except the urn, which could not be found, was taken by the plaintiff and shipped to Chicago. This suit is not brought to recover the contract price for the first monument on the ground that it complied with the agreement. It cannot be claimed that it was accepted, nor is the action brought for the value of the monument as first set up. It must be held that the plaintiff conceded, when it undertook to furnish a new monument and took away the old one, that it did not meet the requirements of the order. The plaintiff's declaration counts upon the contract, and alleges a fulfillment of it in making and putting up the monument of January, 1889, with no hint or intimation of the matters shown in the proof relating to the first and second monuments. The case was submitted to the jury, who decided in favor of the defendants.

Various errors are assigned to the rulings and charge of the court, but none of them are material. As the case stood, the circuit judge would have been amply justified in directing a verdict for the defendants. The defect in this inscription was an important one. The age being left out, there was no date remaining but the day and year of the death. As the age was made a particular part of each inscription of death, and there were seven of them, the omission of it in this instance cannot be considered as an immaterial defect. Henry Gitchel was not obliged to accept it as it was. It was undertaken to be shown that what is known as a “working order” was exhibited to him before the first monument was completed, and

that it came back to the plaintiff, marked "O. K." This testimony was, however, immaterial. By its own action the plaintiff waived its right, if it had any, on this account to force an acceptance of the monument as it was upon Gitchel, and sought to remedy it by building a new one, after Gitchel had repudiated the one furnished, and without his consent, and against his express orders.

Had the plaintiff, the defect as above stated being admitted in the monument first sent, a right to build a new one, and put it up under the agreement in the order, without the consent and against the protests of Henry Gitchel? This is the only question in the case. In the order or agreement in this case there was no provision that the plaintiff should be notified of any defect in the monument, and allowed a reasonable or fixed time thereafter in which to remedy such defects. The performance of the contract preceded payment. There was a substantial failure to perform the contract, and unless the plaintiff had the right to keep on experimenting until a perfect monument was erected, the plaintiff could recover nothing, although Gitchel did not remove the monument first furnished at once from off his lot. Permitting it to stand there would not be an acceptance; and as the company finally removed it, and did not insist upon an acceptance of it as it was first erected, the fact that Gitchel did not remove it until late in the fall can have no bearing on the issue here.

I can find nothing in the order or in law giving the plaintiff in this case a right to furnish Gitchel the new or third monument, for which this suit is brought. The order provided that the monument should be shipped to Niles as soon after June 1, 1888, as convenient to the plaintiff. The plaintiff fixed such convenient time by shipping it June 30, 1888. It was not in compliance with the order. There is nothing in the agreement to meet such a case. It is therefore a naked case of a delivery within the time agreed upon, of a monument not of the description ordered. In such case, the law steps in, and says that the purchaser is not obliged to accept it.

"When the subject-matter of a sale is not in existence at the time of the contract, an undertaking that it shall, when existing, . . . possess certain qualities is not a mere warranty, but a condition the performance of which is precedent to any obligation upon the vendee under the contract": *Pope v. Allis*, 115 U. S. 363.

And I know of no rule of law, in such a case as this, where
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the manufacturer has tendered goods or machinery in performance of a written order or agreement of purchase, that obliges the purchaser, if the article or articles do not conform to the agreement, to permit the manufacturer to keep on tendering other goods or new machinery until the terms of his contract are performed, unless the contract expressly provides that he shall have such opportunity. When, as in this case, the article delivered is not of the description of the article ordered, the purchaser has a right to reject it, and to rescind the contract *in toto*.

We are cited to *Davis v. Downs*, 4 Mich. 530, to sustain plaintiff's claim that it had the right to remedy the defects in the first monument, or to furnish a new one; but in that case there was no stated time of delivery, and it was held that the purchaser undertook to rescind the contract prematurely, before all the castings were sent, and must pay for all the good castings that were delivered. In the opinion of the court, there is language to the effect that the manufacturers had the right to furnish good castings in the place of those that were defective. If this is good law for that case, it does not apply to the facts in the case now before us. Henry Gitchel ordered a monument to be constructed in a certain way, with certain inscriptions upon it. When delivered, a material inscription was omitted. It was not the monument he ordered. He had the right, under all the authorities, to reject it, because the existence of the omitted inscription, being a part of the description of the thing sold, became essential to the identity of the monument ordered, and a condition the performance of which was precedent to any obligation upon Gitchel to take it: Benjamin on Sales, sec. 1349. There being no agreement that the plaintiff might remedy defects or furnish a new monument, the contract between the parties was at an end when Gitchel refused to accept the first monument.

The judgment is affirmed, with costs.

SALES — CONDITIONAL. — A contract to deliver goods not *in esse* will not vest the title in the proposed purchaser by a tender of them. He has a right to examine them, and decide whether they are what he wants. If he refuses them, there is no sale: *Rider v. Kelley*, 32 Vt. 268; 76 Am. Dec. 176. Under a contract for the manufacture of wooden pipes, the proposed purchaser is not bound to accept it unless it is of the kind and quality suited to the purpose for which it was contracted to be made: *Wyckoff v. Artley*, 142 Pa. St. 467. See extended note to *Marvin Safe Co. v. Norton*, 57 Am. Rep. 572.

WHITNEY v. CITY OF PORT HURON.

[36 MICHIGAN, 268.]

MUNICIPAL CORPORATIONS — REASONABLE TIME TO INVESTIGATE CLAIMS AGAINST. — If the charter of a municipal corporation provides that no action shall be maintained on a claim against it unless presented to its council, and a reasonable time allowed to investigate and pass upon it, and the claim has been presented for more than five weeks, during which the council has met five times and has not acted upon the claim, the claimant need not wait longer before bringing suit thereon.

PAYMENT OF TAXES IS NOT VOLUNTARY when made under protest to prevent a tax sale then advertised, though, because of the illegality of the taxes, the sale would have been void, and any cloud upon the title resulting therefrom might have been removed by legal proceedings.

TAXES — PROTEST AGAINST PAYMENT, WHEN SUFFICIENTLY SPECIFIC. — A receipt for taxes, across the face of which is written, "Paid under protest, to protect property from being sold, and on account of taxes being illegal," establishes a protest sufficiently specific, when the whole proceeding on which the taxes were founded was without jurisdiction and void.

MUNICIPAL CORPORATION — RESOLUTION — APPROVAL, WHAT IS NOT. — If a statute requires resolutions of the city council to be approved and signed by the mayor, the fact that he, as presiding officer, heard the resolution read, put the motion for its adoption, declared it adopted, and in fact approved it, and signed and approved the journal in which it was entered, does not dispense with his approving the resolution in the manner pointed out in the statute.

Frank T. Wolcott and O'Brien J. Atkinson, for the appellant.

Frank Whipple, for the plaintiff.

MORSE, J. The plaintiff sues to recover taxes paid by her under protest on a special assessment levied for the paving of Pine Grove Avenue, in the city of Port Huron. She had judgment in the court below, the verdict of the jury being directed by the circuit judge in her favor.

The first objection to this judgment is, that the plaintiff had no right to sue at the time she did. The charter of Port Huron in force at the time this suit was commenced provides that it shall be a sufficient bar and answer to any action or proceeding in any court for the collection of any demand against said city that it was never presented to the council, or if presented, that the suit was brought before the council had reasonable time to investigate and pass upon it: *Local Laws 1885*, p. 496. The plaintiff presented her claim to the common council, and it was read at a meeting of that body held December 6, 1886. Meetings of the council were afterwards held December 13th, December 20th, January 3d, and January 10th, at which meetings no action was taken in re-

gard to plaintiff's claim. The plaintiff brought suit January 12, 1887, and waited long enough before she did it.

It is also claimed that her payment of the tax was voluntary. The tax was paid April 2, 1886, and across the face of the receipt was written as follows: "Paid under protest, to protect property from being sold, and on account of taxes being illegal."

The city treasurer had advertised the plaintiff's property for sale, and she had the right to presume that he would proceed with the sale. The fact that the sale would have conveyed no title to the purchaser on account of the illegality of the tax, or that she could have removed the cloud upon her title caused by such sale by legal proceedings, had no bearing upon her right to pay the tax under protest, and thereby stop the sale. Nor was it any the less an involuntary payment under the law. If because a tax is illegal, and a sale of property under it would be void, a payment to prevent the seizure or sale of one's property cannot be considered as an involuntary payment, then our statute providing for the payment of taxes under protest would be of no force or use. If the citizen's property is threatened with seizure under a tax-warrant, or his real estate is advertised for sale to collect delinquent taxes, he is, equally in both cases, entitled to free his property by a payment of the tax under protest, and such payment will not be considered voluntary.

It was held in *City of Detroit v. Martin*, 34 Mich. 170, 22 Am. Rep. 512, that one who has full knowledge of all the facts, being conclusively presumed to know the law, is presumed to know that an assessment laid under a statute which is unconstitutional and void cannot be made the basis of a sale that could constitute any cloud upon his title, and therefore to know that he could not be injured by it; and that a payment of a tax under protest in such a case, where no seizure of goods or of the person had been made or threatened, and where the officer had no authority to compel payment otherwise than by a sale of land, which could injure no one, would not be other than a voluntary payment, as a protest would not change the character of the payment. It was held, also, that a sale of the land under such circumstances would not create a cloud upon the owner's title. This may be good law when applied to proceedings under an unconstitutional enactment, which is no law, and is held to confer no rights upon any one, as all must be presumed to know that it is un-

constitutional and void; but it cannot be applied to cases where the statute under which the proceedings to levy the tax are taken is constitutional, and where the illegality of the tax is claimed from irregularities or defects in the statutory proceedings. If it were so, it would require of the land-owner a greater knowledge of the law than attorneys, or even courts, possess. For instance, in the present case, able attorneys for the defendant are claiming that the tax paid by plaintiff was a legal one, and that all the proceedings in assessing it were lawful; yet at the same time they argue that if it should be determined by this court to be illegal for any reason, then the plaintiff's payment must be considered a voluntary one, and she cannot recover what she has paid, because she and every one else are presumed to know that the tax is void, and that a sale under it could convey no title, and therefore cast no cloud over her title. But the fact remains, as every one knows, that a tax deed or any other purported conveyance of land does cloud the title, and that it can never be sold or exchanged as readily, and seldom for as great a price, as when unencumbered, although it may be patent to the courts that such deed or conveyance is void and of no consequence, so far as the holding of the title is concerned; and, in my opinion, the owner of the land has the right, in law and equity, to treat every such tax deed or other conveyance as a cloud upon his title, and to take such steps to get rid of it, or to prevent its issue or record, as the law authorizes when the title is actually clouded as defined by some of the authorities.

A cloud upon a title is but an apparent defect in it. If the title, sole and absolute in fee, is really in the person moving against the cloud, the density of the cloud can make no difference in the right to have it removed. Anything of this kind that has a tendency, even in a slight degree, to cast doubt upon the owner's title, and to stand in the way of a full and free exercise of his ownership, is, in my judgment, a cloud upon his title which the law should recognize and remove.

The third objection is, that the protest of plaintiff was not sufficiently specific. Across the face of the receipt for the taxes paid by the plaintiff was the following: "Paid under protest, to protect property from being sold, and on account of taxes being illegal."

In support of this objection, we are cited to *Louden v. East Saginaw*, 41 Mich. 26; *Peninsula Iron etc. Co. v. Crystal Falls Township*, 60 Mich. 514; *Peninsula Iron Co. v. Crystal Falls*

Township, 60 Mich. 79. The last two cases do not apply, as the protest was made under a special statute. In *Louden v. East Saginaw*, 41 Mich. 26, the objection to the tax did not go to the jurisdiction of the city to enter upon the work, but to irregularities in the assessment of the tax, and it was held that the plaintiff should have pointed out more specifically his reason for his objections to the tax, and why he asked that the assessment against him should be refunded. It was said: "The case stands, therefore, on a very different footing from one relating to an entirely illegal assessment. The only illegality here was in a notice which may or may not have been seen by the parties": *Louden v. East Saginaw*, 41 Mich. 22.

In the present case, the claim is, that the whole proceedings were void and without jurisdiction. A case involving the legality of the proceedings to pave Pine Grove Avenue had been decided in this court before the council were asked to refund this money, and that body then well knew that the whole proceeding had been declared void for want of jurisdiction, for the reason that the resolution providing for the grading and paving of the street had not been approved by the mayor, as provided by the charter of Port Huron: *Twiss v. City of Port Huron*, 63 Mich. 528, 532.

An attempt is made in this case to break the force of the ruling in the Twiss case by attempting to show that the resolution was shown to the mayor, and was "approved by him, so far as passing judgment upon it and assenting to it could go." The mayor testifies that when he went into office it had not been the custom of the mayor to sign the resolutions; it was thought the signing of the journal was sufficient. He could not tell whether this particular resolution was presented to him by the clerk, or whether he signed it; but he testified that the resolution, when on its adoption before the council, was read in his hearing, that he put the motion for adoption, and declared it carried, and that he passed his judgment upon it, and approved it. But this judgment and approval rests upon oral testimony, and is not evidenced by writing, as the charter at that time provided it should be. He did not write his approval upon the resolution and sign the same. The approval of the journal did not comply with the charter. It was his duty to approve the journal if the proceedings of the council were therein correctly transcribed, whether he approved of this resolution or not. The case, in this respect,

must be governed by the majority opinion in the Twiss case. It is not necessary to discuss the case further.

The judgment is affirmed, with costs.

TAXATION — PAYMENT — WHEN VOLUNTARY. — An illegal tax paid under protest is not a voluntary payment, and may be recovered: *Grim v. Weisenberg School District*, 57 Pa. St. 433; 98 Am. Dec. 237, and note; *Tuttle v. Everett*, 51 Miss. 27; 24 Am. Rep. 622. An illegal tax paid under duress may be recovered back: *Greenbaum v. King*, 4 Kan. 284; 96 Am. Dec. 172, and note. A voluntary payment accompanied by a protest will not suffice in an action to recover taxes paid. It must appear that the tax was wholly unauthorized and paid under compulsion: *First Nat. Bank v. Mayor*, 68 Ga. 119; 45 Am. Rep. 476; See *Detroit v. Martin*, 34 Mich. 170; 22 Am. Rep. 512. To recover taxes paid voluntarily, but under protest, it must be shown that the tax was illegal according to the protest: *Peninsular etc. Co. v. Crystal Falls*, 60 Mich. 510.

GIBBS v. SCHOOL DISTRICT.

[38 MICHIGAN, 324.]

MUNICIPAL BONDS. — PURCHASERS OF MUNICIPAL BONDS HAVE A RIGHT TO RELY upon the facts asserted or appearing on the face of the bonds, made by any person or body authorized by law to pass upon and determine such facts.

MUNICIPAL BONDS. — THE TITLE OF A BONA FIDE HOLDER of a municipal bond cannot be defeated by the neglect to enter the order directing the bond to be issued, when the bond upon its face declares that such order has been made.

MUNICIPAL BONDS — DETERMINATION OF LOCAL BOND, WHEN CONCLUSIVE IN FAVOR OF. — If a statute provides that whenever any school district shall have voted to borrow any sum, the district board of such district is authorized to issue the bonds of such district, such board is thereby vested with authority to decide whether the proceedings to vote such bonds are such as will authorize the board to issue them; and if they issue such bonds, containing recitals showing them to have been authorized, this is conclusive in favor of an innocent holder.

Dumon and Cogger, for the appellant.

M. Brown, for the plaintiff.

CHAMPLIN, C. J. This action was brought to recover the amount of a certain bond issued by defendant school district, as follows: —

“No. 1. ISSUE OF THREE HUNDRED DOLLARS. \$800.00.

“*State of Michigan, County of Mecosta.*

“SCHOOL DISTRICT No. 10, FRACTIONAL, OF THE TOWNSHIP OF COLFAX.

“School District No. 10, fractional, of the township of Col-

fax, county of Mecosta, state of Michigan, hereby acknowledges itself indebted in the sum of three hundred dollars, lawful money of the United States of America, bearing interest at the rate of eight per cent per annum from the date hereof, payable annually, and said sum of money the said school district hereby promises to pay to the holder hereof on the fifth day of April, A. D. 1889, the interest aforesaid to be paid annually from date, according to interest coupons hereto annexed, and both principal and interest payable at the Northern National Bank, Big Rapids, according to a loan authorized by a two-thirds vote of the qualified voters of said school district, at a special school meeting held at the school-house in said district at seven o'clock, P. M., on the twenty-ninth day of September, A. D. 1885, in accordance with sections 15 and 16 of chapter 2 of Act No. 164, Sessions Laws of 1881.

"In testimony whereof, the moderator and director of said school district have, by the order and direction of the district board of said school district, officially hereunto subscribed their names and the corporate name of said school district, and executed this bond, at Rodney, Mecosta County, this fifth day of November, A. D. 1885.

"SYLVESTER BURDICK, Director.

"WILLIS WOOD, Moderator."

Four interest coupons were attached. There was no denial of the execution of the bond under oath filed with the plea.

The defense upon the trial relied upon the records of the school district board failing to show any legal authority for the issue of the bond. The records of the school district showed that there was what was claimed to be a special meeting held on the twenty-ninth day of September, at the time stated in the bond, and that some action was taken at that meeting with reference to the issue of such bond.

Under the statutes of this state, school districts having less than thirty children between the ages of five and twenty years are authorized, when lawfully assembled, by a two-thirds vote of those present, to issue the bonds of the school district for the purpose of paying for a school-house site, and for the purpose of erecting and furnishing a school-house building, such bonded indebtedness not to exceed three hundred dollars. In school districts having thirty children of like age, they may have a bonded indebtedness not to exceed five hundred dollars; and the statute proceeds to grade the amount of indebtedness according to the number of scholars, until it shall not

exceed thirty thousand dollars. The statute also provides: "Whenever any school district shall have voted to borrow any sum of money, the district board of such district is hereby authorized to issue the bonds of such district, in such form, and executed in such manner, by the moderator and director of such district, and in such sums, not less than fifty dollars, as such district board shall direct, and with such rate of interest, not exceeding eight per centum per annum, and payable at such time or times as the said district shall have directed": Howell's Stats., secs. 5103, 5104.

Purchasers of municipal bonds are bound to know the extent and limitations upon the authority of the corporation to issue the bonds. They are bound, in other words, to know the law under which the authority is exercised. Purchasers of such securities have a right to rely upon all facts asserted or appearing upon the face of the bonds, made by any person or body authorized by law to pass upon and determine the facts.

In purchasing this bond, the purchaser was bound to know that school districts have no authority to issue bonds except for the purposes specified in the statute, and that their authority is limited by the number of scholars between the ages of five and twenty years then residing in the district; that there must be a two-thirds vote of the qualified electors in favor of their issue. The purchaser is chargeable with knowledge of the prerequisites of a legal special meeting, and of the provisions for a board of inspectors and their duties, and of the requirement that the vote shall be by ballot.

The recitals in this bond are made by the director and moderator, who compose a majority of the school board. Neither the school board nor the moderator and director are authorized to issue the bonds unless voted by the district at a lawful meeting; and under section 5104, before the board can act, they have a function to perform, in its nature somewhat judicial, and that is as to their own authority to issue the bonds. The statute limits that authority to bonds voted by the school district, and consequently the question whether the proceedings to vote such bonds are such as will authorize the board to issue them must be passed upon by the board. A purchaser of the bonds, therefore, need look no further back than the face of the bonds for the facts which show a compliance with the law.

We think the assertion appearing upon the face of the bond is sufficient evidence to an innocent purchaser that the board

ordered and directed the bond to be issued. The officers signing the bond are two of the three officers who constitute the board, and the director is the officer who the statute requires shall make a record of the proceedings of all district meetings and the orders, resolutions, and other proceedings of the board. It matters not, therefore, that the records kept by the board do not show the order of the board to execute the bond. The title of a *bona fide* holder of the bond cannot be defeated by a neglect to enter the order in cases where the face of the bond, upon which he has a right to rely, recites the fact that such order was made.

This case is not controlled by *Spitzer v. Village of Blanchard*, 82 Mich. 234. In that case there was a limitation upon the authority to borrow money in excess of a certain percentage upon the taxable property. In that case the law did not designate any body or board to pass upon the facts, and only permitted the bonds to be issued for "loans lawfully made." The bonds could only be issued upon the vote of the electors, and the bonds did not recite that such a vote was taken. "In that case (p. 244) we said that "where there is a total want of power, under the law, in the officers or board who issue the bonds, then the bonds will be void in the hands of innocent holders, the distinction being between questions of fact and questions of law. If it is a question of fact, and the board or officers are authorized by law to determine the fact, then their determination is final and conclusive. And although it may be contrary to the fact, yet if recited in the bond that the necessary and proper steps required by law to be taken had been taken, then the municipality is estopped from denying that they were taken."

The law under which these bonds were issued authorized the school board to issue them, and made that board the body to determine when such facts existed; and hence when the bonds were issued by their order, that fact appearing upon the face of the bond, a *bona fide* holder is entitled to recover, and as against him, the district is not allowed to defend upon the ground that the law was not complied with previous to their determination to issue the bonds. The law having placed that responsibility with the district board, the school district, if defrauded, must seek its remedy against such board.

The judgment is affirmed.

MUNICIPAL CORPORATIONS — BONDS. — A person to whom a bond is issued by a municipal corporation is not charged with constructive notice of anything not appearing on the face of the bond: *De Voss v. Richmond*, 18 Gratt. 238; 98 Am. Dec. 646, and extended note; extended note to *Deming v. Houlton*, 18 Am. Rep. 259-269. Municipal bonds issued without authority are not binding, even in the hands of bona fide purchasers: *Spitzer v. Blanchard*, 82 Mich. 234.

MATHEWSON v. CITY OF GRAND RAPIDS.

[88 MICHIGAN, 558.]

PLEADING — DEMURRER, WHEN FULL CONTRACT IS NOT SHOWN BY THE COMPLAINT. — If the declaration sets out a contract in full, which refers to plans, specifications, and profiles of work to be done, but the declaration omits such specifications, the defendant may attach them to his demurrer, so that the whole contract may be before the court.

MUNICIPAL CORPORATIONS. — PERSONS CONTRACTING WITH A MUNICIPAL CORPORATION ARE BOUND TO KNOW THE LIMITS of its powers, and cannot sustain an action to recover damages resulting to them from the fact that they and the officers of the municipality misapprehended its powers, and entered into a contract for the performance of work which it had no right to do without first making compensation to property owners injured thereby.

MUNICIPAL CORPORATIONS — DAMAGES AGAINST, FOR CONTRACTING WITHOUT AUTHORITY. — Damages cannot be recovered by persons contracting with a city to grade a street in such a manner that embankments must rest more or less upon the lands of abutting owners, because such contractors were delayed in the prosecution of their work by an injunction obtained by such owners. The contractors were chargeable with knowledge that the law would not permit the city to thus injure private property, and no cause of action resulted to them when such owners vindicated their rights in the courts.

Taggart, Wolcott, and Ganson, for the appellants.

William Wisner Taylor, for the defendant.

MORSE, J. This case comes here on declaration and demurrer. The demurrer was sustained in the court below.

The substance of the declaration, as stated in plaintiffs' brief, and mainly correct, is as follows: —

"On the fourteenth day of May, 1888, plaintiffs entered into a contract with the city of Grand Rapids to improve North College Avenue, which was executed in a proper manner by both parties. The improvement consisted of the grade and fill of such street from East Bridge Street north to the city limits; the plaintiffs being required to furnish all material and incidental work, and according to plan, specifications, and profile on file with the board of public works. The

plaintiffs, by the terms of the contract, were to commence on the twenty-first day of May, 1888, and complete the work on or before August 15, 1889. By the third paragraph of the contract, the time named for the completion of the work is made material, 'and of the very essence of this contract; and for each and every day the contract shall remain unperformed, after the time named for the performance thereof, the said board of public works may, in its discretion, deduct the sum of ten dollars from the amount to be paid by said second party on this contract.' The street was to be graded, as it is alleged in the declaration, sixty-six feet wide, and a fill was necessary at certain points of twenty-six feet above the surface of the adjacent premises.

"It is alleged by the plaintiffs that in the making of said contract, the defendant undertook and agreed that the preliminary steps necessary to be taken on its part to secure the right to make such an improvement, and in the manner called for by the contract, had been taken, and that it had the right to so contract, and so improve said street. And the plaintiffs further allege that they believed that the city was acting with full authority, and had such right, and that such contract gave them full power to execute the same in every particular as they were required to do by its terms. Plaintiffs allege that they did go on and employ a large number of men, and secured the necessary material, and commenced work thereon, and were in condition to complete the work in every respect, in accordance with the conditions and terms of said contract.

"Plaintiffs further allege that at the time of the making of said contract, and for about a year thereafter, defendant had not secured the right from any of the property owners adjacent to North College Avenue, including one Sophie Vanderlip's property, at the point where the same was, by the terms of the contract, to be filled, to fill the same as the contract required; that making the fill as required by the contract necessitated an encroachment upon Sophie Vanderlip, and other adjacent property owners; that the slope of such fill, as required by the contract and specifications, reached over upon the land of such parties; that Sophie Vanderlip obtained an injunction against the prosecution of the work in front of her premises from the superior court of Grand Rapids, and other property owners, holding in the same manner as Sophie Vanderlip, asserted their rights against the execution

of said contract by plaintiffs in front of their premises; that the injunction obtained by Sophie Vanderlip was affirmed in the supreme court, and by reason thereof, and of the claims of other parties from whom said defendant had obtained no right to have said contract carried into execution, plaintiffs were delayed in the performance and execution of the contract for the period of about one year.

"The declaration alleges that after such rights were obtained, as they were, by the city from these several parties, they completed the work in question, but never waived any of their rights to claim damages by reason of this breach of the contract as aforesaid, and they so notified said city and its various officials; and in the receipt of the amount paid them by said city, refused to receive the sum in full of extra work and damages occasioned by such breach of contract, and so notified the said city. Plaintiffs allege a presentment of their claim to the city, and that it was entirely rejected. The declaration also alleges that the board of public works and its officials desired them not to continue work on said improvement in front of the premises owned by persons from whom the city had obtained no right to have said contract carried into execution. The declaration also alleges the knowledge on the part of the defendant that it had no right or authority to cause said College Avenue to be filled, as the said contract required plaintiffs to fill the same. Various items of damage are set out in the declaration. Plaintiffs admit that the city has paid them, in orders or money, the amount of the contract price."

The declaration set forth the contract in full, in which contract the plan, specifications, and profile of the work were referred to, and made a part of the contract, but the declaration did not give the plan, specifications, and profile in full. The defendant, in its demurrer, attached the specifications in full of the work. This was proper pleading. They were a part of the contract, and necessarily a part of the declaration, and not being therein given in full, it was proper for the defendant thus to exhibit them to the court, so that the whole contract might be before it. The demurrer insisted, —

"1. That, as a matter of law, under the terms of said contract, the defendant did not undertake and agree that the preliminary steps necessary to be taken by the defendant had been taken on its part, and that said defendant had the right, and had secured the right from the property owners adjoining

and adjacent to the street, to improve said street; and that the defendant did not, by such contract, obligate itself to see that said plaintiffs were not hindered, delayed, or interfered with in carrying out such contract.

"2. That the board of public works had no power to make any request that the plaintiffs should not go on with their work, or to prevent them from continuing it, and that the delay was not caused by defendant, or any of its agents, as appears from the declaration, but by the act of the person enjoining the city and plaintiffs from the prosecution of said work; that if any request was made by such board, such action was *ultra vires*, and void, and not binding upon defendant, and no right of action could grow out of plaintiffs' stopping work at the request of such board.

"3. That for these reasons the declaration, as a matter of law, does not disclose a right of action against the city."

It is not claimed that the contract, by its express terms, guarantees that the city has the right to make this improvement, or has secured such right from the property owners along the line, but it is contended that, by entering into this contract, there is an implied agreement upon the part of the city that it has prepared, or will prepare, the way for the performance, and it is to be presumed that the very thing essential for that purpose constituted an element of the agreement. It is apparent from the contract, the pleadings in this case, and the facts in the case of *Vanderlip v. City of Grand Rapids*, 73 Mich. 522, 16 Am. St. Rep. 597, that the city authorities, at the time they entered into this contract, supposed that they had the right to improve the street as contemplated by such contract. All the necessary steps to grade and improve the streets, so far as the city supposed it was concerned, had been taken. The litigation in the *Vanderlip* case did not grow out of any want of jurisdiction in the city to grade and improve the street proper, but in raising the grade of the street at certain places, one of which was in front of Mrs. Vanderlip's home. The city supposed that it had the right, without the consent of the owners of the abutting property, as an incident of said grade, to let the earth of the fill slide over and upon the abutting lots, if the width of the street proper at the top of the grade was not increased thereby beyond the lines of the highway; that such filling in was not taking of private property for public use; and that the city was not required to take proceedings to condemn the land so occupied by the sliding

of the fill. Mrs. Vanderlip enjoined the city and these plaintiffs from grading the street so that part of the embankment at the bottom would encroach upon her land, and we held that she had the right so to enjoin them. The delay in the performance of the work came from this injunction and the litigation connected with it. The work was not stoopt by the voluntary action or direction of the city. It was not delayed by the actual fault of the city on account of its neglect or failure to furnish any material, or to do any other thing within its power to do, and known to be its duty to perform. It simply failed in its knowledge of the law as to its power to rest the base of the embankment upon the adjoining lands, without the consent of the owners, and without compensation to them. In such a case, if the work had been permanently stopped by the injunction, there is no doubt but the plaintiffs could have recovered the value of the work performed. In this case, they finally completed their contract, and were paid the contract price in full. What they are now seeking is, damage for the delay caused by the injunction. I do not think the city is liable for such damages, and the demurrer was properly sustained.

The fact that the board of public works requested them to desist from the work pending the Vanderlip litigation, in front of the premises of owners situated in the same manner as those of Mrs. Vanderlip, cuts no figure in this case. A compliance with such request could not make the city liable for the damages resulting from such compliance.

The cases cited by plaintiffs' counsel do not reach the case before us. I have carefully examined these cases, and find but few of them to have any connection with the point here in controversy.

In *Doolittle v. Nash*, 48 Vt. 441, the railroad company was enjoined from constructing its road upon certain lands, because it had not acquired the right to do so; whereby the performance of the contract by plaintiff in that case was prevented. Plaintiff was a subcontractor under defendant. The court held that the injunction was without the fault of either of the parties, but said that the defendant was impliedly under the same obligation to see that the plaintiff had the opportunity to perform his contract that the plaintiff was to perform it.

"It was the business of the defendant to know before he made the contract, and thereby induce the plaintiff to incur the expense of preparation, that he had the right to have the

contract performed. If he had not that right, then he was in fault in making the contract, and should be liable to the plaintiff for the damages, and it is no answer to say that he supposed he had the right, and acted in good faith."

It was intimated that if the injunction was unlawfully obtained, the defendant had his remedy upon the injunction bond; if rightfully obtained, then the defendant would have his remedy against the railroad company, it being the party in fault. This decision seems to be based upon the idea that if the plaintiff had no right of action against defendant, he was without remedy, and must bear the loss, which would be unjust; and that the party in fault would be liable to the defendant for what he was obliged to make good to plaintiff, and in the end the loss would be borne, as it ought to be, by the party in fault. The railroad company was presumed to know whether it had acquired the right to pass over the lands, and for that reason would be liable for the damages resulting from its failure to obtain such right. It will be seen that no municipal corporation or its agents were involved in the suit, and the rights and remedies discussed were those of private persons or corporations.

In *Bill v. City of Denver*, 29 Fed. Rep. 344, the plaintiff was employed by the city as an inspector of sewers. The city passed an ordinance creating a sewer district, reciting that it was in accordance with the petition of a majority of the property owners,—a condition required by the law. After considerable work had been done, it was ascertained that a majority of the property owners had not petitioned, and the city abandoned the work. The court held that the city was liable for the work done by the plaintiff on this sewer, on the ground that there was no other body or tribunal to pass upon the fact whether a majority of the property owners had petitioned for the improvement; so that the action of the council in the first place, reciting that a majority had so petitioned, was conclusive upon the city as against the plaintiff, and he had a right to rely upon the fact that the city had power to proceed and make a levy to pay for the work.

In *Moore v. Mayor*, 73 N. Y. 238, 29 Am. Rep. 184, the action was brought for a balance upon a contract fully performed by the plaintiff for the paving of certain streets in the city of New York. The payment was resisted on the ground that the resolution authorizing the paving was not published in the *Leader*, according to law. It was held that the city must

pay; that the act of paving these streets was within the general power of the municipality; that there was no apparent defect in the proceedings upon the journals of the common council; and that the irregularity claimed—and it was only an irregularity—was the omission of an act *in pais* outside of the council chamber, and of which no record would appear in the journals of the council. It was held, under these circumstances, that an individual dealing with the agents of the city government should be permitted to regard the acts of the government as valid, in the absence of any apparent defect, either in the power or the manner of its exercise.

These are the only cases cited that have any close bearing upon the question at issue here, and, as it will be seen, they fail to touch it. The specifications in the contract before us provided that the street should be graded sixty-six feet wide, the whole width of the street, and that when the embankments were made they were to be “made with side slopes of one and one half feet horizontal to one foot vertical.” It was as plain to the plaintiffs as to the city officers that when the embankments were made, if the street was graded its full width, the embankments must rest more or less upon the lands of abutting owners. To so use these lands without compensation, and without the consent of the owners, was not within the general powers of the municipality, and the plaintiffs, in such case, were bound to know the limit of such power: *Moore v. Mayor*, 73 N. Y. 245; 29 Am. Rep. 134; *Newman v. Sylvester*, 42 Ind. 106. And when the city acted in good faith in letting this contract, under the misapprehension that it had a right so to use the abutting property, as a natural and necessary incident to the improvement of the street, without compensation to the owners, and without their consent, and when the plaintiffs also supposed they had such right, they having the like knowledge of the law, which all are supposed alike to know, as the common council, the city cannot be held liable to plaintiffs for damages claimed for interruption of the work by the injunction of Mrs. Vanderlip. It was for plaintiffs, as well as the common council, to make inquiry as to the right of the city to place or rest a portion of the foundation of its embankment upon the abutting premises. It was their duty to know whether the city had the right, and common prudence required them to ascertain the authority of the city before they undertook the work: See *Newman v. Sylvester*, 42 Ind. 111-113, and cases there cited.

In *Davies v. City of East Saginaw*, 66 Mich. 37, 40, in a grading contract exactly like this in respect of its grades to the full width of sixty-six feet, we held that the contractor could not recover for the work actually done in filling outside of the street line, for the reason that neither the city nor the contractor had the right to put any dirt upon the abutting lands. In this case the plaintiffs received pay for all the work they did at the contract price, and cannot recover for damages occasioned by the stoppage of the work by injunction because of the unlawful act of the city, in which they joined.

There is no claim in the declaration that the city knowingly misled the plaintiffs.

The demurrer was properly sustained, and the judgment of the lower court is affirmed.

MUNICIPAL CORPORATIONS — CONTRACTS — NOTICE OF LIMITATION ON POWER TO MAKE. — Those who contract with municipal corporations are bound to know the extent of the powers of their officers: *Satre v. Pettit*, 74 Cal. 332; 5 Am. St. Rep. 442; *Newberry v. Fox*, 37 Minn. 141; 5 Am. St. Rep. 830; *Turney v. Bridgeport*, 55 Conn. 412. A contract made by the common council of a city in disregard of its charter cannot be the subject of any claim against it: *Zottman v. San Francisco*, 20 Cal. 96; 81 Am. Dec. 96, and note. Persons dealing with municipal corporations are bound to make their contracts according to law, and they will not be protected unless they do: *Machey v. Columbus Tp.*, 71 Mich. 227.

SPEIRS v. WISNER.

[86 MICHIGAN, 614.]

EQUITY — EXECUTORS, ACCOUNTING BETWEEN. — EQUITY HAS JURISDICTION over a suit brought by one executor against another who has received all the commissions allowed by the statute for an accounting, and to determine to what portion each is entitled.

EXECUTORS, COMPENSATION OF. — EXECUTORS ARE NOT NECESSARILY ENTITLED TO SHARE PRO RATA IN THE STATUTORY FEES; and if one has substantially managed the whole business, and had the whole responsibility, a court of equity may refuse to require him to share the statutory fees, or any part thereof, with his co-executor.

Moore and Moore, for the complainant.

H. C. Wisner, in pro. per.

CHAMPLIN, C. J. Mr. Wisner, Mr. Kleinhans, and Mrs. Speirs were co-executors of Mr. Mabley's will, filing a joint bond in the penal sum of one thousand dollars.

Mr. Wisner filed two accounts, showing that he had received from the estate and retained all the commissions allowed by the statute, and asking for a further allowance for extraordinary services rendered. All these accounts were contested by the estate, Mrs. Speirs objecting to the amount claimed for extraordinary services, and claiming that Mr. Wisner was entitled to only one third of the commissions. Each of these suits was carried to this court: *Wisner v. Mabley's Estate*, 70 Mich. 285; 74 Mich. 143. This court fixed his allowances for extraordinary services, but held that, as between Mr. Wisner and his co-executors, any executor could collect all the commissions, and their distribution could only be determined by a suit between themselves. After this decision, Mr. Kleinhans assigned his claim to the commissions to Mrs. Speirs, and she files a bill of complaint for an accounting, claiming two thirds of the commissions, being the shares of the two executors.

We think equity had jurisdiction over the subject-matter, and is competent to afford relief.

The only question we have is, in view of the whole history of the case, Is the complainant entitled to the decree prayed for? It appears very clearly that Mr. Wisner was the executor who managed the business, and who had the responsibility of administering the estate. It is true that he consulted with his co-trustees from time to time, as was proper for him to do, and to keep them advised of the situation. We cannot lose sight of the fact, however, that these fees were allowed to defendant, Wisner, by the probate court, against the strenuous objections of complainant, as being justly due to him as a part of his compensation, although the fact of such allowance is not binding upon the conscience of this court. One of the co-executors, Mr. Kleinhans, did not reside in this state, and the complainant was absent from the city much of the time during which the estate was in process of settlement. It strikes us as manifestly unjust that complainant should, by obtaining an assignment from a non-resident executor, demand two thirds of the statutory fees allowed for administration. There is no rule of law or equity which declares that co-executors, without regard to the time spent, responsibility assumed, or service rendered, are entitled to an equal *pro rata* share of the statutory fees. Neither Mrs. Speirs nor Mr. Kleinhans have made or filed a report of their doings as ex-

ecutors in the probate court, and never joined their co-executor in so doing.

Considering all the facts, and weighing all the equities, we do not think that the complainant is equitably entitled to two thirds of the statutory fees awarded and allowed by the probate court to the defendant, and her bill of complaint should be dismissed, with costs.

EXECUTORS AND ADMINISTRATORS — ACCOUNTING BETWEEN — JURISDICTION OF EQUITY. — A court of equity in the settlement of an estate will decide what are the proper commissions as executors: *Newly v. Skinner*, 1 Dev. & B. Eq. 488.

EXECUTORS AND ADMINISTRATORS. — As to how a court of equity will make a division of the compensation between executors when the labors performed have been different, see *Crawwell on Executors and Administrators*, sec. 546.

MONTGOMERY v. MUSKEGON BOOMING COMPANY.

[88 MICHIGAN, 633.]

NEGLECTANCE WILL NOT IN ANY CASE BE PRESUMED FROM THE MERE FACT OF A FIRE, when the testimony as to the cause of the fire is speculative or conjectural, and there is nothing tending to show negligence in not providing proper means for the prevention of fires or in the management of apparatus.

NEGLECTANCE IS THE WANT OF ORDINARY CARE. — Negligence in the conduct of a tug is the failure to use the care ordinarily used by careful men, and cannot be imputed from the failure to do what is practically impossible.

NEGLECTANCE IN CAUSING FIRE BY ONE USING STEAM CANNOT BE ESTABLISHED when he uses carefully those appliances which science and ingenuity have invented to reduce the probabilities of fire.

PLEADING. — AN ALLEGATION THAT THE DEFENDANT WILLFULLY LEFT A SPARK-ARRESTER open, and allowed sparks to escape and set fire to the plaintiff's property, implies that the act charged was done maliciously.

NEGLECTANCE CANNOT BE PREDICATED OF THE LAWFUL AND CUSTOMARY USE of owner's premises.

NEGLECTANCE — LIABILITY OF OWNERS OF STEAM-CRAFT FOR FIRE. — It is only when want of ordinary care is shown in the selection, care, and operation of appliances, or in the management of fires on such craft, or where the absence of proper appliances or neglect in their management, or in the management of fires, can be inferred from peculiar circumstances, that those owning and operating such craft can be held liable.

L. N. Keating, Smith, Nims, Hoyt, and Erwin, and E. F. Uhl,
for the appellant.

Bunker and Carpenter, for the respondents.

MCGRATH, J. A fire occurred on plaintiffs' lumber docks, which consumed certain tramways and docks, and a large quantity of lumber. This suit is brought to recover the value of the property destroyed, upon the theory that the fire was occasioned by a spark from one of defendant's tugs, by reason of defendant's negligence. Under the testimony, the court should have directed a verdict for defendant.

The declaration contained eight counts, alleging negligence as follows:—

1. That defendant "failed to supply the tug with a spark-arrester on its smoke-stack, or with any other appliance or device sufficient to prevent the escape of sparks, burning cinders, and brands from its smoke-stack, and without using any adequate means to prevent the escape of sparks and burning cinders and brands as aforesaid."

2. That the tug was "provided with a spark-arrester in its smoke-stack, so constructed that it could be opened or closed, as might be desired, increasing the draught when open, but at the same time allowing the sparks and burning cinders and brands to escape from the smoke-stack; and on, to wit, the nineteenth day of July, 1888, while said defendant was using said tug in the operation of its business, at and near the plaintiffs' docks and tramways, it willfully, carelessly, and negligently left said spark-arrester open a long time, to wit, for thirty minutes.

3. That the spark-arrester was not sufficient to prevent the escape of sparks, and by reason of the defective condition of said spark-arrester.

4. That defendant used slabs made of pine, hemlock, and other woods, which, while burning, formed and threw off sparks, without taking any precautions to prevent the escape of sparks.

5. That "while the said tug was lying at and near the said docks and tramways of the plaintiffs, the said defendant willfully, carelessly, and negligently opened the furnace door of said tug, and left the same open for a long time, to wit, for the space of five minutes, at a time when the wind was blowing violently in a direction from said tug towards said docks, tramways, bottoms, and lumber of the plaintiffs, and thereby wrongfully, carelessly, and negligently largely increased the draught through the furnace and smoke-stack of the said tug, and caused a large number of sparks and burning cinders and brands to be thrown from said smoke-stack, and the same

were blown and carried by the wind upon and against docks, tramways, bottoms, and lumber, and set fire to and ignited the same."

6. That while said tug was lying at plaintiffs' docks, the defendant "willfully, carelessly, negligently, and wrongfully turned its exhaust steam into and through its smoke-stack, thereby largely increasing the draught through said smoke-stack, and causing the same to emit and pour forth a large number of sparks and burning cinders and brands at a time when the wind was blowing violently in a direction from said tug towards said docks, tramways, bottoms, and lumber; and by reason thereof, said sparks and burning cinders and brands were blown upon and against said docks."

7. That "said tug was so constructed that when in motion, and when the fire was burning in its furnace, a large number of sparks and burning cinders and brands were from time to time emitted from its smoke-stack, and were at times carried by the wind, maintaining their vitality so as to be able to ignite such combustible material as they should come in contact with; yet the defendant, well knowing the character and condition of said tug, and its liability to emit sparks and burning cinders and brands, on, to wit, the nineteenth day of July, 1888, when the wind was blowing violently, did willfully, carelessly, negligently, and wrongfully run said tug up to and near the docks, tramways, bottoms, and lumber of said plaintiffs, and kept it there in such a position that the wind was blowing from said tug in a direction towards said docks, tramways, bottoms, and lumber, and while said tug was so placed kept the fire in its furnace burning."

8. That it "was the duty of the said defendant to use such appliances on its said tugs, and employ such means in operating them, as would not endanger the safety of the mills, docks, and lumber on said Muskegon lake and river, and would not subject them to any needless risk and danger from fire; and it also became and was the duty of the said defendant to take extraordinary precautions in times of high wind in the management of its said tugs, so as not to endanger said mills, docks, tramways, and lumber, or to subject them to any risk of taking fire from said tugs; yet the said defendant, not regarding its said duty, but contriving and intending to injure the said plaintiffs, would not and did not use proper appliances on its tugs, and would not and did not employ such means as would not endanger the safety of the mills, docks,

and lumber on said Muskegon lake and river, and would not subject them to risk and danger from fire, but, on the contrary, . . . failed and neglected to supply its said tugs with proper spark-arresters or other proper or suitable device for preventing the escape of sparks and burning cinders and brands from said tugs, and has failed, neglected, and refused to employ proper means in operating said tugs in this, to wit, that it has continuously, persistently, carelessly, negligently, and wrongfully used and employed on said tugs, as fuel for general steam use therein, pine, hemlock, and other slabs, which are utterly unfit for said purpose, as they make and cause large quantities of light sparks and burning cinders and brands to be thrown off, capable of being carried long distances by the wind before they are extinguished, and seriously endangering the safety of the docks, lumber, and mills on said lake and river; and on, to wit, the nineteenth day of July, 1888, the said defendant, still disregarding its said duty, but contriving and intending to injure the plaintiffs, while a very high wind was blowing, carelessly, negligently, and wrongfully moved one of its said tugs, which it had failed to supply with a spark-arrester or other suitable device for preventing the escape of sparks and burning cinders and brands, in which it was then burning, as fuel, pine, hemlock, and other slabs, up to and against certain other docks, tramways, bottoms, and lumber."

The testimony as to the fire cause was circumstantial. Plaintiff's mill was located about 850 feet southerly from their dock line. There were three other mills in the same locality, — the McGraft mill, situated 1,000 feet northeast from the point where the fire took; the Blodgett mill, located about 875 feet west-southwest; and the Shippey mill, which was about 1,200 feet distant in a southerly direction. Each of these mills had large refuse burners attached, and several fires had been caused by fires from these burners. The wind was blowing fresh from the northwest, and the tug passed the docks about fifteen minutes before the fire was noticed. No sparks were seen coming from the tug, although she was seen to pass by several witnesses. There was no testimony tending to show that the tug had before that time set any fires; on the contrary, it was shown that she had not.

While negligence in providing proper means for the prevention of fires and in the management of the apparatus and fires might be inferred from the size and quantity of sparks or

cinders emitted, when those things are shown, negligence will not in any case be presumed from the mere fact of a fire, when the testimony as to the cause of the fire is purely circumstantial.

The defendant had business with the plaintiffs, and the tug was in the vicinity of plaintiffs' docks in the course of that business. The testimony clearly showed that the smoke-stack of said tug was supplied with a spark-arrester. There was no testimony tending to show that the spark-arrester was defective, or that it was not regarded as sufficient, or that it was not of the kind ordinarily used for that purpose, or that it was not as efficient as any other apparatus, or that it was not operated, or that the furnace door had been opened or left open for any time, or that the construction of the fire apparatus or smoke-stack of said tug was defective, or that defendant was not taking the ordinary precautions to prevent the escape of sparks, or that any other or more efficient apparatus or means to prevent the escape of sparks were in use by others. The proofs showed that defendant used slabs for fuel, but there was no testimony tending to show that the use of slabs for fuel was unusual in that locality.

It is alleged that defendant did not use adequate means to prevent the escape of sparks; but, as already said, it was shown that a spark-arrester was provided and in use. Negligence is the want of ordinary care. Negligence in the conduct of a tug is the failure to use the care ordinarily used by careful men. It is well known that the escape of sparks cannot be absolutely prevented by the use of any appliance yet invented. Defendant cannot be held responsible upon the ground of negligence for not doing what it is practically impossible to do: *Michigan Central R. R. Co. v. Burrows*, 33 Mich. 6; *Batterson v. Chicago etc. R'y Co.*, 49 Mich. 184. Science has as yet been able to reduce the danger in the use of steam as a motive power to the minimum only; and when a party using steam has availed himself of the means used generally for the protection of property, he cannot be held liable because the means are not always effective or adequate. He is only liable when he neglects to use, or carelessly and negligently uses, those appliances which science and ingenuity have invented to reduce the probabilities of fire.

The testimony was speculative and conjectural. The only testimony having the slightest bearing upon the allegation that the furnace door was open or left open was that of the

engineer who subsequently operated the tug, who, speaking with reference to tugs generally, said that if the damper and furnace door were closed, and the exhaust on the outside, no sparks would be thrown out, because there would be no draught. But the declaration does not charge as negligence an open damper, nor does it appear that the tug could be operated without any draught. The same witness was asked, "What was the character of that tug for throwing off sparks?" and replied: "Well, she was like all other small boats with small boilers. If the engine—if you are crowding her, she has got to throw sparks." There was no testimony that she was being crowded at plaintiffs' docks. He was then asked:—

"Q. Did she throw off sparks while you were on her? A. She would throw off sparks, of course, according to the way you fired her,—according to the distance. If you put in a fire to Blodgett and Byrne's, and run as far as Hackley's, or run as far as Hamilton's, and not put in any fire, and you jar against a dock, no matter whether the exhaust is in or out, she will throw fire, providing they don't put in any fresh fire.

"Q. Are sparks apt to be thrown when she stops and starts? A. Well, not when she stops. When she is backing up, if you run up to a dock at a nice little gait,—that is the way they express themselves (tug-men),—a nice little gait,—if you run pretty fast up to a dock, and you stop and back up, whether the exhaust is in or out, it don't make any difference, she will throw sparks just the same.

"Q. What is the effect when the exhaust is in the stack? A. The effect is, she throws it farther, harder, and more fire.

"Q. What kind of sparks will she throw when the exhaust is in? A. When the exhaust is in? According to the fire. If you have got a green fire, she won't throw as many sparks as if you run your fire off five minutes. She will throw more sparks when you run your fire five minutes than a green fire. A green fire is a fire of fresh slabs or any kind of wood."

On cross-examination, the witness was asked:—

"Q. You said something about this particular boat throwing sparks in case she run up and hit a dock? A. Nothing about a particular boat. I said any boat.

"Q. They are all alike in that respect? A. Well, they are all alike, of those burning wood."

There was no testimony tending to show that the tug touched or jarred the dock; none that any fuel had or had

not been put in; none that she was run up to the dock at a nice little gait, or pretty fast; and none that the exhaust was in the stack. The testimony was, that she ran up slowly to within eight or ten feet of the dock, and one of the men on board handed an oar to an employee who was engaged in booming logs at that point. There was the testimony of one witness that she backed a little, to get out, after the oar was delivered; but none that it was carelessly or unnecessarily done, or with the spark-arrester open. One witness, who had been a fireman on the tug, was asked if he ever knew the tug to throw sparks, and he answered, "Yes." He was then asked if she was "in the habit of throwing sparks," and answered, "Yes"; but no time, place, or conditions were asked for or given. It was not shown whether the arrester was in use at the time, or at what rate of speed she was going, or where she was at the time or times.

The use of the word "willfully," in the second, fifth, sixth, and seventh counts, involves design and purpose. The allegation that defendant willfully left the spark-arrester open, and thereby allowed sparks to escape and be carried by the wind upon plaintiffs' docks, and set fire to them, implies that the act was done with a set purpose to accomplish the results which followed the act. It involves more than negligence; it implies malice. The word has no office in the count unless given its ordinary acceptation. There could be no recovery under the evidence upon these counts.

It was held in *Alpern v. Churchill*, 58 Mich. 607, that "negligence implies fault, and cannot be predicated of a lawful and customary use of one's own premises."

Neither can it be predicated of a lawful and customary use of a water-way. As was said in *Michigan Central R. R. Co. v. Coleman*, 28 Mich. 440: "The degree of care required in any business must be proportionate to its nature and risks; but the law does not require business to be conducted upon any unusual basis, though the business be one of great risks, and requiring great caution. All rules applied must be reasonable, and not oppressive, and must be applied with reference to the ordinary conduct of affairs."

It is a matter of common knowledge that draught is essential to the operation of a steam-craft; that so far, it has been found practically impossible to arrest all sparks, and at the same time preserve the necessary draught; that sparks will escape, and fires will occasionally occur; and it is only when

the want of ordinary care is shown in the selection, care, and operation of appliances or in the management of fires on such craft, or where the absence of proper appliances or neglect in their management, or in the management of the fires, can be inferred from peculiar circumstances, that those owning and operating such craft can be made liable.

The defendant is entitled to a verdict upon this record, and the judgment is therefore reversed, and a new trial ordered, with costs of both courts to defendant.

NEGLECT — WHAT IS. — Negligence in a legal sense is the failure to observe for the protection of another person that degree of care which the circumstances demand, whereby such person is injured: *Barrett v. Southern Pacific Co.*, 91 Cal. 296; 25 Am. St. Rep. 186. Negligence is the breach or non-performance of some duty which the party charged with negligently omitted to perform, thereby causing damage: *Roddy v. Missouri Pacific R'y Co.*, 104 Mo. 234; 24 Am. St. Rep. 333, and note. Negligence is the absence of such care as the circumstances require: *Ellis v. Lake Shore etc. R'y Co.*, 138 Pa. St. 506; *Hoffman v. Dickinson*, 31 W. Va. 142.

NEGLECT — NO PRESUMPTION OF, WHEN PREMISES USED IN LAWFUL MANNER. — A person who conducts a lawful business on his premises is under no obligation to save others harmless from accidents happening thereon: *Cosulich v. Standard Oil Co.*, 122 N. Y. 118; 19 Am. St. Rep. 475, and note; *Hart v. Grennell*, 122 N. Y. 371; *Huey v. Gahlenbeck*, 121 Pa. St. 238; 6 Am. St. Rep. 790, and extended note discussing the subject as to when negligence will be presumed.

NEGLECT — WHETHER PRESUMED FROM FACT OF FIRE. — Negligence is not presumed from the fact that goods were destroyed by fire while in a warehouse: *Lancaster Mills v. Merchants' etc. Co.*, 89 Tenn. 1; 24 Am. St. Rep. 586. From the mere fact that a fire was caused by sparks from an engine, there is no presumption of negligence. It must be shown that the company did not use proper appliances to prevent the fire: *Louisville etc. R. R. Co. v. Reese*, 85 Ala. 497; 7 Am. St. Rep. 66, and note. *Contra*, see *Bass v. Chicago etc. R. R. Co.*, 28 Ill. 9; 81 Am. Dec. 254, and note.

NEGLECT — LIABILITY OF OWNERS OF STEAM-ENGINES FOR FIRES. — In order to recover for loss by fire caused by sparks from an engine, where it is shown that such engine was provided with the best appliances for spark-arresting, the proof must be strong and convincing, to establish negligence: *Myer v. Vicksburg etc. R. R. Co.*, 41 La. Ann. 639; 17 Am. St. Rep. 408, and note. The emission of sparks from an engine is not of itself illegal, and in the absence of proof of negligence, is *damnum absque injuria*: *Frankford etc. Turnpike Co. v. Philadelphia etc. R. R. Co.*, 54 Pa. St. 345; 93 Am. Dec. 708, and note. See extended notes to *Flynn v. San Francisco etc. R. R. Co.*, 6 Am. Rep. 597, and *Burroughs v. Housatonic R. R. Co.*, 38 Am. Dec. 71. The owner of a saw-mill is liable for setting fire to a house from sparks escaping from the smoke-stack of his mill, even though it had an arrester, if the latter did not properly stop the sparks: *John Mount L. Co. v. Wilmore*, 15 Col. 126.

SCHUFFERT v. GROTE.

[38 MICHIGAN, 650.]

DEED, DELIVERY OF. — Evidence showing that a conveyance of land was signed, acknowledged, witnessed, and handed to the grantee, who was a son of the grantor, to whom the deed was immediately returned; that the father said he calculated to deed the property to the son, so that there would be no trouble after his death, but that he would not like to see it go on record in his lifetime; and the son replied he need not be afraid of its going on record, and that he (the father) could keep it himself, — does not show a delivery of the deed; and if the grantor subsequently destroyed it, and conveyed the same property to another person in consideration of services performed and to be performed, the latter acquired the title.

E. S. Clarkson and John B. Whelan, for the complainant.

James H. Pound, for the defendant.

GRANT, J. The bill in this case is filed to set aside a deed of the land in controversy, executed by complainant's father to defendant, and to confirm the title in said land to himself.

His claim is, that his father executed a deed to him May 1, 1888; that he gave it back to his father at the same time, telling him to keep it, as he did not desire to take actual possession of the property until after his father's death; that his father, on August 21, 1889, executed a deed of this same land to the defendant; that defendant knew of the former deed to complainant, and therefore cannot be considered a *bona fide* purchaser.

Defendant answers this claim by admitting that such a deed was drawn up to complainant, intended only as a testamentary disposition, subject to revocation, and not to take effect until after the father's death; that it was revoked and destroyed by his father, — was never delivered; that she purchased without notice, and for a valuable consideration.

The case was tried in open court, and a decree rendered dismissing the bill.

All the testimony of the complainant as to the execution of the deed and as to what took place between him and his father is excluded by the statute, because the facts testified to were equally in the knowledge of the deceased. The only competent evidence of the execution of the deed is that of those who were present, aside from complainant. These were two who signed it as witnesses, and one of whom drew it. They testified that the deed was signed, acknowledged, witnessed, handed to com-

plainant, and by him immediately handed back to his father. One of these did not know what was said at the time. The other testified that the father said that he "calculated to deed that property to Charles; that his son Gus had had his share, so that there would be no trouble after he was dead; that the father said he would not like to see the deed go on record until after he was dead; and that Charles said that he need not be afraid the deed should go on record, and that he could keep it himself."

This is all the evidence showing a delivery of the deed.

The land consisted of three lots. There were two houses upon them, in one of which the father lived, the other of which he rented, and collected the rents.

The object of a delivery is to indicate an intent on the part of the grantor to give effect to the instrument. It was clearly not the intention of the grantor in this case to convey to his son either possession or title until his death: *Thatcher v. St. Andrew's Church*, 37 Mich. 264; *Burnett v. Burnett*, 40 Mich. 364. The fact that the grantor retained this deed, as well as the possession of the property, that he subsequently destroyed the deed and executed two others, — one to the defendant for one lot, and the other to the complainant for the other two, — and that he would not consent to the recording of the deed, is convincing proof that the deed was not delivered, and conveyed no title to complainant.

The defendant was a foster-grandchild of Mr. Schuffert, the father. At his request, after the death of his wife, defendant left an employment where she was earning fair wages, and came to his house to take care of him. This she did faithfully for three years and a half, and until his death. After two years of such service, Mr. Schuffert, in consideration of such services already rendered, and to be rendered in the future, executed to her the deed in controversy. The consideration was ample, and the deed valid.

The decree is affirmed, with costs.

DEEDS—DELIVERY. — It is essential to the delivery of a deed that the grantor surrender all power and control over it for the benefit of the grantee at the time of the delivery: *Porter v. Woodhouse*, 59 Conn. 568; 21 Am. St. Rep. 131, and note. Where there is no retention of a deed by the grantee, no possession or control over it, it is not delivered, and the title of the grantor is not thereby divested: *Weber v. Christen*, 121 Ill. 91; 2 Am. St. Rep. 68, and

note. A deed not to be delivered or recorded during the life of the grantor is void: *Stone v. French*, 37 Kan. 145; 1 Am. St. Rep. 237, and note. Where a father executed a deed to two children, but retained it in his possession until his death, it was held insufficient to pass title: *Fair v. Smith*, 14 Or. 82; 58 Am. Rep. 281, and extended note; *Byars v. Spencer*, 101 Ill. 429; 40 Am. Rep. 212, and note. To constitute a valid delivery of a deed, the grantor must part with all control of it: *Bovee v. Hinde*, 135 Ill. 187. A deed not to be delivered until the death of the grantor is void: *Weisinger v. Cock*, 67 Miss. 511.

CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

GALLIGHER *v.* SMILEY.

[28 NEBRASKA, 120.]

HOMESTEAD LAW IN FORCE WHEN CONTRACT IS MADE IS THE LAW APPLICABLE THERETO. — The homestead statute in force at the time when an indebtedness was incurred remains the law of the contract.

HOMESTEAD RIGHT, ONCE VESTED, CANNOT BE DIMINISHED BY LEGISLATURE. — Where a homestead right has become vested under a law exempting the homestead from sale upon attachment or execution so long as it is owned and occupied by the debtor as a homestead, such right cannot be diminished by a subsequently enacted law without the debtor's consent. And while a judgment may be a lien upon it which may become operative upon sale or abandonment, yet the homestead character cannot be molested for the purpose of enforcing its payment. By the existence of the homestead right, the power of the judgment creditor to appropriate the property to the payment of his judgment is held in abeyance during the continuance of the right.

HOMESTEAD, WHAT CONSTITUTES. — A homestead is a parcel of land on which the family reside, and which is to them a home, and is constituted by the two acts of selection and residence in compliance with the terms of the law conferring it.

HOMESTEAD RIGHT NOT DIMINISHED BY EXTENSION OF CITY LIMITS WHEN. — Where the owner of a tract of land near a city has acquired a homestead right therein under the law in force at the time he acquired it, such right cannot be diminished by the subsequent enactment, without his consent or procurement, of a law by which the land is included within the corporate limits of the city.

THE opinion states the case.

Gregory, Day, and Day, for the plaintiff in error.

Savage, Morris, and Davis, contra.

REESE, C. J. This was a proceeding in aid of execution.

Plaintiff in error filed her petition in the district court, in

which she alleged, in substance, that she was the owner of certain judgments which had been rendered by the district court of Douglas County against defendants in error, to wit, one in favor of the Omaha National Bank, for \$1,225.52, rendered at the October term, 1874; one in favor of John McCormick & Co., for \$429.94; and one for \$207.35, in favor of Joseph Sheeley and others, rendered at the March term, 1872; that said judgments had been revived and were in full force as liens against the lands of defendant; that upon the eighteenth day of July, 1887, execution was issued and levied upon the west half of the southeast quarter of section 8, township 15, range 13 east, in the said county, and which land was claimed as a homestead by defendant, but it was alleged that said premises consisted of more than seventy acres of land after deducting the portion thereof which had from time to time been appropriated by the several railroads crossing over it as right of way; that it was all under improvements, with dwellings and other houses and buildings located thereon; that it was within the corporate limits of the city of Omaha, and of more than two hundred thousand dollars value, and exceeded in quantity by at least fifty acres what defendant had a right to hold as a homestead, by virtue of any law at any time enacted under which said homestead could have been acquired.

The prayer of the petition was for an order setting off to defendant his homestead of not to exceed twenty acres in quantity, that the same be admeasured as the law directs, and the remainder declared subject to sale for the satisfaction of the judgments.

Defendant in error answered, admitting the rendition of the judgments, but alleging that the lands described in the petition had been owned by him for thirty years, and that it had been occupied by him as a dwelling and homestead for himself and family during that time, — he being the head of a family; that it did not exceed seventy acres, and until about the first day of May, 1887, was not included in any incorporated city, town, or village, when it was included within the corporate limits of the city of Omaha without his consent; that at the time the indebtedness was incurred and the judgment rendered, — which was subsequent to the passage of the act approved June 22, 1867, relating to homesteads, — the land was exempt from execution by reason of its homestead character. It was also alleged that the question presented had been adjudicated in the district and supreme courts of the

state in the case of *McHugh v. Smiley*, 17 Neb. 620. The latter allegation was denied by the reply.

A trial was had to the court, which resulted in the following findings:—

"This cause having been heard and submitted upon the issue joined and the proofs and arguments of counsel, the court finds the facts of the case to be as follows:—

"1. Each of the judgments mentioned in plaintiff's petition were duly rendered as herein alleged against the defendant; that said judgments have been revived, and are now in full force against the defendant.

"2. That said judgments have been duly assigned of record to the plaintiff.

"3. That executions were duly issued and levied upon the west half of the southeast quarter of section 8, township 15, range 18 east, of the 6th P. M., substantially as alleged in plaintiff's petition; that said tract of land embraced at least seventy acres.

"4. That said land has been owned by the defendant about thirty years, and during all of said time the defendant has lived, and now lives, thereon with his family as a dwelling-place and homestead; that during all of said time defendant has been, and now is, the head of a family, and a resident and citizen of the territory and state of Nebraska.

"5. That until about the first day of May, 1887, said land was not included within the limits of any incorporated town, city, or village; that about the first day of May, 1887, the incorporated limits of the city of Omaha were by its city council extended, under the act relating to metropolitan cities, approved March 30, 1887, and such extended limits embraced the land of defendant, and was so included within the limits of said city at the time of the levy of the execution in the petition mentioned; that said extension was made without the consent of the defendant; that said land is of the value of the sum of two hundred thousand dollars.

"6. That the indebtedness for which said judgments were rendered was contracted subsequent to the passage of the act approved June 22, 1867, relating to homesteads.

"The court finds, as conclusions of law:—

"1. That at the time said indebtedness was contracted, and at the time said judgments were rendered, the said land was exempt from sale on execution on said judgments, by reason of the defendant's homestead rights in said land.

"2. That at the time said indebtedness was contracted and said judgments were rendered there was no law by which said land could be brought within the limits of any incorporated town, city, or village, without the consent of the defendant.

"3. That the homestead rights of the defendant, so far as concerns the judgments in question, are to be governed by the law in force at the time the indebtedness was contracted.

"4. That the passage of the act approved March 30, 1887, and the extension of the city limits thereunder, did not affect the homestead exemption of the defendant so far as concerns these judgments, nor subject said land to sale under said judgment executions, so long as the defendant continues in the occupancy of said land as a homestead.

"Wherefore the court doth order that the petition of the plaintiff be dismissed."

A motion for a new trial was filed, alleging, in substance, that the court erred in its conclusions of law. The motion was overruled. The case is brought to this court by proceedings in error.

The debts were contracted, and the homestead interest of defendant was acquired, under the homestead law of 1867, which was as follows: "A homestead consisting of any quantity of land not exceeding 160 acres, and the dwelling-house thereon and its appurtenances, to be selected by the owner thereof, and not included in any incorporated city or village, or, instead thereof, at the option of the owner, a quantity of contiguous land not exceeding two lots, being within an incorporated town, city, or village, and according to the recorded plat of such incorporated town, city, or village, or in lieu of the above, a lot or parcel of contiguous land not exceeding twenty acres, being within the limits of an incorporated town, city, or village, the said parcel or lot of land not being laid off into streets, blocks, and lots, owned and occupied by any resident of the state, being the head of a family, shall not be subject to attachment, levy, or sale upon execution or other process, issuing out of any court in the state, so long as the same shall be owned and occupied by the debtor as such homestead. This section shall be deemed and construed to exempt such homestead, in the manner aforesaid, as well after as before the death of the debtor, and in the event of the death of the debtor, the estate in such homestead shall descend to and be vested in his heirs at law or legatees, free and divested from all claims of any creditors thereto."

It is contended by the plaintiff that the bringing of the land in question within the corporate limits of the city of Omaha operated to diminish the area of the homestead to the limits prescribed by the law, — twenty acres.

As appears by the section above quoted (the law in force at the time the indebtedness was incurred), the whole of the tract of land involved was exempt from forced sale on execution or other process. This remained the law of the contract (*Dorrington v. Myers*, 11 Neb. 889), and by the occupation of the property, "he became vested, so to speak, of a homestead estate therein, which was alienable only by sale or abandonment": *Dorrington v. Myers*, 11 Neb. 391.

The homestead right, while perhaps not a new estate lying in grant, or transferable by conveyance under the law as it existed at the time of its inception, in this case partook of an interest or right in the home, indeterminate in its duration, which might continue during the lives of defendant and his wife, and perhaps the minority of their children. While the right itself could not be bought or sold, yet it was so far vested in defendant as to be beyond the reach of the legislature by a repeal of the law creating it: *Smyth on Homesteads*, secs. 69, 70. In its inception, a homestead is a parcel of land on which the family resides, and which is to them a home. It is constituted by the two acts of selection and residence, in compliance with the terms of the law conferring it. When these things exist *bona fide*, the essential elements of the homestead right exist, of which the persons entitled to it cannot be divested by acts or influences beyond their volition.

At the time this homestead right was acquired, by a compliance with the provisions of the law, the whole of the tract now in dispute was exempt from sale so long as its occupancy continued. While the judgments were liens, for the payment of which (if not allowed to become dormant) the property was pledged, yet the homestead character could not be molested for the purpose of enforcing their payment. By the existence of the homestead right, the power of the judgment creditors to appropriate the property to the payment of their judgments was held in abeyance during the continuance of the right. The right could not be diminished by law without the consent of defendants: *McHugh v. Smiley*, 17 Neb. 620; *McHugh v. Smiley*, 17 Neb. 628; *De Witt v. Wheeler and Wilson S. M. Co.*, 17 Neb. 538. For twenty years perhaps, and during the whole time of the existence of the indebtedness, the right

could not be questioned. The land was included within the corporate limits of the city by law, and without the consent or procurement of defendant. His rights could not be diminished thereby: *Bassett v. Messner*, 30 Tex. 604; *Nolan v. Reed*, 38 Tex. 425; *Barber v. Rorabeck*, 36 Mich. 399; *Ham v. Santa Rosa Bank*, 62 Cal. 125; 45 Am. Rep. 654.

It is not believed that the fact, that, in some of the states referred to, constitutional provisions direct the legislature to provide suitable homestead laws, can enter into this discussion so as to be of any practical utility. The right must depend upon statutory enactments creating it, and to these enactments the courts must look. The constitutional provisions are directory for the guidance of the legislature.

While it is true that in view of the great value of the property now in dispute, the application of sound moral and business principles, by defendant, would require the payment of the debts against it, yet if he prefers to hold the property and allow the judgments to remain and accumulate interest and finally sweep the whole from his heirs or legatees, we know of no legal objection to his pursuing that course.

The judgment of the district court is affirmed.

HOMESTEAD — WHAT CONSTITUTES. — A homestead is the permanent place of residence of a party claiming the benefit of the homestead act, and includes the land about and contiguous to the dwelling: *Tumlinson v. Swinney*, 22 Ark. 400; 76 Am. Dec. 432, and note; *Gregg v. Bostwick*, 33 Cal. 220; 91 Am. Dec. 637, and note; *Phelps v. Rooney*, 9 Wis. 70; 76 Am. Dec. 244, and extended note.

HOMESTEAD — RIGHTS VESTED UNDER, CANNOT BE TAKEN AWAY. — A homestead, once duly dedicated, cannot be diminished or defeated, except in the manner prescribed by the statute creating it: *Lubbock v. McManis*, 82 Cal. 226; 16 Am. St. Rep. 103. A homestead right, once established, cannot be alienated except by deed of some kind: *Riggs v. Sterling*, 60 Mich. 643; 1 Am. St. Rep. 554, and note. A change in the homestead laws does not repeal the provision for a homestead to the widow as against the husband's heirs or creditors: *Batchelder v. Fottler*, 62 N. H. 445. An assignment of homestead as against a debt contracted prior to the constitution of 1868 is null and void: *Hosford v. Wynn*, 26 S. C. 130.

HOMESTEAD — EXTENDING TOWN LIMITS AS AFFECTING. — Extending the corporate limits of a town over a homestead will not affect its character as a homestead: *Taylor v. Boulovere*, 17 Tex. 74; 67 Am. Dec. 642, and note.

PULLMAN PALACE CAR COMPANY v. LOWE.

[28 NEBRASKA, 289.]

SLEEPING-CAR COMPANY'S LIABILITY FOR PASSENGER'S APPAREL STOLEN FROM ITS CAR. — A sleeping-car company, so far as it renders service as an innkeeper, is subject to like liabilities and obligations, and is liable for a necessary article of wearing apparel belonging to a passenger in its car, which was placed in the care of its employees, and was stolen from the car, without any negligence on the part of the passenger.

"GUEST" AND "LODGER" DEFINED. — Any one away from home, receiving accommodations at an inn as a traveler, is a guest, and entitled to hold the innkeeper responsible as such. Generally, a lodger is one who, for the time being, has his home at his lodging-place.

THE opinion states the case.

Howard B. Smith, for the plaintiff in error.

A. Steere, Jr., *contra*.

MAXWELL, J. This action was brought by the defendant in error against the plaintiff in error, to recover the value of an overcoat, which, it is alleged, was lost or stolen from a Pullman car, in which the defendant in error was a passenger, on the Wabash railway, from St. Louis to Council Bluffs. The court was requested to make special findings in the case, which it did, as follows: —

"I find, as the facts proven on the trial of this case, that on the eighteenth day of April, 1887, the plaintiff took passage at St. Louis for Council Bluffs, on the Wabash and St. Louis railroad, and purchased a sleeping-car ticket from the defendant's agency at St. Louis, entitling him to a lower berth in a sleeping-car attached to the train which left St. Louis the evening of that day; that the train left St. Louis at 8:25, P. M.; that a short time before the train left, plaintiff entered the sleeping-car, and, upon doing so, delivered his coat to the porter of the car, who took it and placed it in the vacant upper berth of the section of which plaintiff had secured the lower berth; that shortly after the train started, the sleeping-car conductor passed through the car and took up the ticket which had been purchased by the plaintiff, and gave him in exchange therefor another ticket, known as a 'berth ticket,' which was in turn taken up by the porter soon afterwards, when he prepared the sleeping-berth for occupation by the plaintiff; that the next morning when the plaintiff arose, he took out from the upper berth a portion of his

clothing, and then saw his overcoat there where it had been placed the evening before by the porter, and where he, the plaintiff, left it; that plaintiff was last to leave his berth, and, with the exception of a gentleman and lady, the last of the passengers to leave the car for breakfast that morning; that plaintiff went out to breakfast at the regular breakfast station, which occupied him about fifteen minutes, and that after breakfast he stood on the rear platform of the sleeper about ten minutes, smoking a cigar, and then went to his berth in the car, the same having been made up, and then discovered that his overcoat was missing; that he immediately called the attention of the conductor of the sleeping-car to the fact, who, after first disclaiming any responsibility for the care of the coat, after a time caused a search to be made through the car, in company with the porter, for it, but without finding it, and the coat has been entirely lost to the plaintiff, and was of the value at the time of the loss of fifty dollars. I also find that the conductor left the car at the breakfast station, and went to his breakfast at the same time as the passengers, including the plaintiff, were at their breakfast, and that during the interval of about twenty-five minutes' absence of the plaintiff from his berth in sleeping-car, between the time when he left the car for breakfast and the time when he returned into it, his berth was made up, and his overcoat abstracted.

"CONCLUSION OF LAW.

"I find, as a conclusion of law, that defendant was guilty of negligence in not properly guarding and taking care of property of plaintiff during his necessary absence from defendant's car, and that plaintiff was not guilty of negligence in the matter.

"I therefore find that defendant is liable to the plaintiff for the value of the overcoat, to wit, \$50, with interest thereon from April 20, 1887, to the first day of this term, \$3.75."

The rules of the company were also introduced in evidence in its behalf, but as the defendant in error had no notice of them, they do not enter into the case. The question presented, therefore, is the liability of a sleeping-car company for the loss of necessary wearing apparel of one who had paid the necessary sleeping-car charges, and was lawfully riding in one of its cars, which apparel had been placed in the care of the employees of the company. We find no case exactly in

point; and as the question is a new one, not only in this state, but to a great extent in the other states of the nation, we are practically without precedents to aid us, and must adopt such rule as may seem just and equitable. It may be well to consider what the company undertakes to perform, and also what it does not undertake. The latter proposition will be considered first. It does not undertake to furnish the railway for its cars to run upon, nor the motive power to propel them, and hence is not entitled to compensation for the ordinary carriage of passengers. It does invite, for hire, all passengers holding first-class tickets to occupy its cars. In effect, it says to all such passengers, We will furnish you safe, pleasant, commodious cars, with all possible facilities to prevent weariness and fatigue, with comfortable sleeping accommodations and the necessary toilet facilities, if you pay the price demanded in addition to the ordinary fare.

The nature of this undertaking is the question for consideration. On the one hand, it is claimed that so far as the company holds itself out as performing the duties of an innkeeper, so far it should be charged with the strict liability of the same. On the other, it is sought to make the liability of the company merely that of a lodging-house keeper. In the very able and carefully prepared briefs of the attorney for the plaintiff in error we find the following objections to charging the company with the liability of an innkeeper. He says: "It undertakes,—1. To furnish accommodations to 'first-class' passengers exclusively; 2. To furnish toilet accommodations to such passengers; 3. To furnish a certain specified seat or bed to such a passenger; 4. To furnish a servant who will respond to all proper demands on his service by such passengers promptly and politely." But to do these four things for a limited time, which is agreed upon between it and each passenger in advance.

It does not make even this agreement with all those who travel by rail. It makes this agreement with first-class passengers exclusively.

The distinction between an innkeeper and a lodging-house keeper is set forth in many cases, but is very well drawn in the case of *Cromwell v. Stevens*, 2 Daly, 15, from pages 21 to 26, inclusive.

After quoting the definition of an inn as given by Chief Justice Oakley in *Wintermute v. Clark*, 5 Sand. 247, to wit: "Where all who come are received as guests, without any pre-

vious agreement as to the duration of their stay or as to the terms of their entertainment"; and from *Willard v. Reinhardt*, 2 E. D. Smith, 148, in which the distinction between a boarding-house and an inn was declared to be this: "In a boarding-house the guest is under an express contract at a certain rate for a certain period of time, but in an inn there is no express engagement, the guest being on his way, is entertained from day to day according to his business, upon an implied contract"; and from *Carpenter v. Taylor*, 1 Hilt. 195, as follows: "Mere eating-houses cannot be considered as inns. They are wanting in some of the requisites necessary to constitute them inns."

It will be seen that a distinction is attempted to be drawn between the sleeping-car company and an innkeeper, because only a certain class can occupy such cars, viz., persons holding first-class tickets, whereas at an inn all who conduct themselves properly may be entertained. There is great confusion in the decisions as to what constitutes an inn. In *Calye's Case*, 8 Coke, 32, it was held that inns were instituted for passengers and wayfaring men. In another case, an inn is defined to be a house where the traveler is furnished all he has occasion for while on the way: *Thompson v. Lacy*, 3 Barn. & Ald. 283. Bouvier defines innkeeper to be "the keeper of a common inn for the lodgment and entertainment of travelers and passengers, their horses and attendants, for a reasonable compensation." The innkeeper is bound to take in and receive all travelers and wayfaring persons and entertain them if he can accommodate them, and the same is true of a sleeping-car company as to all passengers holding a first-class ticket. The fact that persons holding second or third class tickets agree, in effect, in consideration of lower fare, to waive their right to enter a sleeping-car does not enter into the case any more than that of a traveler who, to avoid the expense of an inn, should stop at a private house. In any event, the company which sells sleeping-car tickets to all first-class passengers that may pay the price, to that extent stands in the same relation as an innkeeper, who must for hire entertain those asking for entertainment.

"A more difficult question is to properly define the word "guest" at a hotel. Parsons defines a "guest" to be one who comes "without any bargain for time, remains without one, and may go when he pleases": 2 Parsons on Contracts, 151. This is not sufficiently comprehensive to be a proper definition.

In *Walling v. Potter*, 35 Conn. 183, the supreme court of Connecticut defines the word "guest" as follows: "A 'guest' is one who patronizes an inn as such. But it is said that none but a traveler can be a guest at an inn in a legal sense." We do not suppose that the court intended in the definition above quoted to lay stress upon the word "traveler."

It is used in a broad sense, to designate those who patronize inns. In *Wintermute v. Clark*, 5 Sand. 247, the court say, that in order to charge a party as an innkeeper, it is not necessary to prove that it was only for the reception of travelers that his house was kept open, it being sufficient to prove that all who came were received as guests, without any previous agreement as to the time or terms of their stay. A public house of entertainment for all who choose to visit it is the true definition of an inn. These definitions are really in harmony with each other. Webster defines a traveler as "one who travels in any way." Distance is not material. A townsman or neighbor may be a traveler, and therefore a guest at an inn, as well as he who comes from a distance, or from a foreign country. If he resides at the inn, his relation to the innkeeper is that of a boarder; but if he resides away from it, whether far or near, and comes to it for entertainment as a traveler, and receives it as such, paying the customary rates, we know no reason why he should not be subjected to all the duties of a guest, and entitled to all the rights and privileges of one.

In short, any one away from home, receiving accommodations at an inn as a traveler, is a guest, and entitled to hold the innkeeper responsible as such.

This, we think, is a correct definition of the word "guest," and we adopt the same: *Berkshire Woollen Co. v. Proctor*, 7 Cush. 417.

In the latter case the guest made an arrangement as to the price to be paid per week, and it was held that this did not take away his character as a traveler and guest. See also *Hall v. Pike*, 100 Mass. 495; *Norcross v. Norcross*, 53 Me. 163; *Pinkerton v. Woodward*, 33 Cal. 557; 91 Am. Dec. 657; *Hancock v. Rand*, 17 Hun, 279.

In *Dumbier v. Day*, 12 Neb. 597, 41 Am. Rep. 772, this court held that an innkeeper was bound to take all possible care for the safety and security of the goods, money, etc., of his guests while in his house. And if the goods or money of a guest be stolen from the inn, through no fault or neglect of

the guest, nor by a companion guest, and there is no evidence to show how it was done, or by whom, the innkeeper is liable for the loss. This, we think, is a correct statement of the law.

A lodger is defined by Bouvier to be "one who inhabits a portion of a house of which another has the general possession and custody."

There is some confusion in the decisions, arising mainly from the want of a clear definition of what constitutes a guest, as distinguished from a mere lodger. Generally, however, a lodger is one who, for the time being, has his home at his lodging-place: *Phillips v. Evans*, 64 Mo. 17. The rule under the decisions is not of universal application, but nearly so: *Phillips v. Henson*, 3 C. P. Div. 26; 30 Moak, 19; *Thompson v. Ward*, L. R. 6 Com. P. 327; *Bradley v. Baylis*, L. R. 8 Q. B. D. 195; *Ness v. Stephenson*, L. R. 9 Q. B. D. 245; *Hickman v. Thomas*, 16 Ala. 666; *Ullman v. State*, 1 Tex. App. 220; 28 Am. Rep. 405.

It will be seen that the engagement of the sleeping-car company, so far as it goes, is exactly the same as the duties assumed by an innkeeper. A passenger on entering a sleeping-car as a guest—because that is what he is in fact—necessarily must take his ordinary wearing apparel with him, and some articles for convenience, comfort, or necessity. The articles, when placed in the care of the company's employees, are *infra hospitium*, and are at the company's risk.

The liability of innkeepers is imposed from considerations of public policy, as a means of protecting travelers against the negligence and dishonest practices of the innkeeper and his servants. Occasionally, no doubt the innkeeper is subjected to losses without any fault on his part. This, however, is one of the burdens pertaining to the business, and the courts have deemed it necessary to enforce this wholesome rigor to insure the security of travelers. Besides, where loss is sustained, neither party being in fault, it must be borne by one of them, and it is no more unjust to place it on the innkeeper than on the guest. The liabilities incident to the business are to be considered in fixing the charges for the service: *Mason v. Thompson*, 9 Pick. 280; 20 Am. Dec. 471.

Except in the matter of furnishing meals, there seems to be no essential difference between the accommodations at an inn and those on a sleeping-car, except that the latter are necessarily on a smaller scale than at an inn.

In both cases the porter meets the traveler at the door and

takes whatever portable articles he may have with him. He waits upon him and the other passengers in the car so long as they remain therein. The traveler is not required to sit in his seat during the day, but may, if he so desire, go forward into the other cars on the train, and at stations may go out on the platform.

A passenger in a sleeping-car need not avail himself of these privileges, but the fact that he may do so, and that many persons actually do avail themselves of the same, is well known to every traveler, and to the company, and is a circumstance in the case.

If it is said that it would be unjust to hold the company to the same liability as an innkeeper, because thieves might engage one or more berths in a car, and at the first opportunity leave the car, carrying what articles they could steal before leaving, the same is true of an innkeeper. Thieves, in the garb of respectable people, may take rooms at an inn, and afterwards steal what they can and escape, yet no one would contend that the innkeeper would not be responsible for the property so stolen, and this whether it is stolen at night or in the daytime; yet in many of the large inns, of this country at least, there are numerous doors for ingress and egress, while in a sleeping-car there are but two. Were meals served on a sleeping-car, no one would contend that it differed from an inn in its accommodations.

In this state meals are furnished on the through-trains, and a passenger need not leave the train from the time of entering it until he reaches the end of the line.

This, however, does not appear to have been the case on the railway in question.

But the fact that meals are taken at designated stations on the line of the road, instead of on the train itself, does not change the character of the service rendered. So far as such services are rendered, they are the same in kind as those furnished by an innkeeper; and the security of travelers, and as a means of protecting them, not only against the negligence, but also against the dishonest practices, of the agents or employees of the sleeping-car company requires that the company, so far as it renders service as an innkeeper, shall be subject to like liabilities and obligations.

The judgment is therefore affirmed.

SLEEPING-CAR COMPANIES, OBLIGATIONS AND LIABILITIES OF. — Although the sleeping-car is of recent introduction, it has assumed a very prominent

and important place in railway travel. It can hardly be said that the obligations and liabilities of sleeping-car companies have been as clearly and definitely determined as the importance of the subject demands. The law controlling the relations of these companies to the public is yet in the stage of development. A recent writer on railway law, speaking of these companies, says: "It is unfortunate that the relations of these companies to the public are not defined by statute. They have assumed an importance and prominence in railway travel which requires that their obligation should be definitely fixed, and not left to the shifting policy which sometimes marks the decisions of courts, or to the doubts which fairly exist as to what their true status is in railway trains"; 3 Wood's Railway Law, 1451. There is, however, rapidly growing in this country a body of case law on this subject, from which it is even now possible to deduce, with tolerable certainty and precision, the principles of law applicable to the relations of these companies to the public. Considering how short is the time since sleeping-cars came into use, it is remarkable how much progress the courts have made in developing a body of legal principles by which to determine the varied and complex questions that may arise in this class of cases. Already on many points the law relating to the duties and obligations of sleeping-car companies is as well settled as upon any other subject; and while there is some wavering on other points, there is, perhaps, as much unanimity in the decisions on this as on almost any other branch of the law.

SLEEPING-CAR COMPANIES NOT COMMON CARRIERS OR INNKEEPERS. — It is now firmly established, with the practically unanimous concurrence of text-writers and courts, that sleeping-car companies are not subject to the liability of common carriers or of innkeepers: *Hutchinson on Carriers*, 2d ed., sec. 617 d; 2 *Rorer on Railroads*, 987; 3 *Wood's Railway Law*, 1450; *Blum v. Southern Pullman Palace Car Co.*, 1 *Flip.* 500; *Pullman Palace Car Co. v. Smith*, 73 *Ill.* 360; 24 *Am. Rep.* 238; *Woodruff etc. Co. v. Diehl*, 84 *Ind.* 474; 43 *Am. Rep.* 102; *Pullman Palace Car Co. v. Gaylord*, 23 *Am. Law Reg.*, N. S., 788; *Williams v. Pullman Palace Car Co.*, 40 *La. Ann.* 87; 8 *Am. St. Rep.* 512; *Lewis v. New York S. C. Co.*, 143 *Mass.* 269; 56 *Am. Rep.* 135; *Illinois Cent. R. R. Co. v. Handy*, 63 *Miss.* 609; 56 *Am. Rep.* 846; *Sealing v. Pullman Palace Car Co.*, 24 *Mo. App.* 29; *Bevis v. Baltimore etc. R. R. Co.*, 26 *Mo. App.* 19; *Palmeter v. Wagner*, 11 *Alb. L. J.* 149; *Welch v. Pullman Palace Car Co.*, 16 *Abb. Pr.*, N. S., 352; *Tracy v. Pullman Palace Car Co.*, 67 *How. Pr.* 154; *Pullman Palace Car Co. v. Gardner*, 3 *Penny.* 78; *Pullman Palace Car Co. v. Pollock*, 69 *Tex.* 120; 5 *Am. St. Rep.* 31; *Pullman Palace Car Co. v. Matthews*, 74 *Tex.* 654; 15 *Am. St. Rep.* 873. In delivering the opinion of the court in *Pullman Palace Car Co. v. Smith*, 73 *Ill.* 360, 24 *Am. Rep.* 258, Sheldon, J., said: "From the authorities already cited, it is manifest that this Pullman palace car falls quite short of filling the character of a common inn, and the Pullman Palace Car Company that of an innkeeper. . . . The peculiar liability of the innkeeper is one of great rigor, and should not be extended beyond its proper limits. We are satisfied that there is no precedent or principle for the imposition of such a liability upon appellant. Appellant is not liable as a carrier. It made no contract to carry. Appellee was being carried by the railroad company." And Cooper, C. J., in delivering the opinion of the court in *Illinois Cent. R. R. Co. v. Handy*, 63 *Miss.* 609, 56 *Am. Rep.* 846, referring to the obligation of a sleeping-car company, said: "This obligation is not such as pertains to common carriers or innkeepers, and such companies do not occupy the relation of insurers against all loss under all circumstances. The accommodation offered implies a certain degree

of privacy for the passenger upon his retirement to rest, an intrusion on which by the servants of the company would be rightfully resented by him. If the company should be held liable to one passenger for a theft committed by another, it must be either upon the ground that it is under the common-law liability of an innkeeper, a view not sanctioned by any court, so far as we are informed, or because, by its contract, it may be fairly said to bind itself to keep watch upon each traveler on its car, which would result in the establishment of a system of intolerable espionage."

It is clear that the decision in the principal case is not in harmony with the authorities above cited. In a note to section 617 d of the second edition of *Hutchinson on Carriers* it is said of it: "This case is clearly opposed to the great weight of authority, and its force is lessened by the fact that the court treated the question as a new one, which it obviously was not."

LIABILITY FOR FAILURE TO EXERCISE REASONABLE CARE. — But while a sleeping-car company is not held to the strict liability of a common carrier or of an innkeeper, it is bound to exercise reasonable care and vigilance to guard the persons and property of its passengers, especially while they are sleeping. It is an obvious fact that a sleeping passenger is exposed to dangers to which he is not exposed when awake, and the sleeping-car company which has invited him to sleep in its car is bound to exercise care in guarding him, commensurate with the danger to which he is exposed. It must therefore keep a vigilant and continuous guard over the aisles in its cars during the night, while its passengers are asleep. 3 *Wood's Railway Law*, 1448; *Blum v. Southern Pullman Palace Car Co.*, 1 *Flip.* 500; *Woodruff etc. Co. v. Diehl*, 84 *Ind.* 474; 43 *Am. Rep.* 102; *Pullman Palace Car Co. v. Gaylord*, 23 *Am. Law Reg.*, N. S., 788; *Lewis v. New York S. O. Co.*, 143 *Mass.* 267; 58 *Am. Rep.* 135; *Scaling v. Pullman Palace Car Co.*, 24 *Mo. App.* 29; *Bevis v. Baltimore etc. R. R. Co.*, 26 *Mo. App.* 19; *Hampton v. Pullman Palace Car Co.*, 42 *Mo. App.* 134; *Palmeter v. Wagner*, 11 *Alb. L. J.* 149; *Carpenter v. New York etc. R. R. Co.*, 124 *N. Y.* 53; 21 *Am. St. Rep.* 644; *Pullman Palace Car Co. v. Gardner*, 3 *Penny.* 78; *Pullman Palace Car Co. v. Pollock*, 69 *Tex.* 120; 5 *Am. St. Rep.* 31; *Pullman Palace Car Co. v. Matheuse*, 74 *Tex.* 654; 15 *Am. St. Rep.* 873. In the case of *Carpenter v. New York etc. R. R. Co.*, 124 *N. Y.* 53, 21 *Am. St. Rep.* 644, *Follett, C. J.*, delivering the opinion of the court, said: "These cars are used by both sexes of all ages, by the experienced and inexperienced, by the honest and dishonest, which is understood by the carriers, and though such companies are not insurers, they must exercise vigilance to protect their sleeping customers from robbery. A traveler who pays for a berth is invited and has the right to sleep, and both parties to the contract know that he is to become powerless to defend his property from thieves, or his person from insult, and the company is bound to use a degree of care commensurate with the danger to which passengers are exposed. Considering the compensation received for such services, and the hazards to which unguarded and sleeping travelers are exposed, the rule of diligence above declared is not too onerous." *Richards, J.*, in delivering the opinion of the court in *Pullman Palace Car Co. v. Gaylord*, 23 *Am. Law Reg.*, N. S., 788, 794, said: "These cars are in themselves an invitation to the traveling public to enter and protect themselves against the weariness of a long journey by dozing and sleeping. The passenger in buying and the company in selling the ticket contemplate that this privilege will be improved. The company accepting compensation under these circumstances impliedly undertakes to keep a reasonable watch over the passenger and his property. The faithful performance of this undertaking is the limit of its duty in this respect. Its

breach must be the foundation of every action seeking to charge the company with the loss of articles the passenger has taken with him upon the car." And Morton, C. J., in delivering the opinion of the court in *Lewis v. New York S. C. Co.*, 143 Mass. 287, 273, said: "A sleeping-car company holds itself out to the world as furnishing safe and comfortable cars, and when it sells a ticket, it impliedly stipulates to do so. It invites passengers to pay for and make use of its cars for sleeping, all parties knowing that, during the greater part of the night, the passenger will be asleep, powerless to protect himself or to guard his property. He cannot, like the guest of an inn, by locking the door, guard against danger. He has no right to take any such steps to protect himself in a sleeping-car, but, by the necessity of the case, is dependent upon the owners and officers of the car to guard him and the property he has with him from danger from thieves or otherwise. The law raises the duty on the part of the car company to afford him this protection. While it is not liable as a common carrier or as an innholder, yet it is its duty to use reasonable care to guard the passengers from theft, and if, through want of such care, the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable for it. Such a rule is required by public policy, and by the true interests of both the passenger and the company; and the decided weight of authority supports it."

LIABILITY FOR NEGLIGENCE. — It is well settled that a railway company which accepts and adopts a sleeping-car belonging to a sleeping-car company as a part of its train is liable for the safe carriage of passengers traveling in such car, and if a passenger is injured by reason of the defective condition of the car, he may have his remedy against the railway company as well as against the sleeping-car company. And in the performance of the duties of the railway company under its contract, the servants of the sleeping-car company are to be regarded as the servants of the railway company, for whose acts it is responsible: 3 Wood's Railway Law, 1446; *Pennsylvania Co. v. Roy*, 102 U. S. 451; *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 417; 8 Am. St. Rep. 538; *Kinsley v. Lake Shore etc. R. R. Co.*, 125 Mass. 54; 28 Am. Rep. 200; *Thorpe v. New York etc. R. R. Co.*, 76 N. Y. 402; 32 Am. Rep. 326; *Duinelle v. New York etc. R. R. Co.*, 120 N. Y. 117; 17 Am. St. Rep. 611; *Railroad Co. v. Walrath*, 38 Ohio St. 461; 43 Am. Rep. 433; *Louiscille etc. R. R. Co. v. Kutsenberger*, 16 Lea, 380; 57 Am. Rep. 232. Mr. Justice Harlan, in delivering the opinion of the court in *Pennsylvania Co. v. Roy*, 102 U. S. 451, 457, said: "The law will not permit a railroad company engaged in the business of carrying persons for hire, through any device or arrangement with a sleeping-car company whose cars are used by the railroad company and constitute a part of its train, to evade the duty of providing proper means for the safe conveyance of those whom it has agreed to convey." But in *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 87, 8 Am. St. Rep. 512, it was held that the porter of a sleeping-car has no authority to enforce the rules and regulations of the company, or to forcibly prevent any person from entering the car, or to expel him therefrom after he has entered, and that if he wantonly assaults and beats one who enters the car for a lawful purpose, his act is outside of the functions in which he is employed, and the company will not be liable therefor, unless it had expressly or impliedly authorized the act, or been guilty of knowingly employing a dangerous servant. In this case it was held that the sleeping-car company was not liable for a wanton and unprovoked assault made by its porter upon a person who came into the sleeping-car to ask permission to wash his hands; although in the same case, reported in 40 La. Ann. 417, 8 Am. St. Rep. 538, a judgment

for one thousand dollars was rendered against the railroad company for the same act. And where a passenger is wrongfully expelled from the train by the officers of the railroad company operating the road, the sleeping-car company is not liable: *Paddock v. Atchison etc. R. R. Co.*, 37 Fed. Rep. 841.

For negligence on the part of a sleeping-car company in the performance of those duties which the law imposes upon it in reference to the care and protection of the persons and property of its customers it is undoubtedly liable. But negligence is the foundation of its liability, and without evidence of negligence on its part it cannot be held responsible: 3 Wood's Railway Law, 1448; *Woodruff etc. Co. v. Diehl*, 84 Ind. 474; 43 Am. Rep. 102; *Lewis v. New York S. C. Co.*, 143 Mass. 269; 58 Am. Rep. 135; *Illinois Central R. R. Co. v. Handy*, 63 Miss. 609; 56 Am. Rep. 846; *Root v. New York S. C. Co.*, 28 Mo. App. 199; *Tracy v. Pullman Palace Car Co.*, 67 How. Pr. 154; *Carpenter v. New York etc. R. R. Co.*, 124 N. Y. 53; 21 Am. St. Rep. 644; *Pullman Palace Car Co. v. Pollock*, 69 Tex. 120; 5 Am. St. Rep. 31; *Pullman Palace Car Co. v. Matthews*, 74 Tex. 654; 15 Am. St. Rep. 873; *Pullman Palace Car Co. v. Smith*, 79 Tex. 468; 23 Am. St. Rep. 356. In *Lewis v. New York S. C. Co.*, 143 Mass. 269, 58 Am. Rep. 135, it was held that proof that the porter was found asleep in the early morning, and that he was required to be on duty for thirty-six hours continuously, which included two nights, was sufficient evidence of negligence on the part of the sleeping-car company to justify the submission of the question to the jury. In *Carpenter v. New York etc. R. R. Co.*, 124 N. Y. 53, 21 Am. St. Rep. 644, it was held that evidence that the only person employed on the sleeping-car, which ran over an important thoroughfare, and made stops at several large cities during the night, was a man who acted as conductor and porter, and blacked the passengers' shoes for his own profit, and that this man's closet was at one end of the car, and so situated that he could not from it have a full view of the aisle, was sufficient, in the absence of explanation or evidence by the defendant, to require the question of negligence to be submitted to the jury. And in *Pullman Palace Car Co. v. Smith*, 79 Tex. 468, 23 Am. St. Rep. 356, the company was held liable for the neglect of its servants to awake the plaintiff and his wife in time to enable them to dress and get off the train at the station of their destination, and for causing them to get off the train at a water-tank half a mile from the station, before daylight, on a damp, cold morning in winter, where they were compelled to stand for a long time in the rain, mud, and cold, not knowing where the station was, the train having moved off before they ascertained that they had not reached the station.

NEGLECT NOT PRESUMED FROM MERE FACT OF LOSS. — From the mere fact of loss of property by a passenger while traveling in a sleeping-car, the negligence of the company cannot be presumed. There must be some proof of negligence to establish its liability: 2 Beach's Law of Railways, sec. 909; *Tracy v. Pullman Palace Car Co.*, 67 How. Pr. 154; *Carpenter v. New York etc. R. R. Co.*, 124 N. Y. 53; 21 Am. St. Rep. 644. In delivering the opinion of the court in the case last cited, Follett, C. J., said: "The mere proof of the loss of money by a passenger while occupying a berth does not make out a *prima facie* case, and to sustain a recovery some evidence of negligence on the part of the defendant must be given." But see *Railroad Co. v. Walcott*, 38 Ohio St. 461, 43 Am. Rep. 433, where it was held that upon proof of injury sustained by a passenger on a railroad train, by the fall of a berth in a sleeping-car, and that the passenger was without fault, a presumption arises that the railroad company is liable.

CONTRIBUTORY NEGLIGENCE ON PART OF PASSENGER DEFEATS RECOVERY. — If a passenger, by his own negligence, contributes to the loss of his property, he cannot recover from the sleeping-car company for such loss: *Hillis v. Chicago etc. R'y Co.*, 72 Iowa, 228; *Whitney v. Pullman Palace Car Co.*, 143 Mass. 243; *Illinois Central R. R. Co. v. Handy*, 63 Miss. 609; 56 Am. Rep. 846; *Pullman Palace Car Co. v. Matthews*, 74 Tex. 654; 15 Am. St. Rep. 873. In the case of *Hillis v. Chicago etc. R'y Co.*, 72 Iowa, 228, the plaintiff had five hundred dollars in an envelope in his overcoat pocket. He handed the overcoat to the porter of the sleeping-car, who hung it up in his berth. Afterwards an accident occurred, and the car was thrown on its side and set on fire. The plaintiff then informed the conductor and the porter that the money was in his overcoat pocket. After the fire was extinguished and the car was righted, the coat was recovered, but the money was gone. It was held that the plaintiff could not recover, there being no evidence of gross negligence on the part of the defendant. In *Whitney v. Pullman Palace Co.*, 143 Mass. 243, the plaintiff, at a stopping-place, left a small satchel on the ledge of the window of the sleeping-car, where it could be reached from the outside, through the adjoining window, which was open. Without placing the satchel in the care of the servants of the company, the plaintiff left the car, and remained outside for ten minutes, and when he returned the satchel was gone. He was held to have been guilty of such contributory negligence as would bar a recovery. In the case of *Illinois Central R. R. Co. v. Handy*, 63 Wis. 609, 56 Am. Rep. 846, Cooper, C. J., delivering the opinion of the court, said: "If the appellee carelessly and negligently left his pocket-book on the car when he reached his destination, and its contents were abstracted by persons other than the servants of the company, there would be no liability on the part of the company." And in *Pullman Palace Car Co. v. Matthews*, 74 Tex. 654, 15 Am. St. Rep. 873, Henry, A. J., in delivering the opinion of the court, said: "The position in which plaintiff left his money was unquestionably an act of negligence on his part, and if the evidence did not so conclusively exclude the idea of its having been taken by anybody except the servants of defendant, who were in charge of the car, he ought not to have had a recovery because of his own negligence."

THEFTS BY SERVANTS OF COMPANY, LIABILITY FOR. — A sleeping-car company is, however, liable for property stolen from its customers, whether such customers have been negligent or not, where the property stolen consists of articles such as are usually carried by travelers on a journey, or of a sum of money reasonably necessary for the expenses of the journey: *Illinois Central R. R. Co. v. Handy*, 63 Miss. 609; 53 Am. Rep. 846; *Root v. New York Central S. C. Co.*, 28 Mo. App. 199; *Pullman Palace Car v. Matthews*, 74 Tex. 654; 15 Am. St. Rep. 873. Thompson, J., delivering the opinion of the court in *Root v. New York Central S. C. Co.*, 28 Mo. App. 207, said: "A sleeping-car company . . . is liable for the thefts of its servants to the extent of the necessary baggage or money of the traveler, regard being had to the character, duration, and purposes of the journey, whether the traveler has been negligent in exposing such baggage or money so as to tempt the cupidity of its servants or not. In such a case contributory negligence of the passenger would not be regarded as the proximate or juridical cause of the injury. The duty of the defendant, through its servants, would be to protect the passenger's property, although discovered in an exposed situation where his carelessness may have left it." And Cooper, C. J., delivering the opinion of the court in *Illinois Central R. R. Co. v. Handy*, 63 Miss. 609, 56 Am. Rep. 846, said: "The company is responsible to its patrons for the conduct of its em-

playees as to any property as to which it is brought into contract relations with its owner. But as to any other property, whether owned by a passenger or a stranger, it has no sort of connection, and as to such it lies under no greater obligation than it owes to property of all other persons, the measure of which is fixed by the maxim, *Sic utere tuo ut non alienum laedas*. The extent to which liability has been fixed in cases of this sort has not been held to include anything except the clothing, ornaments, and such articles as are usually carried by travelers in their hands, together with a sum reasonably sufficient for the expenses of the journey in which one is engaged."

LIMIT OF COMPANY'S LIABILITY. — A sleeping-car company's liability for loss through its negligence extends only to such reasonable articles of baggage as a traveler usually takes with him on a journey, and to such reasonable sum of money as may be necessary for his traveling expenses, taking into consideration his condition in life and the surrounding circumstances. For the loss of anything beyond this the company is not liable: *Rorer on Railroads*, 987; 2 *Beach's Law of Railways*, sec. 909; *Hutchinson on Carriers*, 2d ed., sec. 617 f; 13 *Alb. L. J.* 221; *Blum v. Southern Pullman Palace Car Co.*, 1 *Flip.* 500; *Beale v. Baltimore etc. R. R. Co.*, 28 *Mo. App.* 19; *Root v. New York Central etc. R. R. Co.*, 28 *Mo. App.* 199; *Wilson v. Baltimore etc. R. R. Co.*, 32 *Mo. App.* 682; *Hampton v. Pullman Palace Car Co.*, 42 *Mo. App.* 134; *Illinois Central R. R. Co. v. Handy*, 63 *Miss.* 809; 56 *Am. Rep.* 848. In *Hampton v. Pullman Palace Car Co.*, 42 *Mo. App.* 134, the plaintiff sued to recover for the loss, among other things, of certain articles of dress which she had intended to use while on a visit which she contemplated making, but which she did not make because her friend failed to meet her at the railway station. The company contended that it was not liable for the loss of those articles, but *Ellison, J.*, who delivered the opinion of the court, said: "But the point is made that she can only recover of a sleeping-car company for what was necessary or convenient for her use while traveling upon the car and while making the journey. If this point were allowed, it would certainly restrict the liabilities of these companies to an exceedingly narrow limit. If a female passenger is only to be protected in the property which is necessary and convenient for her use while making the trip, her necessities, for all ordinary trips, would be restricted to the clothes, jewelry, and necessary expense money which she would have on her person when entering the car, with the addition of a sleeping-robe. Nothing is, perhaps, better known than that the traveling public carry with them valises containing articles of baggage, not merely necessary for use while on the car, but for use after leaving the car. And so it is known and understood throughout the country that sleeping-car companies invite travelers into these cars with such baggage, receiving the passenger with it, as a part of his belongings. They say to him, in effect: Bring such baggage into our car, and trust to us while you sleep. I am, therefore, satisfied that the liability of sleeping-car companies should extend to, and be made to cover, such articles of baggage as are ordinarily or usually carried by travelers, in like situation, in valises which they carry with them into the car under such invitation."

PROPERTY NOT IN CUSTODY OF COMPANY WHEN. — Money in a passenger's clothing worn during the day, and placed under his pillow at night, is not to be considered as in the custody of the sleeping-car company which furnishes the passenger with a berth in its car: 2 *Rorer on Railroads*, 887; *Leeds v. New York S. C. Co.*, 143 *Mass.* 267; 58 *Am. Rep.* 135; *Carpenter v. New York etc. R. R. Co.*, 124 *N. Y.* 53; 21 *Am. St. Rep.* 644.

NOTICE POSTED IN CAR DOES NOT RELIEVE FROM LIABILITY WHEN. — A sleeping-car company cannot avoid liability for loss of property stolen from a berth in its car while its owner was asleep, by posting notices in the car disclaiming liability for the loss of valuables placed in the berths, where it appears that the passenger did not see or know of such notice: *Lewis v. New York S. C. Co.*, 143 Mass. 267; 58 Am. Rep. 135.

DUTY OF COMPANY TO FURNISH BERTHS TO ALL ENTITLED TO THEM. — Sleeping-car companies can generally contract only with passengers of such a class and over such routes as the rules of the railroad companies of whose trains their sleepers form a part permit. And where a passenger is not of such class as the railroad company's rules allow to ride in the sleeper, the sleeping-car company cannot be held liable for the acts of the servants of the railroad company in refusing to allow him to ride in the sleeping-car: *Lawrence v. Pullman Palace Car Co.*, 144 Mass. 1; 59 Am. Rep. 58. Devens, J., in delivering the opinion of the court in this case, said: "The defendant company could not certainly furnish a berth in its cars until the person requesting it had become entitled to transportation by the railroad company as a passenger, and he must also be entitled to the transportation for such routes, distances, or under such circumstances as the railroad company should determine to be those under which the defendant company would be authorized to furnish him with its accommodations. The defendant company could only contract with a passenger when he was of such a class that the railroad company permitted the contract to be made."

But when a passenger is entitled, under the rules of the railroad company, to purchase a ticket for a berth in the sleeping-car, it is the duty of the sleeping-car company to furnish him a berth, if it has one vacant. It owes a duty to the public to treat its customers fairly, and without unjust discrimination: *Nevin v. Pullman Palace Car Co.*, 106 Ill. 222; 46 Am. Rep. 688. In this case it was held that the plaintiff could maintain an action on the case against the defendant for refusing to permit him to occupy a sleeping-berth in one of its cars, which had been assigned to him, and which he was ready and offered to pay for. Mulkey, J., in delivering the opinion of the court, said: "If, then, this company owes any duties to the community by reason of its relation to the public, as we hold it does, manifestly one of them is, that it shall treat all persons whose patronage it has solicited with fairness, and without unjust discrimination. When, therefore, a passenger who, under the rules of the company is entitled to a berth upon payment of the usual fare, and to whom no personal objection attaches, enters the company's sleeping-car, at a proper time, for the purpose of procuring accommodations, and in an orderly and respectful manner applies for a berth, offering or tendering the customary price therefor, the company is bound to furnish it, provided it has a vacant one at its disposal. To require this of the company is merely exacting of it that which is clearly dictated by the plainest principles of justice and fair dealing. To construe the law otherwise might lead to great abuses and the grossest injustice, detrimental alike to public and private interests." A sleeping-car company, may, however, sell a whole section in its car to a single person, and while such person has the right to occupy the section under his contract, the company cannot be compelled to sell any part of it to another. And where a berth has been sold for occupancy to a certain point, no cause of action arises from the company's refusal, before that point is reached, to sell another person a ticket entitling him to such berth from there to the end of the journey: *Searles v. Mann Bouloir Car Co.*, 45 Fed. Rep. 330.

DUTY TO FURNISH CONTINUOUS PASSAGE IN SAME CAR OR ONE EQUALLY GOOD. — When a sleeping-car company sells to a passenger a ticket purporting to entitle him to a particular berth in a designated car, it is bound by its contract, evidenced by the ticket, to carry him to his destination in that berth and car, or to furnish him an equally desirable berth in the same locality in another car of equal safety, convenience, and comfort. And if it fails to do this, it is liable in damages for the breach of its contract: *Pullman Palace Car Co. v. Taylor*, 65 Ind. 153; 32 Am. Rep. 57.

CONTRACT OF SLEEPING-CAR COMPANY IMPLIED FROM SALE OF TICKET. — When a sleeping-car company sells a ticket between two points to a passenger, the contract entered into, of which the ticket is evidence, is implied from the nature and usages of the employment of the company. It impliedly stipulates to furnish safe and comfortable cars, to exclude therefrom all improper persons, to furnish berths for its passengers, to preserve order and decorum in its cars, and to keep a reasonable watch over the person and property of its passengers while they sleep: 3 Wood's Railway Law, 1448; 2 Borer on Railroads, 967; *Lewis v. New York S. C. Co.*, 143 Mass. 267; 58 Am. Rep. 135. Morton, C. J., in delivering the opinion of the court in the case last cited, said: "When a person buys the right to the use of a berth in a sleeping-car, it is entirely clear that the ticket which he receives is not intended to, and does not, express all the terms of the contract into which he enters. Such ticket, like the ordinary railroad ticket, is little more than a symbol intended to show to the agents in charge of the car that the possessor has entered into a contract with the company owning the car, by which he is entitled to passage in the car named on the ticket." We have seen that a sleeping-car company is bound to maintain decorum in its cars. If, therefore, the servants of the company in the performance of this duty commit an error, through a mistake for which the passenger was responsible, the company will not be liable for such error. Thus in the recent case of *Pullman Palace Car Co. v. Bales*, 80 Tex. 211, a husband purchased a ticket for a berth in a sleeping-car, and his wife subsequently, without disclosing her relationship to him, purchased from the officers of the company another berth across the aisle for his mother. After assisting her mother-in-law to disrobe, and partially undressing herself in the berth which she had purchased, she crossed the aisle to her husband's berth. The porter, observing this, went to the berth, and informed them that the rules of the company did not permit such conduct. The husband informed him that the lady was his wife, but the porter called the conductor, and the two compelled her to return to her mother-in-law's berth. The husband, who was naturally much chagrined and humiliated, brought suit against the company, but it was held that he had no cause of action. The court, in the course of its decision, said that the porter and conductor had acted with rudeness, and that if there had been a cause of action, their conduct would be considered in aggravation of damages. In *Pullman Palace Car Co. v. Ehrman*, 65 Miss. 383, it was held that a passenger who makes an unreasonable demand of the porter of a sleeping-car company, and provokes an angry retort from him, cannot recover damages therefor from the company.

PASSENGER NOT TRESPASSER IN SLEEPING-CAR, WHEN. — A passenger on a railway train who enters a sleeping-car for the purpose of asking permission to wash his hands is not a trespasser in the sleeping-car: *Williams v. Pullman Palace Car Co.*, 40 La. Am. 417; 8 Am. St. Rep. 538. Nor is a passenger who, being unable to find a seat in the ordinary car, enters the sleep-

ing-car and takes a seat there: *Thorpe v. New York etc. R. R. Co.*, 76 N. Y. 402; 32 Am. Rep. 325.

COMPANY NOT LIABLE TO FREE-PASS PASSENGER HOLDING SLEEPER-TICKET. — A sleeping-car company is not liable for negligence to a person who has bought a ticket for a berth in the sleeping-car, where he is riding in the train on a free pass exempting the railway company from liability for its negligence: *Ulrich v. New York Central & H. R. R. Co.*, 108 N. Y. 80; 2 Am. St. Rep. 369.

LIABILITY FOR REFUSAL OF COMPANY'S SERVANT TO RECOGNIZE TICKET. — In the case of *Buck v. Webb*, 59 Hun, 185, a passenger bought a ticket in a drawing-room car, and having lost it, went to the agent to get a duplicate. The agent refused to give him the duplicate, because the diagram of the car had then passed out of his possession; but he gave to the passenger a personal card with the following statement written on it: "This gentleman holds a seat in 'Nokomis' this P. M. Mislaid. O. R. Benedict." The passenger took his seat in the drawing-room car, and presented the agent's card to the conductor, but he refused to recognize the card, and compelled him to remove to an ordinary car. The company was held to be liable in damages.

BARTON v. UNION CATTLE COMPANY.

[28 NEBRASKA, 280.]

WATERS, INJUNCTION TO RESTRAIN POLLUTION OF, WHEN GRANTED. — An owner of a large tract of land upon a small stream, who erects and maintains thereon a large feeding-barn, in which he keeps several thousand cattle, and washes into the stream the manure and urine, and other foul and deleterious substances from the cattle, thereby fouling and polluting the water of the stream, and impregnating it with noxious exhalations, destructive to husbandry and dangerous to health, will, at the suit of an adjoining riparian proprietor below him, be restrained from continuing the nuisance. And the fact that the plaintiff might be able at comparatively small cost to supply water to his cattle from an independent source cannot be considered in connection with his right to have the stream uncontaminated.

NUISANCE, CONTINUING, MAY BE RELIEVED AGAINST AT LAW OR IN EQUITY. — A continuing nuisance caused by the pollution of the waters of a stream, and others of a like character, may be proceeded against either at law or in equity, at the election of an injured party.

INJUNCTION. The opinion states the case.

Hall and McCulloch, for the appellants.

J. M. Woolworth, for the appellee.

COBB, J. This cause was appealed from the judgment of the district court of the county of Sarpy, which dissolved the injunction against the defendant and dismissed the action of the plaintiffs.

The suit was brought to restrain the defendant from pollut-

ing the waters and injuring the flow of the current of Papillion Creek, by discharging into it the manure and offal from the extensive cattle-feeding barns maintained by the defendant, in such manner and degree as to injure the stream for husbandry, and destroy it for watering live-stock on the adjacent premises of the plaintiffs.

The facts appear, that in 1885 the plaintiffs bought two parcels of land lying on said stream; the one of 80 acres was originally pre-empted by Gilmore, and was bought of one Frost, by which names it is designated; the other, of 160 acres, was bought of Gates, after whom it is called, both lying on the creek below the defendant's lands and barns. In the same year, the defendant bought four hundred acres of land on the creek, adjacent and above the lands of plaintiffs, for feeding-barns and grounds for its cattle. The barns are alleged to provide stalls for three thousand five hundred cattle, each animal having a small, separate stall, ranged in rows, heads and tails, in uniformity, with aisles for feeding between head-rows, and the like between tails for carrying away manure and offal,—the droppings falling into a trough, to be carried off by a flow of water in quantities, two or three times daily, and thus conveyed to a sewer through which it is carried on into the stream, amounting to one million gallons daily. By this method, it is claimed by the plaintiffs, the water of the stream is disturbed and polluted, rendered foul for all common uses, and impregnated with noxious exhalations, destructive to husbandry and dangerous to health. The plaintiffs ask that the judgment below be reversed, that the injunction against the defendant be restored and continued, remedying the injuries complained of, and for general relief.

The answer of the defendant admits the location of the land and property of either party on Papillion Creek, in Sarpy County, as alleged; and admits maintaining the cattle-barns in the manner stated; and sets up that the plaintiffs had notice and full knowledge of the manner and results of defendant's business prior to establishing it, and consented thereto, and therefore have no cause of complaint.

Upon the trial, the allegations of the petition as to the ownership and occupation of the property constituting the plaintiffs riparian proprietors of a portion of the small stream called the Papillion, in Sarpy County, were fully proved, and that they owned and occupied said property on either side of said stream for general farming and cattle-raising purposes.

The allegations of the petition as to the occupation of a large tract of land upon said stream, immediately above and adjoining the land of the plaintiffs, by the defendant company, and the use of it by said defendant in the manner and for the purpose as set out in the plaintiffs' petition, was also fully proved. The nature, character, and extent of the damage and injury to the plaintiffs, caused by the use of the defendant's feeding-barn, and the casting of the manure and urine of their cattle, and other foul and deleterious substances therefrom, into the said stream, and such substances mixing with the water of said stream and floating down to and upon the land of plaintiffs, was also proved. I shall not deem it necessary to set out specifically the dates of the acquisition of their several rights in their respective properties upon said stream, by the parties plaintiffs and defendant, as upon a careful examination of the evidence applicable to that branch of the case it does not appear that either party has acquired any prescriptive rights or been guilty of laches which can be urged against them in the case.

While from the evidence it may be deemed probable that the nuisance to the plaintiffs' land, by the defilement of the water of the creek, was aggravated by the discharge of premature calves, or, as one of the defendant's witnesses calls them, "slumps, or deacons," therein, along with the ordinary dung and urine from the cattle, during a portion of the time covered by the pleadings, to an extent not to be apprehended generally in the future, yet it appears from the evidence that the method used by the defendant of using warm or heated feed tends to cause cows to prematurely drop their calves; and where large numbers of them are kept together and fed in that manner, an entire cessation of that source of defilement is scarcely to be expected. But aside from this, it is fully established by the evidence that the maintenance of defendant's feed-stable in the manner contemplated by its owner, and those skilled in that method of feeding cattle, and operated strictly in accordance with the rules and requirements of the system adopted, contemplates and will inevitably cause the destruction of the stream below so far as its value to the plaintiffs is concerned, and for the use and purpose for which it has heretofore been deemed most useful and valuable.

Considerable evidence, as well as discussion, on the part of defendant, is devoted to the proposition that the injury complained of is trifling, and it is sought to show that plaintiffs

may provide means of watering their stock without resorting to Papillion Creek, by the outlay of a few hundred dollars, and an annual expenditure of twenty per cent of the original cost. To this point defendant cites the case of *Jacobs v. Allard*, 42 Vt. 303; 1 Am. Rep. 331. In that case plaintiffs were the owners and operators of a starch-mill propelled by water; defendant was the owner of a shingle-mill on the same stream above. The cause of action was, "that the defendant, with the intent and design to injure the orators, and damage and hinder them from the use of the water for the purposes of their starch factory, threw into the stream the sawdust and shavings and waste from the shingle-mill, . . . and that they render the water impure and unfit for making starch, and clog the flume and penstock and prevent the use of the starch factory," etc. The court, in the opinion, say: "The evidence makes a strong impression on our minds that much of the trouble which the plaintiffs claim, and give evidence to show, that they experience in the condition of the water as it comes to their works, is attributable to the manner in which they have constructed and adjusted a new dam, in reference to their works, and to the lack of proper fenders and strainers to protect against impurities that may get into the stream from the mills and works above the plaintiffs. It would seem that by proper modes and means which they could, without unreasonable pains and expense, have adopted and put in use, they could have secured themselves from the troubles complained of, while the defendant was using his shingle-mill and letting the sawdust and waste from it go into the stream."

The distinction between the above case and the case at bar, in respect to the remedy suggested, is, that in the one case it is a prevention of the effect of the pollution, and in the other it contemplates the enduring of the effect of the pollution of the stream, but suggests the creation of an artificial water-course to supply plaintiffs' land, and contemplates the abandonment of the stream which is the subject of the litigation. The difference, as it seems to me, is radical in principle; and I do not think that the comparatively small cost at which plaintiffs might be able to supply water for their cattle from an independent source can be considered in connection with their right to have the stream remain uncontaminated, in the manner shown by the pleadings and bill of exceptions.

I cannot agree with defendant in the assertion, in the brief, under the second point, that "the waters of the Papillion,

before the building of the defendant's barn, were unfit for cattle." I do not so understand the evidence. While it was doubtless inferior in sparkling clearness to the waters of streams of mountainous regions, where the soil is poor, consisting in great part of sand and gravel, the evidence, as a whole, fails to distinguish it from the general run of Nebraska streams of about the same size, in respect to the clearness and salubrity of its waters and the height of its banks and firmness of its bottom. That it has been used by the inhabitants of the country along its banks, for the purposes of stock water, since the first settlement of the territory, is sufficiently established by the evidence.

Defendant, in the brief, under the third point, uses the following language: "We admit the general rule, that the proprietor above must so use the water as not to impair the enjoyment of it by the proprietor below, and therefore must not pollute it. But that general rule is subject to a qualification inherent in the nature of the subject and the relative rights of the parties." The rule is stated in nearly the same language by Judge Maxwell, in the article on injunctions, 10 Am. & Eng. Ency. of Law, 844: "Every owner of land through which a stream of water flows is entitled to the use and enjoyment of the water, and to have the same flow in its natural and accustomed course, without obstruction, diversion, or pollution. The right extends to the quality as well as the quantity of water. If, therefore, an adjoining proprietor corrupts the water, an action will lie against him." And this is the law substantially as laid down in the cases there cited, especially *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335; *Richmond Mfg. Co. v. Atlantic D. Co.*, 10 R. I. 106; 14 Am. Rep. 658; *Gardner v. Trustees etc.*, 2 Johns. Ch. 161; 7 Am. Dec. 526; *Mayor etc. of Baltimore v. Warren Mfg. Co.*, 59 Md. 96.

These cases are authority for the plaintiffs in the case at bar, as to all its branches. In most or all of them it was held that an injunction would be granted without regard to the magnitude of the interest enjoined.

(It is true, as stated by defendant in the brief, that no complaint is made that the defendant's barns were improperly built or negligently managed. Nor can it be denied that the defendant's business might be legitimately carried on, without damage to adjoining land-owners, upon a stream of the size of the Missouri or the Platte; but it is manifest from the evidence that it cannot, in the magnitude described in

the evidence, be carried on without infringing upon the rights of the lower land-owners, upon a stream of the size of the Papillion.

I do not deem it necessary to discuss the question whether the plaintiffs have a remedy by action at law; for I understand it to be settled by the authority of the cases cited, as well as many others, that a continuing nuisance, by polluting the waters of a stream, and others of a like character, may be proceeded against either at law or in equity, at the election of an injured party. See also *Webb v. Portland Mfg. Co.*, 3 Sum. 189; Angell on Watercourses, sec. 444, and cases there cited; *Attorney-General v. Steward*, 20 N. J. Eq. 415; *Lyon v. McLaughlin*, 32 Vt. 423.

The injury complained of by the plaintiffs is the pollution of the watercourse, and not the improper or unreasonableness of the use of the water of the stream by the defendant. This is a question of fact, and as the decree of the district court was for the defendant, it must be presumed that it found that there was no pollution of the stream; but such finding is unsustained by the evidence as contained in the bill of exceptions, and is clearly against it.

The decree of the district court is reversed, and a decree for the plaintiffs, as prayed, will be entered in this court.

WATERS — INJUNCTION TO RESTRAIN POLLUTION OF. — A defendant, the proprietor of a slaughter-house, will be enjoined from casting offal into a stream of water, thereby polluting it, to the injury of one lower down the stream: *Woodyear v. Schaeffer*, 57 Md. 1; 40 Am. Rep. 419, and note. One will be enjoined from maintaining a privy which pollutes his neighbor's well: *Haugh's Appeal*, 102 Pa. St. 442; 45 Am. Rep. 193, and note.

FRANSE v. ARMBUSTER.

[23 NEBRASKA, 467.]

APPEARANCE, TAKING STAY IN FORECLOSURE SUIT IN, WHEN. — Where, in an action to foreclose a mortgage on real estate, a decree of foreclosure and sale is rendered against the defendant, without legal service of summons upon him, and thereupon his brother, as agent for the defendant, in his name, obtains a stay of the order of sale, and the defendant, being notified of the stay, makes no objection, but avails himself of it, the taking of the stay is an appearance in the action; and the defendant, by availing himself of the stay taken in his name by his brother, thereby ratifies his acts.

REMARKS. The opinion states the case.

T. M. Franse, pro se.

J. F. Losch and M. McLaughlin, contra.

MAXWELL, J. This is an action of ejectment brought by the plaintiff against the defendant in the district court of Cuming County to recover the possession of certain real estate. On the trial of the cause, the court found the issues in favor of the defendant and dismissed the action.

The testimony tends to show that in March, 1878, one Robert B. Millar, the then owner of the land in controversy, gave a mortgage on said land to Aultman and Taylor Company, to secure the sum of \$718.35; that default was made in the payment of the amount secured by said mortgage, and in April, 1879, a decree of foreclosure and sale was had.

At the time the action to foreclose the mortgage was brought, Robert B. Millar was residing in the territory of Dakota, and service of the summons in that action was made on his brother, William Millar, as agent.

It is not claimed that William Millar was appointed the agent of his brother under the provisions of the statute, or that service upon him possessed any validity; and had there been no further appearance in the case, the decree would have been void. After the rendition of the decree, however, William Millar, as agent for his brother, in his name, obtained a stay, as follows:—

“Aultman and Taylor Company v. Robert B. Millar et al.

“*To the clerk of said court:* You are hereby notified that I wish to have a stay of the order of sale on the judgment in the above-entitled cause entered for the time provided by law.

“Witness my hand, May 7, 1879.

“ROBERT B. MILLAR,

“By WM. MILLAR, his Ag’t.”

Soon after this stay was taken, Robert B. Millar was informed by the brother of the decree of foreclosure against his land, and that he had requested a stay of order of sale. Robert made no objection to this, but availed himself of the stay. After its expiration, and an order of sale had been issued and the land advertised for sale, he returned to this state, and on the day of the sale was present in West Point, the county seat of Cuming County, but made no objection to said sale. The sale was confirmed without objection, and a deed made to the purchasers.

The taking of the stay was an appearance in the action:

Helmer v. Rehm, 14 Neb. 219; *Warren v. Dick*, 17 Neb. 241; *Fee v. Big Sand Iron Co.*, 13 Ohio St. 563. And the fact that Robert B. Millar availed himself of the stay taken in his name by his brother was thereby a ratification of his acts. His right of action was therefore barred, and as the plaintiff acquired by the conveyance only the rights of Robert B. Millar, he took nothing by his deed.

The judgment is clearly right, and is affirmed.

STAY, GETTING, WHETHER AN APPEARANCE. — Where counsel appeared, and got an order extending his time to file a plea, such an appearance cannot be regarded as a general appearance which waived irregular service: *Mulhearn v. Press Pub. Co.*, 53 N. J. L. 150. Where a defendant, cited to appear in an action, comes in and asks for a stay of one day, and the next day appears to object to certain irregularities, such an appearance will not confer jurisdiction: *Nelson v. Campbell*, 1 Wash. 261. A special appearance, designating the particular purpose for which the party appears, limits the appearance to that particular matter: *Knockade v. Meyer*, 17 Or. 470. See *Miller v. Hyers*, 11 Neb. 474.

WRIGHT v. DAVIS.

[23 NEBRASKA, 479.]

STATUTE OF LIMITATIONS BEGINS TO RUN FROM DATE OF RECORDING OF FRAUDULENT CONVEYANCE WHEN. — While the person against whom a fraud has been perpetrated has four years from the discovery of the fraud within which to commence his suit for relief, the fraud will be deemed to have been discovered when such facts are known, either actually or constructively, as would amount to knowledge, or which would naturally suggest such inquiries as, if followed up, would lead to such knowledge. Where, therefore, an insolvent debtor executes and records a deed of land to his wife, and it appears from the evidence that his creditor was fully aware of his financial condition, and that the conveyance to his wife could not be otherwise than fraudulent, or that by the most superficial examination suggested by facts within his knowledge he might have had full and complete knowledge of the condition of the title, the statute of limitations will begin to run from the date of the recording of the conveyance, and will bar the creditor's right to relief after the lapse of four years from that date.

CREDITOR'S bill. The opinion states the case.

L. R. Wright, and Breen and Duffie, for the appellant.

Charles B. Keller, for the appellees.

RESE, C. J. This action was instituted in the district court of Douglas County, and was in the nature of a creditor's bill. It was alleged in the petition that in the year 1868, James W. Davis

became indebted to the plaintiff, and that upon such indebtedness plaintiff recovered a judgment against the said Davis for the sum of \$3,069.70, said judgment having been rendered by the district court of Douglas County; that the judgment became dormant, and that the same was revived by the order of said court at the October term thereof, 1885, and it thereby became a lien upon all the real estate of the said defendant situate in said Douglas County; that on the nineteenth day of June, 1886, plaintiff caused an execution to be issued upon said judgment and placed in the hands of the sheriff; and that on the twenty-third day of August, of the same year, the sheriff returned said execution unsatisfied, for want of property upon which to levy and make the same; that the said Davis, about the date of the incurring of the indebtedness, and before and at the time of the recovery of said judgment, was indebted to numerous persons, and contemplated utter insolvency, and with a view to defraud, hinder, and delay his creditors, at the time and date mentioned in the petition, purchased certain real estate, which is described therein, with his own means and money, and for the purpose of hindering, delaying, and defrauding his creditors, caused the title to said property to be taken in the name of defendant Elizabeth Davis, his wife; that at the time of the execution of the conveyances to her, she well knew of the insolvent condition and fraudulent intentions of the said James W. Davis, her husband, and combined and confederated with him to hinder, delay, and defraud his creditors, and that all of the property described in the petition was in truth and in fact the property of the said James W. Davis, and subject to the payment of his debts; that subsequent to the execution of the deed of conveyance to her, and in the years 1879 and 1880, she conveyed the real estate to certain persons named in the petition, and who after that time reconveyed the same to her; but that the persons to whom she conveyed the property never owned the same and had no title therein, the conveyance being made for the purpose of covering up and hiding the title, and thus assisting in defrauding the creditors of the said James W. Davis; that during all of said time, the said James W. Davis was the sole owner of the real estate, and that he erected buildings and made improvements thereon of great value, and paid for the same out of his own means. The other defendants were referred to in the petition as claiming to have some interest in fractional portions of the real estate described, but it was alleged that whatever interest

they had was obtained subsequent to the rendition of the judgment, and with full notice of the lien created thereby, and that the said James W. Davis was the sole owner of the property. The prayer of the petition was, that a decree might be entered declaring the property to have been the property of James W. Davis, and be made subject to plaintiff's judgment.

The defendants, James W. and Elizabeth Davis, filed separate answers, denying all the allegations of the petition, excepting that they were husband and wife; that the deeds were executed to Elizabeth Davis, and recorded at the time alleged in the petition; that the improvements made upon the real estate were made by James W. Davis in the year 1888; and also pleading the statute limitations.

To these answers plaintiff filed a reply, realleging the fraudulent character of the deed to Elizabeth Davis; denying that the record of the deed imparted notice to him; denying knowledge that the real estate was the property of the said James W. Davis; and alleging that, aside from what was shown by the records of Douglas County, the fraud was discovered and made known to the plaintiff within one year previous to the commencement of the action, and not before, and that the cause of action accrued upon the discovery of the fraud.

The other defendants filed separate answers, alleging their purchase of the portions of the real estate occupied by them; that the same was made in good faith and for value, and without any knowledge of plaintiff's alleged rights under his judgment.

The cause was tried to the district court, the trial resulting in a general finding in favor of all the defendants, and a decree dismissing plaintiff's petition. From this decree plaintiff appeals.

A number of questions are presented for consideration by the briefs, but it is deemed essential to notice but one, as it is thought to be decisive of the case.

There is no question but that the plaintiff's right to apply the property to the payment of his claim was barred by the statute of limitations, if the statute began to run upon the filing for record of the deed by which the real estate was finally conveyed to Mrs. Davis, for by section 12 of the Civil Code the statutory limit is four years after the discovery of the fraud. This section of the code has been construed by this court, so far as its application to the question involved in this case is concerned, in *Hellman v. Davis*, 24 Neb. 798; *Parker v.*

Kuhn, 21 Neb. 413; 59 Am. Rep. 838; *Blake v. Chambers*, 4 Neb. 90. By these cases it is pretty well settled in this state that while the person against whom a fraud has been perpetrated has four years from the discovery of the fraud in which to commence his suit, yet the fraud will be deemed to have been discovered when such facts are known, either actually or constructively, as would amount to knowledge, or which would naturally suggest such inquiries as, if followed up, would lead to such knowledge. This being the rule, we are led to inquire whether plaintiff is entitled to pursue his action to a favorable decree, as having discovered the fraud within four years prior to its commencement, or whether by lapse of time his right to relief has become barred.

The land which it is sought to subject to the payment of plaintiff's judgment is described as the north half of the northwest quarter of section 35, township 15 north, range 12 east, in Douglas County. It clearly appears that the conveyances were made and placed on record at a time when defendant was known to be insolvent, or at least just prior thereto; that defendant resided upon the land and made improvements thereon, and that plaintiff knew in the year 1876, or prior thereto, of such residence; that it was claimed by some of the family, and was charged by the record with knowledge of the condition of the title as it then appeared. In answer to the question, "You knew this land had been bought and stood in the name of Mrs. Davis?" he answered, "I presume I did. I don't think I ever looked at the records, but I was satisfied that was the case." He had seen defendant very frequently after his judgment was obtained, had conversed with him about it and the payment of the claim, had received assurances that it would be paid, that he was "to be taken care of," and that the parties in New York, to whom defendant J. W. Davis was hopelessly indebted, had agreed to "wipe out the indebtedness so that it would not be hanging over Davis," and at that time he would get his money. It appears from all the evidence that plaintiff was fully aware of the financial condition of Davis, and that the conveyances to his (Davis's) wife could not be otherwise than fraudulent. Or if this cannot be said to have been fully established, that by the most superficial examination suggested by facts within his knowledge he might have had full and complete knowledge of the condition of the title. As we have seen, this was sufficient to cause the statute to run.

The decree of the district court is affirmed.

FRAUD — LIMITATIONS OF ACTIONS. — A party seeking to relieve himself from fraud must show that he used due diligence to discover it, in order to save himself from the bar of the statute of limitations: *Lataillade v. Orena*, 91 Cal. 565; 25 Am. St. Rep. 219, and note. Where a party has held property in open visible possession for the statutory time, his rights will not be affected by the fraud of his vendor: *Munsen v. Hollowell*, 26 Tex. 475; 84 Am. Dec. 582, and note. The statute will commence to run from the time that the fraud could have been discovered by the use of reasonable diligence: *Smith v. Fly*, 24 Tex. 345; 76 Am. Dec. 109, and note; *Jaffray v. Bear*, 103 N. C. 165. Where parties are entitled to have a conveyance set aside as fraudulent, and fail to do so for ten years, their rights are barred: *Dorsey v. Phillips*, 84 Ky. 420.

BEELS v. FLYNN.

[28 NEBRASKA, 575.]

FRAUDULENT CONVEYANCES — GRANTEE HAVING KNOWLEDGE OF FRAUDULENT INTENT NOT BONA FIDE PURCHASER. — A purchaser of an entire stock of goods, constituting the whole of the property of a debtor, who knows that the effect of his alleged purchase will be to hinder and delay, if not to defraud, the creditors of such debtor, is not a *bona fide* purchaser. Such purchaser cannot close his eyes to the circumstances under which the debtor sells, and if he buys at a considerable discount, and the proposed means of payment must have the effect of hindering and delaying the seller's creditors, he will buy at his peril.

FRAUDULENT CONVEYANCES, CREDITORS DEFRAUDED MAY CONTEST. — The words "as against the person so hindered, delayed, or defrauded," in a statute against fraudulent conveyances by debtors, are intended to limit the right of recovery to those who have suffered by the act complained of. A mere volunteer who has no interest in the result of the suit cannot complain, even if the transfer is known to him to be fraudulent, but a creditor who has been defrauded has an unquestionable right to contest the sale.

ANSWER WILL BE LIBERALLY CONSTRUED AFTER VERDICT.

CONVERSION. The opinion states the case.

Wigton and Whithan, for the plaintiff in error.

Holmes and Hays, contra.

MAXWELL, J. This action was brought by the plaintiff against the defendant in the district court of Madison County, to recover a judgment for the conversion of "the entire stock of harness, whips, saddles, saddlery hardware, collars and leather, the safe, show-case, and stove which were in the harness-shop in Beels's block, in the city of Norfolk, Nebraska, at the time hereinafter mentioned, formerly occupied by H. L. Spaulding, together with all the tools and fixtures belonging to said shop, which goods and chattels were of the value of \$1,163.26.

"On the twenty-eighth day of April, 1888, the defendant obtained possession of the said goods and chattels, and unlawfully and wrongfully converted the same to his own use, to the damage of the plaintiff in the sum of \$1,163.26."

Flynn answered the petition, and alleged that he was the sheriff of Madison County, and levied upon the property in question "by virtue of an order of sale issued by the county court of Madison County, upon a judgment rendered in said court in favor of Marks Brothers Saddlery Company and against H. L. Spaulding. Marks Brothers Saddlery Company intervened and answered, "that on the twenty-eighth day of April, 1881, your petitioner commenced its action in the county court against H. L. Spaulding, on an account for goods sold and delivered, and caused an attachment to be issued in said action, levied upon a certain stock of harness, saddlery, etc., being the property described in plaintiff's petition; that afterwards, to wit, on or about the twenty-seventh day of June, 1888, the defendant, as sheriff of said county, sold the said property by virtue of an order of sale issued by the county court aforesaid, on a judgment rendered in said action; that the said defendant has no interest in said property, or the proceeds of the sale thereof,—your petitioner is the real party in interest; that the said property so levied upon and sold by the defendant was in the possession of the said H. L. Spaulding, and the property of said Spaulding on the day preceding the levy of said attachment, and until a late hour of the night preceding the said levy; that it constituted the entire stock in trade of said Spaulding, who had been for several years before, and until said time, engaged in the harness and saddlery business at Norfolk, Nebraska; that said Spaulding was largely indebted to your petitioner, and other dealers in the same line of goods, and the said Spaulding was, and had been for several years, carrying on his said business in a building belonging to and rented of the plaintiff, who was fully advised of his financial condition; that the said Spaulding pretended to sell said stock of goods to plaintiff, but such sale was made with the intent to defraud your petitioner, and other creditors of said Spaulding, and no sufficient consideration was paid for the same; and the purchase thereof, if made at all by plaintiff, was so made with full knowledge on the part of said plaintiff of such fraudulent intent."

On the trial of the cause, the jury returned a verdict for the

defendant, and a motion for a new trial having been overruled, judgment was entered on the verdict.

A large number of errors are assigned in the petition in error, which need not be noticed, as it is apparent from the testimony that the verdict and judgment conform to the proof.

The testimony tends to show that in April, 1888, one H. L. Spaulding was conducting a harness-shop in Beels's block, in the city of Norfolk, Nebraska, and that he had been engaged in that business for about four years; that at that time he made a verbal agreement with one Hopkins to purchase his stock at ten per cent below the wholesale price; that in pursuance of this agreement an invoice of the stock was taken, which amounted to \$1,205; that Hopkins thereupon refused to take the stock at the invoice figures, but offered \$950 for the stock, which Spaulding refused. Spaulding at this time testifies that he was owing for stock from nine hundred to eleven hundred dollars, some of the claims for which were due, and there is testimony tending to show that he had asked an extension of time for the payment of some of these claims.

Some of the agents of the creditors were present in Norfolk on the day the alleged sale to Beels took place, and others were expected and were there the next day.

Mr. Beels and Spaulding were at Madison on an excursion, and while there, late at night, the following bill of sale was prepared and signed:—

"This article witnesseth, that I, H. L. Spaulding, for and in consideration of one thousand dollars in hand paid, the receipt whereof is hereby acknowledged, do hereby sell and convey unto George W. Beels the following described property, to wit:—

"All my stock of harness, whips, saddles, saddlery hardware, collars, leather, safes, show-cases, and stove now in my harness-shop in Beels's block, in the city of Norfolk, Nebraska, together with all my tools and other fixtures belonging to said shop, except my small bench-tools, such as awls, round knives, etc., such as belong to an individual set; for a specific description of said stock, tools, etc., reference is hereby made to a certain bill-invoice of same, made in the presence of H. L. Spaulding, Burt Shearer, D. A. Hopkins, and Mr. Cooley, on April 25, 1888, which bill is now in said safe, and is made a part hereof.

"And I also, in consideration of the further sum of three hundred dollars, I hereby sell and convey unto said George W. Beels all my accounts as now appears on my books, to-

gether with books containing same, amounting to about five hundred dollars, and not less than four hundred dollars.

"Possession of said shop and said stock is hereby transferred to said George W. Beels.

"Witness my hand the twentieth day of April, 1888.

"H. L. SPAULDING.

"Witnesses:—

"W. H. LAW.

"W. H. PECK."

This was all the property possessed by Mr. Spaulding, except some money and notes derived from the sale of his homestead, and which seem to have been reserved for the purchase of another homestead. It is claimed on behalf of the plaintiffs in error that the testimony fails to show that this was all of Spaulding's property, but this is a mistake, as Spaulding's own testimony shows such to be the case. The book-accounts, if placed at \$400, would make \$1,605, — which Beels received from Spaulding. For this, according to his own testimony, he satisfied a debt of one hundred dollars due to himself. He assumed a note of \$285 at one of the banks in Norfolk, and gave his own note to Spaulding for about \$900.

On the day after the sale, he was informed by an attorney of one or more of the creditors that the sale was regarded as fraudulent as to creditors, but if the creditors could reach the amount due upon the note they would seek relief in that way.

After this, but apparently on the same day, Beels traded land to Spaulding for the note.

Both Beels and Spaulding testify that this trade for land was not contemplated when the bill of sale was executed.

It evidently was done, however, to prevent Beels being garnished and the creditors paid. A creditor may collect his claim from a failing debtor and not be chargeable with aiding him to defraud his creditors, and such creditor may accept payment in goods, so that the goods are purchased at a fair price, and no more taken than will pay the debt. The prohibition of the statute applies to transfers made by a debtor, and not to a creditor.

But when a debtor has incurred debts on the strength of his being the owner of certain property, his creditors have an equitable claim thereon, and may insist that he use his property honestly and fairly, and without any intention of hindering and delaying them in the collection of their claims: *Seymour v. Wilson*, 19 N. Y. 417; and if the debtor dispose of his

property in such a way as to violate the trust reposed in him at the creation of the debt, by disposing of his property in such a manner as to hinder and delay or defraud creditors, and the person purchasing has notice of such intent, he will not be protected: *Weed v. Pierce*, 9 Cow. 722; *Smith v. Sands*, 17 Neb. 498.

In the latter case it is said: "A debtor, while the owner of his property, sustains two distinct relations in regard to it, viz., as owner and as quasi trustee for his creditors. If his creditors have taken no lien upon the property as security, they may be said to have given him credit upon the implied agreement that his property shall, if necessary, be applied to the payment of his debts, and such creditors have an equitable lien upon the property for that purpose: *Bump on Fraudulent Conveyances*, 13, 14; *Eppes v. Randolph*, 2 Call, 125; *Seymour v. Wilson*, 19 N. Y. 417.

"The law requires the debtor to act in good faith with his creditors, and apply his property, not exempt, if need be, to the payment of his debts. If he attempts to evade this duty, and for the purpose of hindering or defrauding his creditors by transferring his property to another without consideration, or with knowledge on the part of grantee of the fraudulent intent, such grantee will take the property charged with the trust, and if he converts the property into money, he will be liable for its value, less any valid liens subsisting against it."

A purchaser cannot close his eyes to the circumstances under which a debtor sells his goods,—his entire stock. If he buys at a considerable discount, and the effect of the proposed means of payment must be to hinder and delay, if not defraud, creditors of the seller, the purchaser will buy at his peril.

Good faith, honesty, and fair dealing require that the debtor's property be applied to the payment of his debts, and it is the duty of the courts to frown upon all attempts of a debtor and purchaser of his goods to evade that duty.

It is evident that Mr. Beels well knew that the effect of his alleged purchase would be to hinder and delay, if not defraud, the creditors of Spaulding, and that he is not a *bona fide* purchaser. It is claimed by the plaintiff in error that the language of section 17, chapter 32, Compiled Statutes, that "every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods or things in action, or of any rents or profits issuing therefrom, and every

charge upon lands, goods, or things in action, or upon the rents and profits thereof, made with the intent to hinder, delay, or defraud creditors or persons of their lawful rights, damages, forfeitures, debts, or demands, and every bond or other evidence of debt given, suit commenced, or decree or judgment suffered, with the like intent as against the person so hindered, delayed, or defrauded, shall be void,"—is restrictive, and hence the words at the close of the section, "against the person so hindered, delayed, or defrauded," limit the right of recovery to one that is hindered, delayed, or defrauded by the acts complained of. It is claimed that this provision is peculiar to this state.

An examination of the statutes of the several states, however, shows that a provision of similar import is found in many, if not most, of the states, and is also found in the second section of 13 Eliz., c. 5, from which, in substance, our statute appears to have been taken.

The evident intention was to limit the right of recovery to those who had suffered by the act complained of, while as between the parties to it, the sale would not be disturbed. In other words, a mere volunteer who has no interest in the result of the suit cannot complain, even if the transfer was well known to him to be fraudulent, because he sustains no injury by such fraud.

When, however, as in the case at bar, the creditors who have been defrauded complain, their right to contest the sale is unquestionable.

Some objection is made to the answer that it does not charge fraud on the part of Spaulding and Beels.

In our view, however, the answer, liberally construed after a verdict, does state sufficient to entitle the creditors to relief.

It is unnecessary to notice the instructions.

The judgment is clearly right, and is affirmed.

FRAUDULENT CONVEYANCES — EFFECT OF KNOWLEDGE BY GRANTEE OF GRANTOR'S FRAUDULENT INTENT. — A purchaser from an insolvent debtor must prove that he was without notice of the fraud; otherwise he acquires no title, and will not be protected: *Tillman v. Heller*, 78 Tex. 597; 22 Am. St. Rep. 77; *Van Raalte v. Harrington*, 101 Mo. 602; 20 Am. St. Rep. 626, and note 632, 633; *Paul v. Baugh*, 85 Va. 955.

A mere knowledge by the grantee that the grantor was insolvent at the time of the transfer is not sufficient: *Albertell v. Brunkam*, 80 Cal. 631; 18 Am. St. Rep. 200, and note; *Pochels v. Catonnet*, 40 La. Ann. 327.

FRAUDULENT CONVEYANCES — WHO CAN ATTACK. — Creditors only of a grantor can attack a conveyance as fraudulent: *McClenney v. McClenney*, 3 Tex. 192; 49 Am. Dec. 738.

MITCHELSON v SMITH

[28 NEBRASKA, 553.]

HOMESTEAD, ADDITIONAL LIABILITY WILL NOT BE IMPOSED ON, BY MARSHALING SECURITIES. — Where a husband and wife execute a mortgage upon their homestead, and other real estate owned by the wife, and she afterwards executes to another person a mortgage upon the same real estate, excepting the homestead, in a suit to foreclose the mortgages the first mortgagees will not be required to exhaust the fund derived from a sale of the homestead before resorting to the land covered by the second mortgage; the court has no authority to impose a greater burden upon the homestead than has been placed thereon by the parties themselves or by the law. This is not a case in which the securities can be marshaled.

HOMESTEAD LAW LIBERALLY CONSTRUED. — The homestead law is remedial in its character, and is to receive a liberal construction, to carry into effect its beneficent provisions.

SUIT to foreclose a mortgage. The opinion states the case.

Haslett and Bates, for the plaintiffs in error.

Burke and Prout, contra.

MAXWELL, J. On December 21, 1883, the defendants executed and delivered to Joel C. Williams a mortgage on a part of lot No. 15, in block No. 1, in the town of Blue Springs, and also on lots 3 and 4, in block 9, in Hall's Addition to Blue Springs, to secure the sum of \$186.92. This property stood in the name of Catharine Smith, and both Catharine Smith and her husband, Jacob W. Smith, signed the mortgage.

On February 2, 1884, the defendant Catharine Smith executed and delivered to the plaintiffs a mortgage on that portion of the same property described as a part of lot 15, in block No. 1, to secure the sum of \$425. This mortgage was signed only by the defendant Catharine Smith.

On the seventh day of January, 1886, the plaintiffs brought an action in the district court of Gage County, Nebraska, to foreclose the last-mentioned mortgage. The prior mortgagees, Joel C. Williams, was made a party to this suit, and the allegations as to him in said foreclosure petition were as follows:—

“The defendant Joel C. Williams claims a lien on said premises by virtue of a mortgage executed and delivered to him by said defendants on or about December 21, 1883, on the premises hereinbefore described, together with other property, to secure the sum of \$186.92, and plaintiff alleges the fact to be that the other property included in said mortgage of said Joel C. Williams is sufficient to pay and is of sufficient value to secure said Williams his claim of \$186.92, and that the

property herein described is not of sufficient value to pay both the lien of these plaintiffs and the lien of the defendant Williams, and not worth over the sum of plaintiffs' said mortgage."

The prayer was the ordinary form of prayer of foreclosure, with the addition that the defendant Joel C. Williams be required to exhaust his other security on his indebtedness before having or receiving any of the proceeds of the sale of the premises described in plaintiffs' mortgage. In the mean time Joel C. Williams disposed of his mortgage to the defendant Charles A. Murdock, who was substituted as defendant in place of Williams. On September 13, 1886, the defendant Murdock filed a cross-petition, asking that his mortgage be declared a first lien on the entire premises, and for a foreclosure of the same.

The defendants Catharine and Jacob W. Smith filed separate answers to both the petition of the plaintiff and the cross-petition of the defendant Murdock.

The case was tried to the court, and a decision rendered in the case, finding generally for the plaintiffs, and that plaintiffs had a second lien on part of lot 15, in block 1, for the amount of their mortgage, and finding further that the defendant Murdock had a first lien on this same property, and also on lots 3 and 4, in block 9, in Hall's Addition, and ordering the entire property to be sold to satisfy the amounts found due on the first mortgage, the surplus derived from the sale of part of lot 15, block 1, to be applied on the second mortgage. The court also found that lots 3 and 4, in block 9, in Hall's Addition, constituted the homestead of the defendant, and therefore was not subject to the Mitchelson mortgage. An order of sale was issued on this decree on the thirty-first day of December, A. D. 1887, and placed in the sheriff's hands, who advertised the property for sale.

On the day of the sale, the plaintiffs served on the sheriff a request that he first offer for sale lots 3 and 4, in block 9, Hall's Addition to Blue Springs, being the property covered by the prior mortgage of Murdock, and upon which plaintiffs had no lien. This the sheriff refused to do, but sold the part of lot 15, in block 1, which was covered by both mortgages, and upon which the plaintiffs had the second lien for \$425, and in his return says: "The above-described real estate having been sold for enough to pay off the first judgment, interest, and costs in said order of sale, and the second judgment not being a lien on lots 3 and 4, in block 9, in Hall's Addition to said town of Blue

Springs, I did not sell said lots. The second lien returned wholly unsatisfied."

The plaintiffs filed a motion to modify the decree rendered in the foreclosure case to correspond with the fact and the judgment and decree actually rendered in the case. The motion was overruled and duly excepted to.

Plaintiffs also filed objections to the sale, which were overruled, and the sale confirmed by the court and deed ordered.

As the mortgage in question created no lien on the homestead, the case was not one in which it would have been proper to marshal the liens and require the first mortgagee, whose mortgage was not signed by both husband and wife, to exhaust the lien on the family homestead before resorting to part of lot 15, block 1, which was covered by both mortgages.

If lots 3 and 4, in block 9, in Hall's Addition, were not the family homestead, the plaintiff would be entitled to the relief sought, as the first mortgagee has two funds for the satisfaction of his mortgage, but one of which can be reached by a second mortgagee; but as those lots constitute the homestead, the court has no authority to impose a greater burden upon such lots than has been placed thereon by the parties themselves. If it could do so, it would be possible to divest the parties of their homestead altogether, by compelling them to pay debts, as burdens on the homestead, which were not liens thereon.

The homestead law is remedial in its character, and is to receive a liberal construction, to carry into effect its beneficent provisions. No burdens will be placed on the homestead, therefore, not created by the parties themselves, or by the law, as for taxes, nor will a mortgagee of real estate, a part of which constitutes the homestead, be permitted or required to resort to the homestead alone for the satisfaction of his lien, to the exclusion of the other real estate owned by the mortgagor, nor is the case one in which the securities can be marshaled.

The judgment is therefore right, and is affirmed.

HOMESTEAD — MARSHALING SECURITIES. — Marshaling securities will not be allowed where it would work an injustice. Where A held a mortgage on land, in part of which the mortgagor's widow claimed a homestead, and B held a mortgage on the other part, in an action of foreclosure on A's mortgage it was decreed that he should not be forced to sell first the part on which the homestead was claimed: *Marr v. Lewis*, 31 Ark. 203; 25 Am. Rep. 553; *Dickson v. Chorn*, 6 Iowa, 19; 71 Am. Dec. 382, and note. See *Hodges v. Hickey*, 67 Miss. 715; *Shell v. Young*, 32 S. C. 462, in which the question of marshal-

ing securities as to homesteads is discussed, and in which it is decided that the rule will not apply.

HOMESTEAD—CONSTRUCTION OF LAWS CONCERNING.—Homestead provisions are construed liberally, and in accordance with their equity and spirit: *Riggs v. Sterling*, 60 Mich. 643; 1 Am. St. Rep. 554; *Deere v. Chapman*, 25 Ill. 610; 79 Am. Dec. 338, and note; *Southwick v. Davis*, 78 Cal. 504; *White v. Fulghum*, 57 Tenn. 231; *Schuyler v. Broughton*, 76 Cal. 524.

PARKER v. COURTNEY.

[28 NEBRASKA, 605.]

REVERSAL OF DECREE QUIETING TITLE DOES NOT AFFECT BONA FIDE PURCHASER.—Where, after the entry of a decree quieting title to real estate in a party to the suit, he conveys it to a bona fide purchaser, no appeal bond having been filed, a subsequent reversal of such decree upon appeal will not affect the purchaser.

SUIT to quiet title. The opinion states the case.

C. M. Parker, and Lamb, Ricketts, and Wilson, for the appellant.

O. P. Mason and D. G. Courtney, for the appellee.

NORVAL, J. This is an appeal from a decree rendered by the district court of Lancaster County dismissing appellant's bill. The suit was brought to quiet the title in the plaintiff to lot 3, in block 10, Lavender's Addition to Lincoln.

The findings of the court establish the following facts: That in an action pending in the district court of Lancaster County, wherein Martha I. Courtney was plaintiff, and Casper B. Parker and Almira Parker, his wife, were defendants, a decree was rendered April 9, 1885, by said court, finding that the said Martha I. Courtney had a lien for the sum of \$76.85 on said lot 3, in block 10, in Lavender's Addition to Lincoln, and the defendants therein having paid said sum to the clerk of said court for the use of said Courtney, said lien was by said decree canceled, and the title to said premises was quieted in said Casper B. Parker. Courtney appealed from this decree to the supreme court, but did not file any *supercedas* bond. While said cause was pending in the supreme court, the Lancaster County Bank, for a valuable consideration, purchased said premises from the said Casper B. Parker and wife, and afterwards the plaintiff herein, Charles M. Parker, in good faith, for a valuable consideration, purchased said premises from the said bank, and that plaintiff is the

present owner of said premises. After the making of said conveyances, said cause was reversed by the supreme court, and is now pending in said district court.

The appellee contends that the decree should be affirmed, because the evidence taken in the case in the court below has not been preserved and brought before us. If the appellant was here contending that the findings of the trial court are not supported by the evidence, the position of appellee would be well taken, for the presumption is, that the findings are based upon sufficient evidence. Appellant does not claim that the findings are contrary to the evidence, but that the decree is contrary to the findings. In other words, that, under the findings, the decree of the lower court should have been for the appellant.

There is but one question for the determination in this case, and that is this: Did the reversal of the decree quieting the title in Casper B. Parker affect the plaintiff's title to said premises, he having purchased the lot for a valuable consideration and in good faith while the decree was in full force, there having been no *supersedeas* bond filed?

Section 677 of the code provides that "no appeal in any case in equity now pending and undetermined, or which shall hereafter be brought, shall operate as *supersedeas* unless the appellant or appellants shall within twenty days after the rendition of such judgment or decree, or the making of such final order, execute to the adverse party a bond with one or more sureties, as follows," etc. The provision of section 588 of the code in respect to *supersedeas* bond, where a reversal is sought by a proceeding in error, is quite similar to the one above quoted.

It is evident that where no *supersedeas* bond is filed, the decree remains in full force, and that when a third party purchases property at a judicial sale, or in reliance upon the decree then in force, his rights cannot be divested by a subsequent reversal of the decree.

The case of *Lessee of Taylor v. Boyd*, 3 Ohio, 353, 17 Am. Dec. 603, is so much like the one at bar that we quote the following from the opinion in that case: "But the most difficult and important point in this case is as to the effect the reversal is to have upon the rights of third persons, legitimately and innocently acquired. After the time limited in the decree itself had transpired, and the decree became an absolute title, the party thus invested with title, and in possession of th

land, sold and conveyed it to a third person, who stands before the court as an innocent purchaser for a valuable consideration without notice. Can his rights be divested by a reversal of the decree upon which his title was originally founded? We are of opinion that they cannot be so divested. When James Boyd conveyed to Abraham Boyd, he had a complete title, which it was competent for him to transmit by conveyance in the usual mode. In making this conveyance, he divested himself of title, and invested it in Abraham Boyd, the defendant, who reported himself upon the solemn and final decree of a court of competent jurisdiction, then in full force and of unquestionable validity."

The title to the property was quieted in Casper B. Parker by the decree of the court, he having sold the property for a valuable consideration, to a good-faith purchaser, no appeal bond being filed; there can be no doubt, upon principle, as well as the adjudicated cases, that such purchase is not affected by the subsequent reversal of the decree: *Voorhees v. United States Bank*, 10 Pet. 475; *Shultz v. Sanders*, 38 N. J. Eq. 154; *Jesup v. City Bank*, 15 Wis. *604; 82 Am. Dec. 703; *Feaster v. Fleming*, 56 Ill. 457; *Phillips v. Benson*, 85 Ala. 416.

We think the principle here involved has already been determined by this court adversely to the appellee Courtney, in the case of *McAusland v. Pundt*, 1 Neb. 211, 93 Am. Dec. 358. The following is the fourth paragraph of the *syllabus* in that case: "If a party who has recovered a judgment or decree becomes the purchaser of property thereunder, and conveys the same to a third party, and afterwards the judgment and decree, not having been superseded by bond, is reversed in the appellate court, such grantee will retain the property notwithstanding the reversal."

The lower court having held that the plaintiff herein was affected by the pendency of the appeal in the supreme court and the subsequent reversal of the case, it follows that the decree of the district court must be reversed, and a decree will be entered in this court quieting the title to said premises in the appellant.

JUDGMENT — SALE UNDER — EFFECT OF REVERSAL ON. — The title to land sold under a judgment to a third party is unaffected by its reversal; *Gould v. Sternburg*, 128 Ill. 510; 15 Am. St. Rep. 138, and note 144; *McAusland v. Pundt*, 1 Neb. 211; 93 Am. Dec. 358; *Marklin v. Allenberg*, 100 Mo. 338; *Stout v. Gully*, 13 Col. 604; *Withers v. Jacks*, 79 Cal. 297; 12 Am. St. Rep. 143.

KEMP v. WESTERN UNION TELEGRAPH COMPANY.

[28 NEBRASKA, 661.]

TELEGRAPH COMPANY LIABLE FOR MISTAKE IN TRANSMITTING MESSAGE. — A telegraph company is liable to the sender of a message for the damages sustained by him by reason of its failure to transmit the message correctly. And a statute which makes a telegraph company liable "for all mistakes in transmitting messages, made by any person in its employ," and declares that it "shall not be exempted from any such liability by reason of any clause, condition, or agreement contained in its printed blanks," is reasonable in its requirements, and binding upon all telegraph companies in the state.

TELEGRAPH MESSAGE TRANSMITTED OUT OF STATE, LIABILITY FOR MISTAKE IN TRANSMISSION. — A telegraph company which undertakes to correctly transmit a message to another state is liable for a breach of its contract, and the sender of the message may recover all the damages he sustains by reason of such breach.

ACTION for breach of contract. The opinion states the case.

William V. Allen and John S. Robinson, for the plaintiff in error.

H. C. Brome, contra.

MAXWELL, J. This action was brought by the plaintiff against the defendant, in the district court of Madison County, to recover damages for the breach of an alleged contract.

It is averred in the petition "that on the first day of November, 1886, the said defendant owned, controlled, and operated a line of telegraph wire from Papillion, in the state of Nebraska, to Kansas City, in the state of Missouri, with offices in each of said places in charge of duly authorized agents, at which offices it held itself out to the public to receive and deliver telegraphic messages for hire, and on said date the plaintiff delivered to the defendant, at its office in said Papillion, for immediate transmission and delivery at Kansas City, Missouri, a message in the words and figures as follows, to wit:—

"Nov. 1, 1886.

"To J. C. ROBERTSON, Coates House, Kansas City.

"Am on my way, Missouri Pacific, Kansas City; arrive eight to-night.
D. KEMP."

"Which the said defendant then received from the plaintiff, and agreed to promptly and correctly transmit and deliver to the said J. Robertson, at the Coates House, Kansas City, Missouri, without delay; that the plaintiff then paid the defendant's duly authorized agent the sum of sixty-five cents for such services, which was accepted by him as full compensation

therefor; that at the said time this plaintiff had an engagement to meet said J. C. Robertson, the person to whom said message was sent, at the Coates House, Kansas City, Missouri, at the hour of eight o'clock, P. M., on said day, to contract with him as general agent of the Texas Land and Cattle Company, to enter the service of said company on a salary; that if plaintiff made said contract of employment, he was compelled to leave said Kansas City that evening, at nine o'clock, P. M., to enter upon the discharge of his duties as employee of said company, and if he did not reach said Kansas City by eight o'clock, P. M., said Robertson was at liberty to hire another man for said situation; that said defendant so carelessly and negligently transmitted said message, that when it was delivered to said J. C. Robertson, at said Coates House, Kansas City, Missouri, by the defendant, it read, that the plaintiff would reach Kansas City at ten o'clock that night, making plaintiff's arrival there too late to transact said business; that said message was delivered in the condition last above stated, and in consequence of its reading that plaintiff would arrive at Kansas City, Missouri, at ten o'clock that night, that said J. C. Robertson employed another man for said Texas Land and Cattle Company, and the plaintiff was deprived of said employment, and the profit of said proposed contract; that the plaintiff was entirely without fault or neglect himself; that the plaintiff expended in money in going to and returning from said Kansas City to see said Robertson the sum of fifty dollars, lost six days' time, of the value of thirty dollars, and was deprived and prevented from making said contract of employment, all to his damage in the sum of two hundred dollars, which said sum is now due the plaintiff from the defendant, and wholly unpaid, and plaintiff prays judgment against the said defendant for the sum of two hundred dollars, with interest and costs of suit."

To this petition the defendant answered, in effect, that there was a condition printed on the blanks furnished by it on which to send messages, which provided that the company should not be liable for "mistakes or delays in the transmission of any unrepeatd message whatever, happening from the negligence of its servants or otherwise, beyond the amount received for the sending of the same," etc., and fixing the liability "for mistakes or delays in the transmission or delivery, or for non-delivery, of any repeated message beyond fifty times the sum received for the transmission of the same, unless specially

insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages," etc. Also that the company will not be liable for damages in any case where the claim is not presented in writing within sixty days after the sending "of the message."

On the trial of the cause the court instructed the jury "that, under the law and the agreed statement of the facts herein, the plaintiff cannot recover beyond the amount paid for sending said message, which it is agreed is the sum of sixty-five cents." The jury returned a verdict as directed, and a motion for a new trial having been overruled, judgment was entered on the verdict.

The testimony tends to sustain the allegations of the petition.

The point in the answer as to the limitation of time in which to bring the action is not referred to in the brief of either attorney, and therefore will not be noticed.

Section 12 of chapter 89 a of the Compiled Statutes provides that "any telegraph company engaged in the transmission of telegraphic dispatches is hereby declared to be liable for the non-delivery of dispatches intrusted to its care, and for all mistakes in transmitting messages, made by any person in its employ, and for all damages resulting from a failure to perform any other duty required by law, and any such telegraph company shall not be exempted from any such liability by reason of any clause, condition, or agreement contained in its printed blanks."

The defendant is a corporation existing in this state, and having offices at various points therein for the transaction of business, and that business is the transmission, for hire, of messages from points within the state to points on its line within or without the state. It is a common carrier of messages, the agent for the transmission of which is electricity. The agent used in the transmission, however, is not material. Suppose the defendant undertook to carry in wagons or other vehicles messages or packages, and under such employment for the plaintiff at Papillion it received the message in question to be delivered at Kansas City, and if it failed to deliver the same it would thereby fail to perform its agreement, and would be liable for any damages which the party sending the message might thereby sustain. Why should not the same rule apply where the message is sent by electricity?

The value of a message depends upon its correctness. If it is changed in any material part, it is not the same message as that delivered for transmission, and may materially affect the rights of both the person sending it and the person receiving it. Experience has shown that messages can be correctly transmitted from point to point, both within and without the state, and where due care is used mistakes can be avoided. The rule seems to be, that messages are correctly transmitted.

The legislature of this state, recognizing these facts, in 1883 passed an act in regard to the telegraph companies within the state, the twelfth section of which makes the company liable for the non-delivery of dispatches delivered to its care, "and for all mistakes in transmitting messages, made by any person in its employ," etc., and declares that it "shall not be exempted from any such liability by reason of any clause, condition, or agreement contained in its printed blanks." This is a reasonable requirement, and as the telegraph company is bound by the law of the state as much so as any inhabitant thereof, the statute in question becomes a part of the contract; that is, the telegraph company cannot ignore the law and set itself up as superior to it, but must obey it, and transmit messages correctly, or be liable for its failure in that respect. This is conceded as to business in the state, but it is claimed that it does not apply to messages transmitted out of the state.

The contract was made at Papillion, within this state, and there the defendant undertook to transmit correctly the message to Kansas City. It did not do so. The contract of the defendant, therefore, was broken, and the plaintiff thereby sustained damages. The place where part of the service was to be performed can make no difference; the contract was made here, and was to be in part performed in this state, and the defendant is liable for the breach thereof.

We are referred to the case of *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, as establishing a different rule. In that case, the statute of Indiana provided for a penalty of one hundred dollars in certain cases of failure of a telegraph company to perform its duty. A message was transmitted from Indiana to a point in Iowa, and the company there failed to deliver the same. The action was brought to recover the penalty, and the United States supreme court held that it could not be enforced; in other words, that the penal laws of a state do not extend beyond its boundaries, and therefore on the failure of

the company to perform its duty in Iowa it did not become liable to the penal laws of Indiana.

The above decision, no doubt, is correct, but it can have no application here. In the case at bar, the contract entered into by the defendant to transmit the plaintiff's message correctly, and for which it had received its pay, was broken. He has thereby sustained damages. These damages are the natural result of the breach of the contract, and are not penal in their nature. If recovered, they are merely to compensate the plaintiff for the injury sustained by him from the wrongful act of the defendant. Such damages may be recovered.

The precise question here involved was recently before the United States circuit court of this state in *Oppenheimer v. Western Union Tel. Co.*, and Judge Dundy held that the company was liable, and we so hold.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

TELEGRAPH COMPANY — LIABILITY FOR MISTAKE IN TRANSMITTING MESSAGES. — Where a message reasonably discloses the fact of its importance, the company will be liable for all direct damages resulting from a negligent failure to transmit it as written: *Postal Tel. Cable Co. v. Lathrop*, 131 Ill. 575; 19 Am. St. Rep. 55, and note; *Western U. Tel. Co. v. Stevenson*, 128 Pa. St. 442; 15 Am. St. Rep. 687, and note; *Western U. Tel. Co. v. Blanchard*, 68 Ga. 299; 45 Am. Rep. 480, and extended note 486-500. A telegraph company cannot stipulate for immunity from liability for negligence in transmitting unrepeatable messages. They will be liable for all damages occurring through such negligence: *Western U. Tel. Co. v. Short*, 53 Ark. 434; *Cutts v. Western U. Tel. Co.*, 71 Wis. 46; *Thompson v. Western U. Tel. Co.*, 101 N. C. 450; *Western U. Tel. Co. v. Way*, 83 Ala. 542.

KENDALL v. ALESHIRE.

[28 NEBRASKA, 707.]

SHERIFF'S OFFICIAL BOND, SURETIES ON, LIABLE FOR WHAT ACTS OF THEIR PRINCIPAL. — Where the sheriff of a county in the state of Nebraska, having in his hands a warrant issued by a justice of the peace of that county for the arrest of a resident of the state of Kansas on a criminal charge, proceeds to the latter state, and there, by fraud, induces him to submit to arrest, and then, without obtaining from the governor of Kansas any warrant of extradition, brings his prisoner into the state of Nebraska, and wrongfully and unlawfully keeps him in prison there, by virtue of his office and the warrant held by him, the sureties on his official bond will be liable in damages for so much of the imprisonment as took place within the state of Nebraska, although his acts in Kansas

were without either the virtue of office or the color of office, for which he alone, if he had never brought his prisoner to Nebraska, would have been liable.

ACTION on an official bond. The opinion states the case.

G. R. Chaney, G. W. Stubbs, and C. F. McGrew, for the plaintiffs in error.

S. A. Searle, contra.

COBB, C. J. This action was brought in the district court of Nuckolls County, by Eli Aleshire, plaintiff, against Thomas A. Meeker, V. H. Kendall, L. W. Beale, A. C. McCorkle, L. B. Adams, and D. B. Ayres, defendants.

The petition alleges the election of said Thomas A. Meeker to the office of sheriff of Nuckolls County, for the term of two years from the Thursday after the first Tuesday in January, 1886; that he gave a bond as such sheriff, with the other defendants as his sureties; took the oath of office, and entered upon the discharge of his duties as such sheriff; that on the twelfth day of October, 1886, while the said Meeker was acting as such sheriff, under and by virtue of said election and qualification, he filed a complaint in writing before one A. Sterns, a justice of the peace in and for Nuckolls County, charging the plaintiff with having, on the night of October 2, 1886, feloniously and unlawfully stolen, taken, and driven away a number of neat cattle, of the aggregate value of \$142 (here follows a copy of the complaint); that at the time of making said complaint, said Meeker well knew that said Aleshire had not stolen, taken, and driven away said animals, as charged in said complaint, and that said Meeker had no reason to believe, nor did he honestly believe, that said Aleshire was guilty of said offense; that in making said complaint said Meeker acted officially as sheriff of said county, and did so fraudulently, and with a design to harass and oppress the said Aleshire; that upon the filing of such complaint the said justice of the peace with whom the same was filed issued a warrant in due form, directed to the sheriff, Thomas A. Meeker, to pursue and arrest the said Eli Aleshire, if found in the state of Nebraska, and bring him before the said justice, or some other justice of said county (here follows a copy of warrant, together with the return thereon, signed by T. A. Meeker, sheriff; that said writ was received October 12, 1886, and that on the fifteenth day of October, 1886, he served the same on the said Eli Aleshire, by taking him into custody, and then had his

body before this said justice, dated October 16, 1886); that the plaintiff, on the date of said complaint and warrant, was, and for a long time prior thereto had been, a resident of Rawlins County, in the state of Kansas, which fact was well known to said Meeker at the time he made the said complaint and received the said warrant; that in the execution of the said warrant the said Meeker, acting in his official capacity as such sheriff, pursued said plaintiff, Aleshire, out of the state of Nebraska, and into Rawlins County, Kansas, intending thereby, under color of his office of sheriff, and acting by virtue thereof, to harass and oppress the plaintiff; did pretend to arrest, and did arrest, the plaintiff in Rawlins County, Kansas, and illegally and unlawfully, and without authority of law for so doing, did convey the said plaintiff out of the state of Kansas and into Nuckolls County, Nebraska, where the said Meeker unlawfully and unjustly detained the said plaintiff for the space of ten days, and which detention, had and made as aforesaid, was under color of his said office, and by virtue thereof; and that the said Meeker did, on the fifteenth day of October, 1886, without lawful authority, forcibly seize and confine the said Aleshire in the county of Rawlins, in the state of Kansas, with the intent him, the said Aleshire, to take out of the state of Kansas against his will; and the said Meeker did then and there, while so acting in his official capacity as sheriff of Nuckolls County, pretend to said Aleshire that he had authority, by virtue of the warrant issued by a justice of the peace of Nuckolls County, to seize and confine him, the said plaintiff, and take him out of the state of Kansas into the state of Nebraska, and did so confine him, the said Aleshire, and take him fraudulently from the state of Kansas, intending to unlawfully and unjustly harass and oppress him, the said Aleshire; that the said complaint, made by the said Meeker against the plaintiff, was fraudulently and maliciously made, and without reasonable and probable cause, and the plaintiff was by the said Meeker falsely and maliciously charged with the larceny of said cattle, when there existed no reasonable and probable cause therefor; and that the said Meeker, under color of his said office and by virtue thereof, on the warrant issued and directed to and received by him as aforesaid, did, on the fifteenth day of October, 1886, in Rawlins County, Kansas, seize and confine him, the said Aleshire, and convey him to Nuckolls County, Nebraska, and before the justice of the peace who issued the said warrant; whereupon, on

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the motion of the said Meeker, the hearing was postponed until the eighteenth day of said month, when, on the further motion of said Meeker, the hearing was again postponed until the nineteenth day of said month, on which day the said Meeker failed to produce for and in support of his said complaint any testimony; whereupon the court dismissed the cause, and discharged the defendant therein, the said Aleshire, and the said prosecution was then fully ended; that all the time, from the fifteenth day of October, to the nineteenth day of said month, the said Meeker, without lawful authority, but while acting in his official capacity, and by virtue of his said office, did unjustly and unlawfully, and without probable cause, confine said Aleshire in the jail of said Nuckolls County, and so did not perform the duties of his said office, as required by law, but has therein wholly failed, and that, by reason of which said several premises, the plaintiff has been greatly injured in his credit and reputation, and brought into public scandal, infamy, and disgrace, and has suffered great anxiety of body and mind, and has been forced to pay out and expend large sums of money, to wit, the sum of fifty dollars, in prosecuting his discharge from said imprisonment and in defending himself, and has been prevented, by reason of the premises, from transacting any business for the space of fifteen days, to the damage of the plaintiff in the sum of five hundred dollars, etc., with demand for judgment. A summons issued against all of the defendants, and was returned served upon all except Meeker and Ayres, who were not found. Defendants Adams, Beal, Kendall, and McCorkle answered jointly in form, but in substance separately, each for himself and not for the others, admitting the election and qualification of defendant Meeker as sheriff of Nuckolls County, the execution of the bond set out in the petition, by the said Meeker as principal, and the answering defendants and one D. B. Ayres as sureties for said Meeker, on said bond; that if the said Meeker made the arrest charged in the petition in the state of Kansas, he did so without having first procured a requisition upon the governor of the state of Kansas for the delivery and return of said plaintiff to the state of Nebraska to answer criminal charge, and they and each of them denied each and every other allegation contained in said petition, with demand for judgment.

There was a trial to a jury, with verdict and judgment for the plaintiff in the sum of two thousand five hundred dollars.

The defendants bring the cause to this court by petition in error, and assignment of twenty-two errors. So many of which as are argued by counsel in the briefs and are deemed necessary will be considered.

The first error presented and argued in the brief of counsel is, "that the trial court erred in overruling the objection of defendants to the admission of any evidence upon the trial against the answering defendants." This objection was rightly overruled. The petition does contain a cause of action against the answering defendants. Meeker, as sheriff of the county, had a warrant in his possession, directed to him, issued by a justice of the peace of the county, for the arrest of the plaintiff upon a criminal charge; this warrant was, for aught that appears, fair on its face. It was the duty of the sheriff to arrest said Aleshire, defendant in said warrant, if found within this state; it was not his duty, nor had he the power, to arrest him out of the state. When he entered the state of Kansas, his acts were those of an individual without either the virtue of office or the color of office, and yet there is a sense in which his acts, in the state of Kansas, are binding upon his sureties as sheriff. If while in that state he used either force or fraud upon Aleshire, by which he brought him across the dividing line into this state, and there held him in custody, as charged in the petition, so much of that act as was committed in this state was done *virtute officii*; and if wrongful, and to the prejudice of the plaintiff, the defendants are liable to him. We have stated above that had the sheriff found Aleshire in this state, it would have been his duty to arrest him upon the warrant. But if he brought him within the limits of the state, by force or fraud, although he was in fact in this state, he was not found within it, within the meaning of the law or the language of the warrant; and his detention under these circumstances, while done *virtute officii*, was wrongful and actionable, and within the contemplation of his official bond. The illegality of Aleshire's detention and imprisonment in Nuckolls County springs out of, and is based upon, the force or fraud, or both, by which he was brought from Kansas to this state; and it is in this sense that the acts of Meeker are binding upon the sureties on his official bond in Nuckolls County. Had he assaulted, imprisoned, or otherwise wronged Aleshire in Kansas, but never brought him to this state, he alone would have been liable.

The above views, I think, substantially dispose of the case.

If they are correct, it follows that there was a vast amount of irrelevant testimony permitted to go to the jury, over the objections of the defendants, which testimony was highly prejudicial to the defendants. Of this character is all that part of plaintiff's testimony in relation to the condition in which he left his family at their home in Kansas, the amount of stock they had to care for, the plans he had made for providing for his family, his stock, and other property at the time of his arrest; the size and number of his family at the time of his arrest, and their age and condition; also, that in relation to where plaintiff went after he was discharged from custody, how long he staid there, and for what purpose; his necessary expenses for board and travel after he was discharged, the work he resumed after his return to Kansas, and the business he was engaged in at the time of his arrest; that the fact of his arrest became noised about in the neighborhood where he lived; that he lives in the same neighborhood yet; and the fact that his arrest became known to his friends in other states. None of this testimony was admissible as against the answering defendants, even if it would have been as against Meeker, which is doubtful; it was all admitted over defendant's objections, and must be presumed to have contributed largely to swell the verdict.

The testimony of the plaintiff is clear that he was arrested by Meeker in Kansas, under the pretense that he had taken a requisition to the governor of Kansas, upon which a warrant had been issued for the arrest and extradition of Aleshire as a fugitive from justice. And it is admitted in the answer that there was no such requisition. It therefore follows that Meeker, by fraud, induced Aleshire to submit to arrest by him in Kansas, and by this means got him into this state, where he held him in prison by virtue of his office and the warrant which he held, yet, nevertheless, wrongfully and unlawfully, by reason of the wrongful and fraudulent means resorted to to bring him within the reach of the office and warrant of Meeker.

As above stated, so much of the imprisonment of the plaintiff as took place within this state was, for the reasons above stated, in violation of the official bond of Meeker as sheriff, being wrongful, yet done by virtue of his office, and for the damages directly resulting therefrom the answering defendants are liable.

The judgment of the district court is reversed, and the cause remanded for further proceedings, unless the defendant shall,

within sixty days from this date, make and file in this court a *remittitur* in said cause in the sum of two thousand dollars, of the date of the judgment in the district court; but that in case such *remittitur* is made and filed within the time limited, said judgment is affirmed.

SHERIFFS — RIGHT TO CAPTURE PRISONER IN ANOTHER STATE. — The sheriff of a neighboring state has not the right to pursue and recapture in this state a prisoner held on civil process who has escaped from his custody: *Bromley v. Hutchins*, 2 Vt. 136; 30 Am. Dec. 465. For an extended discussion of the liability of a sheriff on a sheriff's bond, see note to *Commonwealth v. Cole*, 44 Am. Dec. 509-517.

SMITH v. BOYER.

[29 NEBRASKA, 75.]

FRAUDULENT CONVEYANCES — ATTACHMENT. — A creditor may obtain from his failing debtor ample security for his debt, without being chargeable with a fraudulent intent to hinder and delay other creditors; but if he takes and ties up property of the debtor greatly in excess of security for his debt, he is chargeable with such fraudulent intent, and the property in his hands is subject to attachment by the other creditors.

FRAUDULENT CONVEYANCES — EVIDENCE OF SUBSEQUENT ACTS AND DECLARATIONS OF VENDOR. — An exception to the general rule, that the declarations of a party made after he has parted with his interest in the subject-matter of litigation cannot be received to disparage the right of title of an innocent purchaser, exists in cases of fraudulent sales of property to defeat creditors. In these cases the acts and declarations of the debtor while claiming an interest in the property which he asserts he has conveyed are admissible in evidence to prove fraudulent intent.

R. M. Snavely and E. M. Bartlett, for the plaintiffs in error.

G. M. Lamberton, Rittenhouse and Starr, and H. W. Keyes, for the defendants in error.

MAXWELL, J. On the 24th of September, 1887, the defendants executed and delivered to the First National Bank of Indianola and L. J. Holland a chattel mortgage upon "all their general stock of merchandise, consisting of dry-goods, groceries, boots and shoes, hats and caps, crockery, clothing, notions, jewelry, safe and show-cases, fixtures, and all their other goods and merchandise contained in the brick building, storehouses, and basement situate on lot 6, block 33, in the town of Indianola, Nebraska; also, our books and book-accounts held and owing to us, the said firm of Boyer and Davidson, on account of their business in said store above named,"—to secure the payment of \$5,336.46, of which sum, \$2,000 is alleged to have been due the bank, and the remainder to Holland.

The exact value of the property mortgaged does not appear, but there is testimony that the goods were of the value of about twelve thousand dollars, while the amount due on the accounts is not shown. On the twenty-sixth day of September, 1887, the plaintiffs commenced an action by attachment against the defendants, the grounds therefor, as stated in the affidavit for an attachment, being "that the defendants have sold, assigned, and disposed of their property with the fraudulent intent to cheat and defraud their creditors, and hinder and delay them in the collection of their debts, and are about to sell, assign, and dispose of their property with the fraudulent intent to cheat and defraud their creditors, and hinder and delay them in the collection of their debts, and that they are about to convert their property into money for the purpose of placing it beyond the reach of their creditors, and are about to sell, assign, and dispose of a part of their property with intent to defraud their creditors, and have sold, assigned, and disposed of a part of their property with the intent to defraud their creditors." Upon this affidavit being filed, and a like affidavit for garnishment and an order of the court obtained, part of the debt not then being due, a writ of attachment was issued and delivered to the sheriff at eight o'clock, P. M., of said day, and returned, "Not being able to come at the property of Boyer and Davidson, or James I. Boyer or Charles B. Davidson, members of said firm, claimed to be in the possession of L. J. Holland, J. W. Dolan, the First National Bank," etc., "notice was served upon the persons garnished, naming them, and requiring them to appear and answer," etc.

The defendants filed a motion, supported by affidavits, to dissolve the attachment upon substantially two grounds, viz., irregularity in procuring the same, and because the grounds upon which the attachment was granted were untrue. Affidavits in opposition to and in support of the attachment were thereupon filed, and on the final hearing the attachment was discharged and the garnishees released. The dissolution of the attachment is now assigned for error.

It seems to be conceded by the attorneys for the plaintiff that the claim of the National Bank is *bona fide*, and probably that of Holland. The chattel mortgage seems to have been procured through the instrumentality of the latter.

A debtor in failing circumstances may pay one or more of his creditors, provided he deliver him no more than sufficient to pay the debt.

In *Elwood v. May*, 24 Neb. 375, it is said: "A creditor may obtain from a failing debtor payment in full of his claim, and he will not be chargeable upon that ground alone of seeking to defraud other creditors. Neither will the fact that the claim is paid in goods of no greater value than the amount of the claim, of itself, establish the fraudulent character of the transaction. So far as the testimony discloses, the defendants in error were paid in goods of value not exceeding the amount of their claims against Cramer." To the same effect, *Rothell v. Grimes*, 22 Neb. 526; *Leffel v. Schermerhorn*, 13 Neb. 342; *Shelly v. Heater*, 17 Neb. 505.

The case of *Grimes v. Farrington*, 19 Neb. 49, is not in conflict with these decisions, the exact value of the goods mortgaged not being shown. The highest estimate in that case was about fourteen thousand dollars, while the debts secured exceeded nine thousand dollars. It did not appear that the property would sell for more than the amount of the debts.

While a *bona fide* creditor has a right to secure his claim, yet he has no right to tie up all the property of his debtor, where all of such property greatly exceeds in value the amount of the debt secured; in other words, while he may take adequate security for his own claim, he cannot hinder and delay, if not defraud, other creditors in the collection of their claims by placing the debtor's property beyond their reach. If he do so, he violates the law prohibiting fraudulent conveyances. The fact that he is a creditor does not give him a license to tie up property of the debtor not necessary for his own security, and prevent its application to the payment of other debts owing by the debtor, and if the debtor assigns him all his property to secure a grossly inadequate debt, other creditors have good cause to complain that the transfer is fraudulent as to them.

In the case at bar the defendants had conveyed all their property to the mortgagees. Such property is shown to have been greatly in excess of adequate security for the debts, and *prima facie* was sufficient to justify an attachment upon the grounds specified in the affidavit therefor.

Fraud can rarely be proved by direct evidence, and in most cases necessarily must be shown by facts and circumstances, and among those which may be proved against himself are the declarations and acts of the debtor while claiming an interest in the property which he asserts he has conveyed.

Thus in *Campbell v. Holland*, 22 Neb. 596, the court, by

Cobb, J., quoting from *Carney v. Carney*, 7 Baxt. 284, say: "As a general rule, the declarations of a party made after he has parted with his interest in the subject-matter of litigation cannot be received to disparage the title or right of a party acquired in good faith previous to the time of making such declarations. But this very just and reasonable principle must be taken as inapplicable to cases of fraudulent sales of property. If, for example, a conveyance is made absolute on its face, and the vendor continues to retain possession of the property as before, this being *prima facie* evidence of fraud, a creditor, impeaching such conveyance on the ground of fraud, may be admitted to prove the declarations of the vendor, thus retaining the possession in relation to the ownership or the character of his possession of the property.'"

A number of statements made by Boyer, and acts done by him shortly after the attachment was levied, and while he still claimed an interest in the property that tends to support the charge that the transfer was made to defeat certain of his creditors, is shown by the record, while the sheriff in an affidavit states "that on the nineteenth day of October, 1887, I had subpoenas put into my hands by J. H. Berge, of Indianola, a notary public in the above-entitled cases, and also in behalf of Nave and McCord, in their claim against Boyer and Davidson, to subpoena said James I. Boyer in all of said cases, and Charles P. Davidson and Matilda Davidson and others in said above-entitled cases, to appear before said notary public and give their depositions in said cases respectively on the twenty-first and twenty-second days of October, 1887, as shown by my returns on said subpoenas, and that said subpoenas were received on the 19th of October, 1887; that about the time said subpoenas were received, said James I. Boyer was here in town, but I made diligent search for him, and could not find him anywhere. His wife had already gone away. I went to his house on the 19th, and on the 20th, and on the 21st of October, 1887, and knocked at the door, and it was locked. After some talking of some persons in the house, and after some little time, L. J. Holland came to the door, and on being asked where Boyer was, said he was not there, and did not know where he was; and that L. J. Holland was the only one to be seen in the house, although affiant did not search the house. I searched diligently in the county and in this town for said James I. Boyer, but could not find him. I learned that he had been seen riding his trotting-horse across

into Kansas since I received said subpoenas. I have good reasons to believe, and do believe, that the said James I. Boyer knew that said subpoenas were in my hands before he left, and that he secreted himself and hid away from me and absconded into the state of Kansas to avoid the service of said subpoenas, and to avoid giving his testimony in the above-entitled and above-mentioned cases. That said Matilda Davidson left on the train on the very same day that said subpoenas were placed in my hands to take her depositions, and, as I am informed, went to Denver. The said James I. Boyer said to me, about the time I was serving the execution on said oats, heretofore mentioned, that I would not get his horse, referring to the trotting-horse which I had had orders to serve execution against; that I thought I was pretty sharp, but I would not get the horse; he knew where it was, but I would not get it, and he would not tell me where it was. I was told that some one was seen driving that horse that evening out west of town. Went out to Steve Lyons's place, but not finding the horse there, came back. I met said James I. Boyer in the road about a mile out of town, and he skulked off in the weeds to keep me from knowing who he was. I searched diligently for the horse, but could not find him. I verily believe, and have good reasons to believe, that he was hiding away, secreting, and concealing said horse to prevent me from serving the execution against it, and to prevent his creditors from appropriating it to the payment of their demands, and that he has removed said animal out of this state with intent to keep me from serving said execution at that time in my hands."

These statements are not denied by Boyer.

In the affidavit of the defendants for the dissolution of the attachment, they swear to the honesty of their intentions. This statement would have had much greater weight if they had come into court and made a full and detailed statement of their business, and the assets still in their hands, if any. Had they done so, perhaps it would have been unnecessary to swear to a mere conclusion, and the latter is entitled to but little weight.

The evidence fully sustains the grounds for the attachment, and the court erred in discharging it. The judgment of the district court is reversed, the attachment reinstated, and the cause remanded for further proceedings.

FRAUDULENT CONVEYANCES — CONVEYANCE TO ONE CREDITOR OF PROPERTY LAZARUS IN EXCESS OF HIS DEBT. — A conveyance by a debtor in sac-

infaction of a debt will be overreached in favor of other creditors, where the value of the property conveyed greatly exceeds the amount of the debt which it was conveyed to satisfy: *Bailey v. Kennedy*, 2 Del. Ch. 12; 29 Am. Dec. 351. Conveyances which bear such ratio to the indebtedness of the grantor as tend to defeat creditors' claims are fraudulent as to them, unless founded upon an adequate consideration: *Clark v. Depew*, 25 Pa. St. 509; 64 Am. Dec. 717, and note. Where the consideration in a deed is grossly disproportionate to the value of the property conveyed by an insolvent debtor, it will be set aside as fraudulent: *Newman v. Kirk*, 45 N. J. Eq. 677.

IN RE ROBINSON.

[20 NEBRASKA, 185.]

HABEAS CORPUS—ARREST WITHOUT EXTRADITION. — Where a person is arrested in one state without warrant, requisition, extradition, or other legal process, and by force, fraud, deceit, or other means taken into another state to answer to a criminal charge, the latter state acquires no jurisdiction over him, and he is entitled to his discharge on *habeas corpus*.

W. K. Brown, J. R. Webster, and McClure and Anderson, for the petitioner.

A. Y. Wright, for the respondent.

NORVAL, J. A petition was filed in this court on the sixth day of February, 1890, on behalf of Bertie Robinson for a writ of *habeas corpus*. It appears from the petition and evidence that a complaint in writing was made before the county judge of Furnas County on September 10, 1889, charging the petitioner with stealing a horse, the property of one Ira B. Huff, and that on the twenty-fourth day of the same month one E. M. Matson filed a complaint before a justice of the peace of Sherman County, Kansas, charging the petitioner with stealing, in said Furnas County, the aforesaid horse. The said justice issued a warrant for the arrest of the petitioner, who was afterwards arrested and taken before said justice of the peace. On motion of the county attorney, the prosecution was dismissed. Robinson was, by order of the justice, delivered to the custody of said Matson, a constable of Red Willow County, Nebraska, who forcibly, and against the will and consent of Robinson, and without any warrant, requisition, or other legal process, conveyed said Robinson out of the state of Kansas into the state of Nebraska, where he delivered said Robinson up to the sheriff of Furnas County for prosecution for said crime. The petitioner was taken before the county judge of said Furnas County, who held the petitioner to the

district court of said county to answer said charge, and in default of bail said petitioner was committed to the jail of said county, where he has ever since been deprived of his liberty by the respondent, as sheriff of said county. On the ninth day of December, 1889, an information was filed in said district court charging said Robinson with the crime of horse-stealing. On the following day, on being arraigned in said court, he pleaded not guilty to said charge, and on the same day he prayed said district court to discharge him from custody, because he was arrested in the state of Kansas, and was brought forcibly and without any requisition into this state and delivered to the sheriff of said county to answer said accusation. The motion was overruled, and the exception was entered. On the eleventh day of December, Robinson was tried for said crime in said district court, and the jury failing to agree upon a verdict, it was discharged, and Robinson was remanded to the custody of the respondent to await further trial.

But a single question is presented for our consideration, and that is, whether or not, under the foregoing facts, the district court of Furnas County had jurisdiction of the person of the petitioner in the criminal case pending therein against him. We think the answer should be in the negative. There can be no doubt that jurisdiction cannot be acquired in a civil case when the summons is served upon a defendant who was brought into the jurisdiction of the court by force, fraud, or deceit for the purpose of obtaining service of summons upon him: *Wanser v. Bright*, 52 Ill. 35; *Williams v. Reed*, 29 N. J. L. 385; *Dunlap v. Cody*, 31 Iowa, 260; 7 Am. Rep. 129; *Van Horn v. Great Western Mfg. Co.*, 37 Kan. 523; *Townsend v. Smith*, 47 Wis. 623; 32 Am. Rep. 793; *Allen v. Miller*, 11 Ohio St. 374; *Compton v. Wilder*, 40 Ohio St. 130.

The same rule obtains in criminal prosecutions. Nearly the entire current of authority in this country is to the effect that when a fugitive from justice has been extradited from one state to another, he cannot be prosecuted in the state to which he has been surrendered on an offense other than the one for which he was extradited, before he has had an opportunity to return to the state from whence he was brought: *In re Cannon*, 47 Mich. 481; *State v. Vanderpool*, 39 Ohio St. 273; 48 Am. Rep. 431; *Ex parte Hibbs*, 26 Fed. Rep. 421; *United States v. Rauscher*, 119 U. S. 407; *State v. Hall*, 40 Kan. 338; 10 Am. St. Rep. 200; *Waterman v. State*, 116 Ind. 51.

In principle, there is no difference between the case at bar and where a person is held for an offense other than the one he was extradited for. In either case it is an abuse of judicial process, which the law does not allow. Ample provisions are made for the arrest and return of a person accused of crime, who has fled to a sister state, by extradition warrants issued by the executives of the states. There is no excuse for a citizen or officer arresting, without authority of law, a fugitive, and taking him forcibly and against his will into the jurisdiction of the state for the purpose of prosecution. We cannot sanction the method adopted to bring the petitioner into the jurisdiction of this state. He did not come into the state voluntarily, but because he could not avoid it. The district court, therefore, did not acquire jurisdiction of the person of the petitioner, and his detention is unlawful: *State v. Simmons*, 39 Kan. 263; *State v. Hall*, 40 Kan. 338; 10 Am. St. Rep. 200; *In re Cannon*, 47 Mich. 481.

While many authorities hold to the contrary doctrine, we prefer to adopt the rule that seems to be based upon reason, and which recognizes honesty and fair dealing.

The petitioner will be discharged.

HABEAS CORPUS—ARREST OF PRISONER WITHOUT EXTRADITION.—The fact that a prisoner, being a fugitive from justice, was kidnaped in another state, and brought into the state from which he fled, is no ground for his release. A demand for his release must be made by the executive authority of such foreign state: *Ex parte Barker*, 37 Ala. 4; 13 Am. St. Rep. 17, and note.

A convicted felon who flees to another state, and is pursued and brought back, though in an illegal manner, is liable to punishment for his previous acts in the state from which he fled: *State v. Smith*, 1 Bail. 263; 19 Am. Dec. 679.

In a criminal case in which the court has acquired jurisdiction of the defendant only by means of illegal arrest in another state, it has no such jurisdiction as will properly permit it to render judgment against him: *State v. Simmons*, 39 Kan. 262.

CARTER v. GIBSON.

[20 NEBRASKA, 324.]

JUDICIAL SALES — AGREEMENT TO HOLD IN TRUST FOR THE DEBTOR. —

Where the owner of real estate charged with judgment and mortgage liens agrees in writing with his judgment creditor, that the latter shall purchase the lands at a judicial sale soon to be had to satisfy such liens, and shall take and hold the title for their payment, and that when they are satisfied the balance of the real estate or the proceeds thereof shall be reconveyed to the judgment debtor, the contract is based upon a sufficient consideration, and such judgment creditor purchasing at the proposed judicial sale takes the land charged with a trust, and holds it as trustee for his judgment debtor according to the terms of such contract.

CONTRACTS — PRIVILEGE OF PURCHASE AT JUDICIAL SALE AS CONSIDERATION. —

A contract between a debtor and his judgment creditor, promising an advantage to such debtor in case his creditor is permitted to purchase the property at a judicial sale, then about to take place, and which is calculated to relax the vigilance of the debtor and his friends at such judicial sale and prevent competition, will be enforced if creditors are not affected thereby, and the plea of want of consideration will not be entertained.

TRUSTS — DISCHARGE OF TRUSTEE, AND LIABILITY TO ACCOUNT. — When a trustee has entered upon the execution of the trust, he cannot afterwards free himself of its discharge by a denial of its existence, and without the consent of the cestui que trust, unless by order of court.

H. D. Travis, J. B. Strode, and A. N. Sullivan, for the appellant.

E. H. Wooley, and Benson and Root, for the respondent.

MAXWELL, J. This action was brought by the plaintiff against the defendant to establish a trust in certain real estate, and for an accounting upon the following contract: —

"This agreement, made and entered into this thirteenth day of May, 1887, between B. A. Gibson and J. M. Carter, witnesseth: —

"That whereas, said B. A. Gibson is the owner of a certain judgment rendered in foreclosure proceedings in the district court of Cass County, Nebraska, in an action pending in said court, wherein Beardsley and Clark, successors to Beardsley and Davis, were plaintiffs, and J. M. Carter and Eliza Carter were defendants, and the said B. A. Gibson now desires to sell the lands upon which said judgment is a lien, and the said J. M. Carter desires to have an opportunity to redeem said land or some portion thereof, — now, therefore, it is mutually agreed between said parties that if the said B. A. Gibson shall have to bid said land in at sheriff's sale, he, the said Gibson, shall proceed to sell the lots in the addition known as Carter's Ad-

dition to Weeping Water, and shall receive the proceeds of such sales until such time as he shall have received back the amount of said judgment and costs, and also the amount of all other prior liens which he shall have to pay, also the further sum of seventeen hundred dollars and interest, the amount of a certain mortgage given by said Carter to Francis N. Gibson, controlled by B. A. Gibson as his agent, also a balance due on a certain other mortgage for three thousand eight hundred dollars and interest, given by said Carter to Gibson, together with the expenses and costs incurred, and other prior liens he may be required to pay, when all of said sums shall have been received by said B. A. Gibson in cash or in notes, the proceeds of sale or otherwise paid by said Carter, then said Gibson shall turn over to said J. M. Carter any surplus he may receive from the sale of said lots and lands, and shall also deed to said J. M. Carter, or any person said Carter may direct, all of the remaining lots and lands which he shall have purchased at said sheriff's sale.

"It is further agreed that said B. A. Gibson shall confer with said Carter in making sales of said lots and lands, and shall not sell more lands or lots than will pay the sums aforesaid, without the consent of the said Carter.

"It is further agreed that the said Gibson shall use his best endeavors to sell enough lots from date hereof, and at any time when said sums shall be reduced to two thousand dollars, and said Carter shall so desire, said Gibson shall deed said remaining lots and lands to said Carter, or any other person said Carter shall direct, and accept a good and sufficient mortgage on sufficient real estate to secure the same.

"Witness our hands this thirteenth day of May, 1887.

"B. A. GIBSON.

"J. M. CARTER."

It is alleged in substance that in pursuance of said agreement the defendant purchased said lands, and has sold and conveyed more than sufficient to satisfy the debts, judgments, and decrees specified, and that he conveyed a considerable portion thereof to a relative for a less price than it was worth. There are other allegations to which we need not refer.

The defendant in his answer admits that the plaintiff possessed the title to the land described in the petition, except ten acres near the center thereof, which was owned by one Coleman, and about three acres on one side which had previously been laid out for a public road; he also admits that the

lands were encumbered by a certain mortgage and other liens; he also admits the contract, "substantially as set forth in plaintiff's petition." He alleges that there were other judgments against the plaintiff, of the aggregate amount of fifteen hundred dollars, which were liens on said lands, and alleges that the plaintiff was indebted to the defendant on May 17, 1887, in other large sums, aggregating about six thousand dollars, secured by chattel mortgage upon certain personal property, of the reasonable value of ten thousand dollars, "as the plaintiff represented." "Plaintiff then told this defendant that he was owing large sums of money to divers persons in Cass County, Nebraska, that he was homesteading land in Cheyenne County, Nebraska, and that he was afraid that such creditors would obtain judgment against him in Cass County, and would make them liens on his land in Cheyenne County, and he then implored defendant to sign the foregoing agreement, in order that he might show it to his numerous creditors in Cass County, and make it appear to them that he still had an interest in the lands described in his petition, and thus delay them in enforcing their claims against him until such time as he should be able to acquire title to his land in Cheyenne County, and so encumber it and transfer it so as to place it beyond the reach of his creditors, and for the purpose of cutting out, defrauding, and delaying persons who already had judgments against him, and in that manner plaintiff induced defendant to sign said agreement.

"Defendant further avers that plaintiff never paid, or agreed to pay, him any consideration for signing said agreement, and defendant never received in any manner any consideration or benefit whatever from plaintiff, or any other person for him, for signing said agreement, and defendant never in any manner recognized the validity of or entered upon the execution of said agreement.

"That he afterwards caused said land to be regularly appraised, advertised, and sold under said judgment; that he was the highest bidder therefor, and it was, on or about the 29th of June, 1887, sold to him by the sheriff of Cass County, Nebraska, for the sum of eight thousand dollars, a sum more than two thirds of the appraised value of said land, and much less than the liens thereon, and said sale was, at the September, 1887, term of the district court of Cass County, Nebraska, confirmed, and deed ordered to be made for said land to this defendant, which said deed was made, executed, and delivered

to this defendant in due form; that at the time of said sale, and at no time since, has there been paid to him by the plaintiff, or any other person for him, any of the encumbrances or debts of the plaintiff hereinbefore mentioned.

"Plaintiff had neglected to pay the taxes on said land for the years 1883, 1884, 1885, and 1886, and the taxes for the year 1887 were due and unpaid, and that said mortgage and this defendant's judgment lien, and the taxes due and unpaid on said land, amounted to about the sum of thirteen thousand dollars, and that all of said land at the time was not worth the sum of nine thousand dollars. Subsequently, to wit, on or about the twenty-ninth day of September, 1887, this defendant sought to collect the debts owing this defendant by this plaintiff, secured by the chattel mortgages hereinbefore mentioned, and to foreclose the same, when this defendant learned that plaintiff had fraudulently sold and disposed of the greater part of such chattel property so mortgaged to secure said indebtedness; that he had fraudulently, and with the intention of cheating and defrauding this defendant of his security, removed a part of said property to Cheyenne County, Nebraska, and had disposed of the same and placed it beyond the reach of this defendant, and that this defendant then, with the plaintiff's consent, sold such of said property so secured by chattel mortgage, not so fraudulently sold and disposed of and removed from the county of Cass aforesaid, at public auction, and the proceeds of said sale amounted to less than one thousand dollars. . . .

"Defendant, further answering, avers that he has laid out and expended a large sum of money, to wit, about the sum of two thousand five hundred dollars, in building roads and buildings upon and improving and advertising said property and in selling a part of the same; that he has sold lands and lots therefrom amounting to about eight thousand dollars; that he has obtained for same all said land so sold was worth; that there is due the plaintiff and the owners of the liens on the said land mentioned in the plaintiff's petition from plaintiff about the sum of nine thousand dollars over and above all sums paid, laid out, and expended by the defendant in improving, advertising, and selling said land, after applying all sums obtained from sales thereof to the payment of the same.

"Further answering, defendant denies that he is in any manner liable to account to the plaintiff under the agreement set

forth in plaintiff's petition, or under any other agreement, for any lands or lots sold by defendant."

There is a reply which need not be noticed.

The principal question presented by the pleadings is, Does the contract set out in the petition create Gibson a trustee for the plaintiff?

Here is a distinct agreement of a creditor interested in a number of the judgment and mortgage liens against the defendant's real estate, that if he purchases the land at sheriff's sale he will "proceed to sell the lots until such time as he shall have received back the amount of such judgment and costs and other liens mentioned. . . . Then said Gibson shall turn over to said Carter any surplus he may receive from the sale of said lots and lands, the remaining lots and lands which he shall have purchased at sheriff's sale," etc.

This agreement was made more than a month before the sale by the sheriff took place, and evidently in view of it, and the defendant thereupon seems to have treated the property as under his control, and prior to the confirmation of the sale in September, 1887, sold and made deeds in his own name for a portion of the lots. This he had no right to do unless he was acting under the contract, as the plaintiff could but for the contract have redeemed the land at any time before the sale was confirmed. The defendant, therefore, must have made these sales and conveyances by virtue of his contract with the defendant, and thereby accepted its terms and conditions.

A trust, in its simplest elements, is a confidence reposed in one person, who is termed trustee, for the benefit of another, who is called the *cestui que trust*; and it is a confidence respecting property which is thus held by the former for the benefit of the latter: Willard's Eq. Jur. 186. The essential requisites of a valid trust are: 1. A sufficient expression of an intention to create a trust; and 2. A definite beneficiary. The statute 29 Car. II., c. 3, sec. 7, required all trusts in real estate to be manifested and proved by some writing signed by the party creating the trust, or by his last will. Under this statute, it has been held that it was not necessary that a trust should be declared by deed, but it would be sufficient if proved to exist in writing: *Fisher v. Fields*, 10 Johns. 495; *Steere v. Steere*, 5 Johns. Ch. 1; 9 Am. Dec. 256; *Scituate v. Hanover*, 16 Pick. 222; *Wright v. Douglass*, 7 N. Y. 564; *Kingsbury v. Burnside*, 58 Ill. 310; *Morse v. Morse*, 85 N. Y. 53.

It is claimed on behalf of the defendant that the statute has

changed the rule as above stated. Section 3, chapter 32, Compiled Statutes, provides:—

“No estate or interest in land, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, or surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same.

“Sec. 4. The preceding section shall not be construed to affect in any manner the power of a testator in the disposition of his real estate by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law.”

The defendant contends that an instrument, to be sufficient to constitute a declaration of a trust in real estate, must be such as to convey an interest in the land; that the contract set out in the petition not being a conveyance, and there being no mutuality in it, it is therefore void. The cases of *Tatge v. Tatge*, 34 Minn. 272, and *Graham v. Long*, 65 Pa. St. 383, are cited to support this proposition.

In the former case an unmarried man, who seemed to have wronged a woman under promise of marriage, and fearing that an action for damages might be brought against him, conveyed his real estate to his mother, a married woman then living with her husband. A year later, the difficulty having been settled in some way, his mother reconveyed the land to him. The conveyance, under the Minnesota statute, was void, because of the failure of the husband “to join with her” in making the same. As the husband refused to join with his wife in making the conveyance to the son, an action was brought to enforce the alleged trust, and the court held, rightly we think, that the action would not lie; that the deed from the mother, being void as a deed, was also void when it was sought to establish a trust thereby; and this was substantially the holding of the court in the case cited from Pennsylvania. If, therefore, the instrument set out in the petition is not void, the cases cited have no application. Section 3 of the act above copied requires a conveyance by which a trust is created to be in writing, and subscribed by the party creating the same. It is not required to be witnessed or acknowledged. Therefore it is not necessarily a deed, the requisites of which are prescribed by statute. Section 23 of the same chapter declares that “the

term 'conveyance,' as used in this chapter, shall be construed to embrace every instrument in writing (except a last will and testament), whatever may be its form, and by whatever name it may be known in law, by which any estate or interest in lands is created, aliened, assigned, or surrendered."

This leaves the creation of a trust substantially as under the statute of 29 Car. II., that any agreement or contract in writing, made by a person having the power of disposal over real property, whereby such person agrees or directs that certain real estate shall be held or dealt with in a particular manner for the benefit of another, raises a trust: Perry on Trusts, sec. 82, and cases cited.

Here was a plain agreement made by the owner of the land, then heavily indebted, and one of his principal creditors, a proposed purchaser of the land. It is true, the sale was not directly by the plaintiff to the defendant, and the reason of this is apparent. There were many judgments and other liens against the property which only a judicial sale could cut off and give a perfect title. The defendant was aware of this fact, and entered into the contract in view of becoming the purchaser at the sale, and thereby acquiring a title free from these liens. In effect, he promised the plaintiff that if he was permitted to acquire a good title to the lands by a sale, he would hold the lands for his benefit, and when the debts mentioned in the contract were paid, would reconvey to him. In pursuance of this contract, he did acquire the title to said real estate, and he holds it as trustee for the plaintiff, according to the terms of the agreement.

But it is contended that even if the instrument is valid to create a trust where there is a sufficient consideration, yet that in this case there was no consideration, and that therefore it cannot be enforced.

The testimony is, that from the date of the agreement to the time of the confirmation of the sale the defendant exercised acts of ownership over the property, and sold and conveyed some of the lots. This was a great advantage to him, and of itself is a sufficient consideration for the contract. In addition to this, it seems to have been generally known that the purchase, in effect, was for the benefit of the plaintiff after the payment of the debts named, and this may reasonably be presumed to have deterred other bidders from attempting to purchase the property, and prevented competition: *Brown v. Lynch*, 1 Paige, 147; *Roach v. Hudson*, 8 Bush, 410; *McRae*

v. *Huff*, 32 Ga. 681; *Paine v. Wilcox*, 16 Wis. 202; *Onson v. Cowen*, 22 Wis. 329; *Lillard v. Chasey*, 2 Bibb, 459; *Peebles v. Reading*, 8 Serg. & R. 492; *Denton v. McKenzie*, 1 Desaus. Eq. 289; 1 Am. Dec. 664. This advantage the defendant cannot avail himself of and then repudiate its effect. Contracts between a mortgagor and mortgagee, and between a debtor and his judgment creditor, promising an advantage to such debtor in case the creditor is permitted to purchase the property at a judicial sale then about to take place, which are calculated to relax the vigilance of the debtor and his friends at the judicial sale, and prevent competition, if creditors are not affected thereby, ordinarily will be enforced, and the plea of want of consideration cannot be entertained. The proposed purchaser, by making the proposition, evidently expected to gain an advantage thereby, and his proposition being accepted, he must carry it out. No one can estimate the amount of benefit to the purchaser by such a proposition, when carried into effect, or injury to the debtor, if it can safely be ignored after the sale has taken place.

3. But it is said that the plaintiff was notified before the confirmation of the sale that the defendant did not intend to carry out the contract, and that he claimed the property as his own. The testimony on this point consists of the letter of an attorney, who merely gives his individual opinion that from appearances he believed such to be the case. The defendant, nor any one for him, so far as the testimony shows, ever gave such notice, and even if he had it would have been unavailing. The rule is, that when a trustee has entered upon the execution of the trust, he cannot afterwards free himself from the discharge of the same without the consent of the *cestui que trust*, unless by an order of court: *Cruger v. Holliday*, 11 Paige, 314; *Shepherd v. McEvers*, 4 Johns. Ch. 136; 8 Am. Dec. 561; *Doyle v. Blake*, 2 Schoales & L. 245; *Lowrey v. Fulton*, 9 Sim. 123. In *Shepherd v. McEvers*, 4 Johns. Ch. 136; 8 Am. Dec. 561, Chancellor Kent says: "I take this to be a clear and settled rule of this court." If this is a correct rule, of which there seems to be no doubt, the defendant, if he personally notified the plaintiff of his denial of the trust, would not thereby have been discharged.

The fourth objection is, that sufficient property has not been sold to satisfy the debts named in the contract. This question is one of fact to be determined from the evidence; and even if it is found that the amount realized from the sale was

not sufficient to satisfy the debts named in full, it is probable that it could not defeat the action.

A large amount of land has been sold by the defendant, but the value of the same is to be determined from very conflicting evidence. There is no proof that the plaintiff intended to defraud his creditors by the contract in question, and that question need not be considered. A "substantial" copy of an alleged agreement, made subsequent to the one which is the basis of this action, and the execution of which is denied, was introduced in evidence without sufficiently accounting for the original. But this error probably will be avoided hereafter.

There are no findings of fact in the case, as they were unnecessary in view of the holding of the court below, hence the cause will be remanded for findings and judgment. The judgment of the district court is reversed, and the cause remanded for further proceedings.

JUDICIAL SALE — BUYING IN LAND FOR ANOTHER AT — TRUST CREATED. — Where a person agreed verbally to bid in land for another at a sheriff's sale, he will be decreed to hold in trust, though he took the land in his own name: *Denton v. McKemie*, 1 Desana. Eq. 289; 1 Am. Dec. 664.

TRUSTS — DISCHARGE OF TRUSTEE. — A trustee can be discharged only by a decree of a court of equity or by consent of the parties interested: *Ross v. Barclay*, 18 Pa. St. 179; 55 Am. Dec. 616, and note; *Shepherd v. McEvers*, 4 Johns. Ch. 136; 8 Am. Dec. 561, and note.

BARNEY v. PINKHAM.

[29 NEBRASKA, 864.]

VETERINARY SURGEON — DEGREE OF SKILL REQUIRED OF. — A veterinary surgeon impliedly engages and is bound to use, in the performance of his duties in his employment, such reasonable skill, diligence, and attention as may be ordinarily expected of careful and trustworthy persons in that profession. He does not contract to use the highest degree of skill, nor an extraordinary amount of diligence, nor, in the absence of special contract, to effect a cure; and negligence cannot be implied from his failure to do so.

COMPLAINT CHARGING VETERINARY SURGEON WITH IGNORANCE OR WANT OF DUE CARE must contain specific allegations stating such ignorance or want of care, and not leave it to be deduced from mere inference, or the use of vague and indefinite terms.

L. W. Hogue, and Stewart and Ross, for the plaintiff in error.

St. Clair and McPhee, for the defendant in error.

MAXWELL, J. The defendant in error recovered a judgment against the plaintiff in error in the court below, and the only question presented is, Does the petition state a cause of action? The petition is as follows:—

“Joseph Pinkham v. M. M. Barney.

“The plaintiff, for cause of action against the defendant herein, says that prior to and until the twenty-seventh day of April, 1888, he, the plaintiff, was the owner of a certain roan mare of the value of two hundred dollars; that on or about the twenty-first day of April, 1888, the said mare became and was sick with some disease then unknown to plaintiff in kind and character; that at said date last aforesaid, and long prior thereto, the defendant claimed to be, and advertised and held himself out to the public to be, a veterinary surgeon, and asked to be employed as such in the treatment of sick and diseased horses; that the plaintiff, on or about the twenty-second day of April, 1888, employed the defendant to treat and cure the said mare aforesaid of said sickness aforesaid for pay; that the defendant, under said employment, and in his professional capacity as veterinary, visited said mare a number of times, examined her, diagnosed her case, prescribed medicine, gave her medicine, and treated, and caused her to be treated, under his sole directions and management, until on or about the twenty-seventh day of April, 1888, when said mare died.

“Plaintiff alleges that the defendant was and is incompetent to treat sick and diseased horses; that he prescribed, and gave, and caused to be given, to said mare aforesaid, drugs and medicines wholly improper for the cure of and treatment of the disease from which the said mare was suffering; that he prescribed, and gave, and caused to be given, to said mare in his said treatment of her aforesaid, medicines improper to be given internally for the cure of her said disease, and medicines of such a nature and such large quantities as to cause, and which did cause, the death of said mare, to the damage of this plaintiff in the sum of two hundred dollars.”

A veterinary surgeon impliedly engages and is bound to use, in the performance of his duties in his employment, such reasonable skill, diligence, and attention as may be ordinarily expected of persons in that profession. He does not contract to use the highest degree of skill, nor an extraordinary amount of diligence, but to exercise a reasonable degree of knowledge, diligence, and attention: *Craig v. Chambers*, 17 Ohio St.

253; *Nelson v. Harrington*, 72 Wis. 591; 7 Am. St. Rep. 900; *Leighton v. Sargent*, 27 N. H. 460; 59 Am. Dec. 388; *Holtzman v. Hoy*, 118 Ill. 534; 59 Am. Rep. 390; *Carpenter v. Blake*, 60 Barb. 488; *McNevin v. Lowe*, 40 Ill. 209; *Wood v. Clapp*, 4 Sneed, 65.

No doubt an action will lie against a veterinary surgeon for gross ignorance and want of skill as well as for negligence: *Seare v. Prentice*, 8 East, 348; but there is no charge of this kind, unless the word "incompetent" includes such charge, which it does not necessarily, as the incompetency may arise from physical defects, as impaired vision or other like cause.

When it is sought to charge one employed in a profession requiring skill with ignorance or want of due care, it must be done by allegations stating that fact, and it should not be left to mere inference, to be deduced from the use of vague and indefinite terms.

The implied contract of the plaintiff in error was not to cure, but to possess and apply in his treatment of the case such reasonable skill and diligence as are ordinarily exercised in his profession, or, as stated by the supreme court of Ohio in *Craig v. Chambers*, 17 Ohio St. 253: "By accepting the retainer, he bound himself to bring to the performance of his undertaking a reasonable degree of care and skill, but in the absence of a special agreement to do so, he did not undertake to perform a cure. Nor can negligence be implied from the failure of the defendant to effect a cure. Such failure may have arisen from the age and constitution of the patient, or from the inherent difficulties growing out of the nature of the injury, which may have been such as to baffle the highest degree of skill and care."

The care and diligence required are such as under the circumstances a careful and trustworthy man would be expected to exercise. It is evident, therefore, that the petition fails to state a cause of action. If the evidence was before us and established the liability of the plaintiff in error, we would permit an amendment to conform to the proof upon the payment of costs, but as we have no means of determining what the proof in the case was, the judgment is reversed, and the cause remanded for further proceedings.

PHYSICIANS AND SURGEONS — DEGREE OF CARE AND SKILL REQUIRED OF.
— Physicians and surgeons in the performance of their duties are required to exercise only a reasonable degree of skill and diligence: *State v. Housekeeper*,

70 Md. 162; 14 Am. St. Rep. 340, and note; note to *Holtzman v. Hey*, 50 Am. Rep. 392-394; *Barnes v. Means*, 82 Ill. 379; 25 Am. Rep. 328; *Smother v. Hanks*, 34 Iowa, 286; 11 Am. Rep. 141, and note; *Wilmot v. Howard*, 30 Vt. 447; 94 Am. Dec. 338, and note; *Langford v. Jones*, 18 Or. 307.

BUCK v. DAVENPORT SAVINGS BANK.

[29 NEBRASKA, 407.]

NEGOTIABLE INSTRUMENTS—INDORSEMENT WITH ENLARGED LIABILITY.—The written words, "demand, notice, and protest waived, and payment guaranteed," signed by the payee on the back of a negotiable note, constitute an indorsement with an enlarged liability.

CHATTEL MORTGAGES.—SUFFICIENT DESCRIPTION.—A description of property in a chattel mortgage as "ninety-five head of steers, one year old this spring, marked as follows: Right ear cropped, and notch cut out of the under side of the left, being the said cattle I have this day purchased of Welcome Mowry, being all the cattle I have now thus marked. Said cattle to be kept in Seward County, Nebraska, except during the herding season, in which they are kept in Butler County, Nebraska,"—is sufficient.

CHATTEL MORTGAGES.—THE DESCRIPTION OF PROPERTY in a chattel mortgage is sufficient, as a general rule, when it will enable a third party, aided by inquiries which the mortgage itself suggests, to identify the property.

G. M. Lambertson and R. P. Anderson, for the plaintiff in error.

R. S. Norval, for the defendant in error.

MAXWELL, J. In May, 1887, one Welcome Mowry sold and delivered to Thomas J. Johnson, a resident of Seward County, ninety-five head of yearling steers for the sum of \$1,591.25, taking his negotiable note therefor due in one year, with interest at ten per cent. To secure the payment of this note, Johnson executed and delivered to Mowry a chattel mortgage upon the steers so sold; the description thereof in the mortgage being, "ninety-five head of steers one year old this spring, marked as follows: Right ear cropped, and notch cut out of the under side of the left, being the said cattle I have this day purchased of Welcome Mowry, being all of the cattle I have now thus marked. Said cattle are to be kept in Seward County, Nebraska, except during the herding season, in which they are to be kept in Butler County, Nebraska." This mortgage was duly filed for record in Seward County on June 4, 1887. In October of the same year, Johnson sold said cattle to certain parties named Spelts and Nye for the sum of \$460.

The latter parties sold a portion of the cattle to the plaintiff in error.

In June, 1887, Mowry sold and indorsed the note in controversy, and transferred the same to the defendant in error, the indorsement being as follows: "Demand, notice, and protest waived, and payment guaranteed. Welcome Mowry." The note not being paid, the bank brought an action of replevin against the plaintiff in error and others holding the stock, and on the trial recovered judgment for the possession thereof and for damages.

Two questions are presented by record: First, is the writing on the back of the note an indorsement, or merely a guaranty? In *Heard v. Dubuque etc. Bank*, 8 Neb. 10, 30 Am. Rep. 811, the writing on the back of the note was as follows: "For value received, I hereby guarantee payment of the within note, and waive presentation, protest, and notice." This was held to be an indorsement with an enlarged liability: *State National Bank v. Haylen*, 14 Neb. 480. The writing on the back of the note in question, therefore, was a valid indorsement with an enlarged liability.

In *Wiley v. Shars*, 21 Neb. 712, the property mortgaged was described as "twenty-three head of horses and mules, . . . all situated on their range on the South Loup River, . . . above described, are now in their (the mortgagors') possession and are owned by them." The testimony showed that the range in question was situated in Buffalo County, and the description was held sufficient.

In *Knapp v. Deitz*, 64 Wis. 31, the description was "forty-one Berkshire hogs and sixty-five grain sacks." The testimony tended to show that the mortgage covered all the hogs possessed by the mortgagor, and the court held that the description was sufficient. Lyon J., says (p. 472): "We apprehend the property might be found and identified without much difficulty if a little diligence were used in that direction."

In *Kenyon v. Tramel*, 71 Iowa, 693, a description, "fifty head of steers about (twenty) months old, now owned by me and in my possession on my farm in Independence township, Jasper County, Iowa," was held to sufficiently identify the property. Seevers, J., says: "There is no uncertainty in the mortgage, or if there is, there is a sufficient description of the property to enable an honest inquirer to identify it: *Smith v. McLean*, 24 Iowa, 322."

In *Hurt v. Redd*, 64 Ala. 85, the description, "fourteen head

of mules, now on my plantation in Russell County," was held to be good; and a description, "one black mule about eight years old," was held by the same court not void: *Connally v. Spragins*, 66 Ala. 258. See also *Harding v. Coburn*, 12 Met. 333; 46 Am. Dec. 680; *Russell v. Winne*, 37 N. Y. 591; 97 Am. Dec. 755; *Ellis v. Martin*, 60 Ala. 394; *Seay v. McCormick*, 68 Ala. 549; *Burditt v. Hunt*, 25 Me. 419; 43 Am. Dec. 289; *Newell v. Warner*, 44 Barb. 258; *Harris v. Kennedy*, 48 Wis. 500; *Eddy v. Caldwell*, 7 Minn. 225; *Burns v. Harris*, 66 Ind. 536; 3 Am. & Eng. Ency. of Law, 180.

The description of property in a chattel mortgage will, as a rule, be held sufficient where it will enable a third party, aided by inquiries which the instrument itself suggests, to identify the property: *Jones on Chattel Mortgages*, sec. 54, and cases cited.

It is very clear that the mortgage in question was sufficient to impart notice to any honest inquirer after the facts. The judgment, therefore, is right, and is affirmed.

NEGOTIABLE INSTRUMENTS — INDORSEMENT WITH INCREASED LIABILITY.

—The payee of a promissory note wrote his name on the back, under the following words: "For value received, I hereby guarantee payment of the within note, and waive presentation, protest, and notice." This was an indorsement with enlarged liability: *Heard v. Dubuque Co. Bank*, 8 Neb. 10; 30 Am. Rep. 811; *Helmer v. Commercial Bank*, 28 Neb. 474; *Welts v. Wolfe*, 28 Neb. 500.

CHattel MORTGAGES — SUFFICIENCY OF DESCRIPTION. — The description of property in a chattel mortgage is sufficient if it is such as to suggest a line of inquiry and furnish the basis of identification: *Parker v. Chase*, 62 Vt. 206; 22 Am. St. Rep. 99. For the sufficiency of description of property in chattel mortgages, see extended note to *Barrett v. Fisch*, 14 Am. St. Rep. 239-247. Any description in a chattel mortgage is sufficient if by it the mind is directed to evidence whereby it may ascertain the precise property conveyed: *City Bank v. Ratkey*, 79 Iowa, 215.

NORTH v. PLATTE COUNTY.

[39 NEBRASKA, 467.]

MUNICIPAL RAILROAD AID BONDS — VOIDABLE ISSUE — INNOCENT PURCHASER. — A proposition submitted to the voters of a county to issue and deliver its bonds to aid in the construction of a railroad by one of two companies named, being in the alternative, is defective; and the issue and delivery of the bonds voted under such proposition will be enjoined, or they may be set aside after issue if timely application is made, yet after such bonds have been issued and certified under apparent authority, they are valid in the hands of an innocent purchaser for value.

LACHES IN SEEKING TO DEFEAT VOIDABLE MUNICIPAL RAILROAD AID BONDS. — A delay of nine years in bringing an action to defeat municipal railroad aid bonds, voidably issued and delivered, is such laches as will defeat the action, when the bonds have passed into the hands of an innocent purchaser for value.

A. J. Poppleton and Charles A. Speice, for the plaintiff.

William Leese, attorney-general, J. M. Woolworth, and M. B. Reese, for the defendant.

MAXWELL, J. This is an original action brought in this court to restrain the payment of interest coupons or bonds of Platte County, issued in aid of the Lincoln and Northwestern Railroad Company.

It is alleged in the petition that "plaintiff is and for many years past has been the owner of real and personal estate situated and taxable in the county of Platte, and that he brings this action as well on his own behalf as on behalf of all other tax-payers similarly situated who may come in and contribute to the expense of the suit; . . . that heretofore, to wit, on the first day of January, 1880, the said county of Platte, by the board of county commissioners (it being at that time under the government and management of a board of county commissioners) issued and delivered, either to the Lincoln and Northwestern Railroad Company, or to the Blue Valley and Northwestern Railway Company, one hundred thousand dollars, par value of the coupon bonds of said county of Platte, for the alleged purpose of aiding the construction of one of said railroads commencing at a point on the line of the then existing Atchison and Nebraska Railroad, and extending to the city of Columbus in said county of Platte; said coupon bonds being dated on the first day of January, 1880, bearing interest from the date thereof at the rate of eight per cent per annum, payable at the office of the county treasurer, as provided by the terms and conditions of a proclamation hereafter set forth. Plaintiff further saith that the sole right, power, and authority

upon and under which said coupon bonds were voted, issued, and delivered as aforesaid was a proposition dated May 6, 1879, issued and submitted to the voters of said county of Platte, at an election called and held on the fourteenth day of June, 1879, which, among other things, provided that the question to be submitted should be: 'Shall the county commissioners of Platte County, in the state of Nebraska, be authorized and required to issue and give to the Lincoln and Northwestern Railroad Company, or to the Blue Valley and Northwestern Railway Company, one hundred thousand dollars of the coupon bonds of said Platte County, to be dated the first day of January, 1880, bearing interest from date at the rate of eight per cent per annum, the interest payable annually at the office of the county treasurer of the county of Platte?' Said proposition was carried and adopted by the requisite and lawful number of votes, and the said bonds were ordered issued, and issued accordingly, and are still outstanding and unpaid. A true copy of said proposition so submitted as aforesaid, and under which said bonds were issued, is hereto attached and made a part of this petition, and marked 'Schedule A.' Plaintiff further alleges and charges that said proclamation and proposition under which said bonds were voted was and is insufficient and illegal, and the adoption and approval conferred upon said county and its commissioners no power or authority to sign, seal, issue, and deliver said bonds to said railway companies, or either of them, or to any other person or corporation under the statutes of the state of Nebraska, and that said bonds, and all thereof so issued and delivered as aforesaid, are absolutely void for lack of power to make the same, both in the hands of the donees thereof and in the hands of whomsoever they may reach."

The authority of the commissioners of Platte County, under the statute, to submit a proposition to the voters of said county, and of the electors thereof to authorize by their votes the issuing of bonds to a designated railroad company in the amount of one hundred thousand dollars, is not seriously questioned; but it is claimed upon behalf of the plaintiff that the bonds in question are void because the terms of the proposition were in the alternative, "to the Lincoln and Northwestern Railroad Company, or the Blue Valley and Northwestern Railway Company."

In *Jones v. Hurlburt*, 13 Neb. 126, which was an appeal from a decree of the district court of Seward County enjoin-

ing the delivery of the bonds of that county, and of certain precincts therein, upon the ground that the proposition to issue bonds in aid of certain railroads was in the alternative, it was held that the dual form of the proposition vitiated the election.

In *Spruck v. Lincoln & N. W. R. R. Co.*, 14 Neb. 293, which was an appeal from the district court of Butler County, enjoining the registration of the bonds of that county, upon the ground that the proposition was in the alternative, the injunction was made perpetual. Lake, C. J., says: "The defendant had notice of the want of authority on the part of the commissioners, and is therefore not in a situation to complain."

In *State v. Roggen*, 22 Neb. 118, which was an application for a *mandamus* to compel the defendant to certify certain bonds of Butler County, and of a precinct therein, issued to the Lincoln and Northwestern Railway Company, the writ was denied. The relator in that case had purchased the bonds in good faith, but as they were incomplete on their face, by reason of the want of the certificate of the auditor and secretary of state, it was held that she was not protected, but clearly implying that had the bonds been duly certified, — in other words, been perfect instruments, — she would have been in the position of a *bona fide* purchaser for value.

The essential facts in each of these cases were substantially the same as in the case under consideration. A county, like any other corporation, necessarily must act through its agents. These agents, for the purpose of issuing its bonds, were the county commissioners. Such commissioners could issue the bonds of the county in aid of a work of internal improvement only upon the conditions named in the statute.

Two companies proposed to build a railway from Lincoln to Columbus. "A plat of the survey, showing their exact line of route through Platte County," was required by statute to be filed two weeks before the election, and the line thus surveyed could not vary to exceed forty rods from such plat as filed. So far as appears, but one line was surveyed, and but one plat filed in the clerk's office of that county. The owner of this line was to be one of two persons, and with this understanding the election in question was had, and the bonds in controversy declared carried and issued to the company or person which built the road. There was no want of power to issue the bonds, but the electors should have designated the donee. Instead of doing this, however, they, in effect, in-

structed the commissioners to issue the bonds to the corporation building the road, which the commissioners did. The commissioners, therefore, as agents of the county, acting under apparent authority, issued the obligations in question, and they are valid in the hands of an innocent purchaser for value. The evil of a proposition in the alternative form is, that voters who may be hostile to one of the roads named, and who would vote against aid to such road, may be induced, by reason of the supposed probability of the railroad in which he is in favor being the successful line, to vote in its favor, and thus the proposition in that form may be adopted by the requisite majority, when, had propositions been submitted separately, both would have failed. In other words, electors may be induced to vote for the proposition by exciting false hopes as to the road that will be constructed, and thus carry the proposition by the necessary majority. Such bonds, however, are not void when duly certified, and have passed into the hands of innocent purchasers for value. In the able and carefully prepared brief of the attorney for the plaintiff, it is said that "municipal bonds issued without power clearly conferred by constitution or statute are void everywhere and in all hands": *Marsh v. Fulton Co.*, 10 Wall. 676; *East Oakland v. Skinner*, 94 U. S. 255; *Lewis v. Shreveport*, 108 U. S. 282; and that was the holding of this court in *Reineman v. Covington etc. R. R. Co.*, 7 Neb. 310, and *Hamlin v. Meadville*, 6 Neb. 227. It is also true, as he contends, the holder of municipal bonds is chargeable with notice of all provisions of statute and constitution in reference thereto: *Ogden v. County of Daviess*, 102 U. S. 634; *Dixon Co. v. Field*, 111 U. S. 83. But neither proposition is applicable to the facts of this case.

2. The action was brought nine years after the bonds were issued and delivered, and the plaintiff shows by his petition that he has been a tax-payer of Platte County during "many years past." There are many cases holding that such delay and laches will defeat an action where relief would have been granted had the application been seasonably made: *Supervisors v. Schenck*, 5 Wall. 772; *County of Clay v. Society for Savings*, 104 U. S. 579; *Johnson v. Stark Co.*, 24 Ill. 75; *Keitsburg v. Frick*, 34 Ill. 421; *Commonwealth v. Pittsburgh*, 43 Pa. St. 391; *Steines v. Franklin Co.*, 48 Mo. 167; *Bradley v. Franklin Co.*, 65 Mo. 638; *Burr v. Carbondale*, 76 Ill. 455; *Burlington etc. R. R. Co. v. Saunders Co.*, 16 Neb. 123.

Upon the whole case, no sufficient reason has been shown to

justify the court in granting or continuing the injunction in force in this case. The injunction is therefore dissolved and the action dismissed.

MUNICIPAL RAILROAD AID BONDS — VALIDITY OF, IN HANDS OF BONA FIDE PURCHASERS. — Bonds issued by a county are valid in the hands of *bona fide* purchasers, notwithstanding the fact that there were such irregularities in their issue that if the question of their validity had been raised at the proper time, they would have been declared invalid: *State v. Commissioners*, 30 Kan. 657; 7 Am. St. Rep. 569, and note. Municipal bonds in aid of a railroad are not commercial paper, and even in the hands of innocent and remote purchasers are subject to all equities existing against them at the time of their issue: *Diamond v. Lawrence County*, 37 Pa. St. 353; 78 Am. Dec. 429, and note. See extended note to *Morris Canal Co. v. Fisher*, 64 Am. Dec. 428-445. Municipal bonds in aid of a railroad, not issued according to law, are void: *Williams v. People*, 132 Ill. 574.

LACHES — EFFECT OF, ON GRANTING RELIEF. — Equity will refuse an injunction to one who has unreasonably delayed: *Sheldon v. Rackwell*, 9 Wis. 166; 76 Am. Dec. 265; extended note to *Smith v. Thompson*, 54 Am. Dec. 130-134. Equity will refuse to aid a stale claim or encourage laches: *Bates v. Gilt-u*, 132 Ill. 287; *Sanchez v. Dow*, 23 Fla. 445; *Burgess v. St. Louis Co. R. Co.*, 99 Mo. 496.

PASEWALK v. BOLLMAN.

[29 NEBRASKA, 519.]

JUDGMENT AS EVIDENCE AGAINST SURETIES IN INDEMNITY BOND. — In an action against sureties on a bond given by plaintiff in execution to a sheriff, to indemnify him against judgments to which he shall be a party, by reason of a levy on property claimed by a third party, a judgment so obtained against the officer, in an action defended for him by the principal in the bond, is conclusive against the sureties, in the absence of fraud and collusion, although they had no notice of the pendency of the action in which such judgment was obtained.

JUDGMENTS — SATISFACTION OF. — COUNTY WARRANTS AND APPROVED PROMISSORY NOTES, received and accepted as cash in satisfaction of a judgment and execution, will be treated as a good payment in cash.

PRACTICE — FAILURE TO SUBMIT MATERIAL ISSUE TO JURY upon which there is no conflict of evidence is not reversible error.

H. C. Brome and A. C. Brown, for the plaintiffs in error.

D. A. Holmes, for the defendant in error.

NORVAL, J. This is an action by Bollman, a sheriff, upon an indemnifying bond given to W. L. Rothwell, his deputy, by the Norwegian Plow Company, a judgment creditor, conditioned for the officer's indemnification in case he would levy certain executions held by him in favor of the said company and one J. H. Thomas, and against Fred Fisher, upon certain prop-

erty claimed by Deere, Wells, & Co. The condition in the bond reads: "If the above-bounden Norwegian Plow Company shall well and truly save harmless and indemnify the said W. L. Rothwell, and any and all persons aiding and assisting him in the premises, from all harm, trouble, damage, costs, suits, actions, judgments, and executions that shall or may at any time arise, come, or be brought against him; them, or any of them, then this obligation to be void, otherwise to be and remain in full force and effect."

The petition alleges the execution and delivery of the bond, the levying of the executions; and the sale of the property, and that the proceeds thereof were paid to the Norwegian Plow Company. The petition further alleges that afterwards the said Deere, Wells, & Co. brought an action against the plaintiff for the conversion of said property so levied upon, in the circuit court of the United States for this district, and on the sixteenth day of June, 1886, a judgment was rendered in said suit in said court against the plaintiff herein for \$3,000 damages, and \$198.65 costs of suit, and plaintiff was compelled to and did pay the said judgment and costs, and \$218 accrued costs and expenses. The petition further avers that the Norwegian Plow Company was notified of the pendency of said action in the federal court, and that the defendants have failed to pay the plaintiff said amounts, or any part thereof.

The defendants, answering, admit that the executions were issued and levied upon certain personal property, but deny that they were issued at the request of the Norwegian Plow Company, or that the property levied upon was at any time claimed by Deere, Wells, & Co. The defendants also admit that after the levy of the executions, but before the sale of the property taken thereunder, they signed an instrument in terms like the one set out in the petition, but aver that at the time they signed such instrument they and each of them did so with the express understanding and upon condition that it should be executed and signed by the Norwegian Plow Company, and that they never authorized or consented to the delivery thereof except upon the above condition. The defendants further deny that the Norwegian Plow Company, in consideration of and upon the promise of plaintiff to sell said goods, executed and delivered to the deputy sheriff for the plaintiff the obligation declared on, but aver that it was never executed by said Norwegian Plow Company, nor was said obligation ever delivered to said deputy, or any other person, by said

company. After denying the fourth, fifth, and sixth paragraphs of the petition, the answer admits that Deere, Wella, & Co. brought suit against the plaintiff in the United States circuit court, and recovered judgment therein for the amounts stated in the petition, but deny that said action was brought to recover for the conversion of the goods levied upon under said executions. The answer alleges that the judgment rendered in the circuit court was for the conversion of goods by plaintiff and his agents, other than the goods taken by Rothwell under said executions.

The reply denies all new matter contained in the answer. The cause was tried to a jury, and verdict for the plaintiff rendered for \$3,797.87.

The first error assigned is, that the evidence does not show that the bond upon which the action was brought was delivered to the officer in its present condition with the consent of the defendants. The defendants admitted, when upon the witness-stand, that they executed the bond at the request of E. B. Mower, the traveling salesman of the Norwegian Plow Company, and delivered it to him, but claimed that the agreement was, that it was also to be signed by the company before it should be delivered to the obligee. The testimony of the witness Dixon tends to corroborate the defendants.

E. B. Mower, called by the plaintiff, testified that he procured the signatures of the defendants to the bond, that he told them he wanted to use it that day in the Fisher case; that he was going back to Creighton that day for that purpose, and expressly denies that he told the defendants that the bond would be signed by the Norwegian Plow Company. It further appears that the defendant Pasewalk signed his name on the first line left for signatures, and no place was left on the bond for the signature of the company.

R. E. Allen, called by the plaintiff, testifies that he was present when the defendant McClary signed the bond, that he does not remember of Dixon being present at the time, that there was nothing said in witness's presence about any one else signing the bond, and that it was delivered to Mower in his presence.

Upon the question of the execution and delivery of the bond, the court on its own motion instructed the jury as follows:—

"2. You are instructed that in this case the burden of proof is upon the plaintiff, and before he can recover he must prove all the material allegations of his petition by a fair preponder-

ance of the evidence. One of the material allegations of the plaintiff's petition, and the only question of fact for you to determine, is, that defendants, at the time said bond was delivered to the agent of the Norwegian Plow Company, consented that it should be delivered to plaintiff without said Norwegian Plow Company having signed the same. It devolves upon plaintiff to prove that such consent was given, either expressly or by implication; and if you believe from the evidence that defendants signed said bond without any understanding that it should be signed by the principal, and delivered the same to principal's agent, and were careless and indifferent as to whether the principal signed said bond or not before it was delivered to plaintiff, then defendants' consent would be presumed that said bond might be delivered to plaintiff without the principal's signature thereto.

"8. In this case, if you believe from the evidence that the defendant did not consent that said bond should be delivered to plaintiff by the agent of the Norwegian Plow Company until said company had signed the same, or if, from the evidence, you believe that the agent of the Norwegian Plow Company agreed with defendants, at the time they signed the bond, that he would sign the name of the Norwegian Plow Company upon the bond in case he used it, then in either case defendants are not liable upon said bond, and your verdict must be for the defendants."

These instructions fairly submitted to the jury the issue presented by the pleadings and evidence, whether or not it was the understanding that the bond should be signed by the Norwegian Plow Company before it should be delivered to the officer. No place was left upon the bond for the signature of the principal, nor is it claimed that the obligee had any knowledge that it was to be signed by any one else. The testimony on the part of the plaintiff was given by witnesses who appear to be entirely disinterested, and if true, fully sustains the conclusions reached by the jury. It was the province of the jury to pass upon the credibility of the witnesses, and determine the weight to be given to the testimony of each. By the verdict the jury have said that the plaintiff's witnesses were truthful. The evidence will not justify us reaching a different conclusion.

It is undisputed that in the suit brought by Deere, Wells, & Co. against the plaintiff in this action, in the United States circuit court, the principal mentioned on the face of the bond.

the Norwegian Plow Company, appeared in said case for the defendant therein, and defended the action for him. The petition in the circuit court alleges, and that court found, that the property converted was seized by the sheriff upon five executions in favor of the Norwegian Plow Company and against Fred Fisher.

W. L. Rothwell testified that he was the deputy sheriff, and, producing five executions, stated that they were in his hands when the indemnity bond was delivered to him, and that he had no other executions against Fred Fisher. While the executions were not introduced in evidence, yet sufficient appears to show that the suit in the circuit court was brought for the conversion of the same goods that were levied upon by virtue of the executions described in the bond of indemnity.

We therefore come to the principal point in the case, which is, What is the extent of the defendants' liability? To state it differently, Is the judgment rendered against the plaintiff in the circuit court conclusive upon the defendants? It cannot be doubted that the Norwegian Plow Company, having appeared in that action, and defendant for the sheriff, the judgment is conclusive as to it: *Miller v. Rhoades*, 20 Ohio St. 494; *Davis v. Smith*, 79 Me. 351. The sureties contend that as they had no notice of the pendency of that suit, the judgment therein rendered is only *prima facie* evidence of the plaintiff's right to recover against them, and of the amount of such recovery. The plaintiff urges that as the judgment is conclusive upon the principal in the bond, it is likewise conclusive as to the sureties. There is considerable conflict in the authorities as to the effect a judgment rendered against the principal of a bond has upon the sureties who were not made parties to the suit, and had no notice of its pendency. The following cases sustain the position of the defendants that such a judgment is *prima facie* evidence in a suit against the surety: *State v. Colerick*, 3 Ohio, 487; *Taylor v. Barnes*, 69 N. Y. 430; *Stewart v. Thomas*, 45 Mo. 42; *Bridgeport etc. Ins. Co. v. Wilson*, 84 N. Y. 275. An examination of these cases will disclose that none of them were founded upon bonds conditioned for the payment of judgments. In this they differ from the one at bar. It will be observed that the bond on which this action is based indemnifies the obligee "from all harm, trouble, damages, costs, suits, actions, judgments, and executions that shall or may arise, come, or be brought against him." The sureties undertook to save the officer harmless

from any judgment that might be recovered against him by reason of the levying of the executions. It was no part of the agreement that the sureties should be notified of the pendency of the action. If the sureties desired notice of the proceedings to obtain the judgment, they should have stipulated for it in the bond of indemnity; not having done so, the failure to receive such notice does not affect their liability. They agreed absolutely to be bound by any judgment rendered against the officer. In the case of most official bonds the sureties do not promise to pay any judgment rendered against the principal, hence a judgment against the official on such a bond is not conclusive upon the sureties, where the latter had no notice of the suit. There are numerous decisions, however, to the effect that a judgment obtained in a suit on an official bond against the principal is conclusive against the sureties, though not notified of the suit: *Messer v. Strickland*, 17 Serg. & R. 354; 17 Am. Dec. 668; *Evans v. Commonwealth*, 8 Watts. 398; 34 Am. Dec. 477; *Snapp v. Commonwealth*, 2 Pa. St. 49; *Garber v. Commonwealth*, 7 Pa. St. 286; *Lloyd v. Barr*, 11 Pa. St. 52; *Tracy v. Goodwin*, 5 Allen, 411. It has likewise been frequently held that a judgment against an administrator, in the absence of fraud, is conclusive against his sureties; *Heard v. Lodge*, 20 Pick. 58; 32 Am. Dec. 197; *Irwin v. Backus*, 25 Cal. 223; 85 Am. Dec. 125; *State v. Holt*, 27 Mo. 340; 72 Am. Dec. 273; *Salzer v. State*, 5 Ind. 204; *Kalston v. Wood*, 15 Ill. 159; 58 Am. Dec. 604; *Stevall v. Banks*, 10 Wall. 568; *Willey v. Paulk*, 6 Conn. 76.

The precise question involved in the case at bar was recently passed upon by the supreme court of New York, in *Conner v. Reeves*, 103 N. Y. 527. That was a suit against the sureties upon an indemnifying bond given to a sheriff, conditioned to save the officer harmless against all "suits, actions, and judgments that may at any time arise, come, accrue, or happen to be brought against him for, or by reason of, the levying, attaching, and making sale under and by virtue of an execution issued to him as sheriff." Prior to that suit, judgment had been rendered against the sheriff for conversion in making a levy under an execution. The sureties on the indemnifying bond had no notice of the pendency of the suit in which the judgment was obtained. The court, in the opinion in *Conner v. Reeves*, 103 N. Y. 527, says: "The covenantor, in an action on a covenant of general indemnity against judgments, is concluded, by the judgment received against the covenantor, from question-

ing the existence or extent of the covenantor's liability in the action in which it was rendered. The recovery of a judgment is an event against which he covenanted, and it would contravene the manifest intention and purpose of the indemnity to make the right of the covenantor to maintain an action on the covenant to depend upon the result of the retrial of an issue, which, as against the covenantor, had been conclusively determined in the former action."

The decision in *Conner v. Reeves*, 103 N. Y. 527, is sustained by the following cases: *Fay v. Ames*, 44 Barb. 327; *Tracy v. Goodwin*, 5 Allen, 409; *Train v. Gold*, 5 Pick. 380; *Lincoln v. Blanchard*, 17 Vt. 464; *Heard v. Lodge*, 20 Pick. 53; 32 Am. Dec. 197; *State v. Holt*, 27 Mo. 340; 72 Am. Dec. 273; *Ralston v. Wood*, 15 Ill. 159; 58 Am. Dec. 604; *Stovall v. Banks*, 10 Wall. 588.

The conclusion we have reached is, that in an action against the sureties on a bond given to a sheriff to indemnify him against judgments to which he shall be a party, the judgment recovered against the officer is conclusive against the sureties, although they had no notice of the pendency of the action in which the judgment was obtained, when it is shown that their principal defended the suit for the officer. The sureties could contest the judgment on the ground of fraud and collusion. It follows that the evidence offered in this case by the defendants, for the purpose of contradicting the judgment rendered against the plaintiff in the federal court, was properly executed.

It is claimed that it was not necessary to allege and prove, in the action in the federal court, that the sheriff levied upon the goods for which that suit was brought, and that the plaintiff therein was entitled to recover, regardless of the fact of a levy, if the goods were his and the sheriff had taken them. That action was against the sheriff and his sureties upon his official bond, and it was necessary to the recovery therein that the pleadings and evidence in that case show that the goods were taken by the sheriff by virtue of his office.

For the purpose of proving payment of the judgment recovered in the federal court, the plaintiff offered in evidence a paper purporting to be an execution issued out of said court in said cause, and the indorsements thereon. No certificate of the clerk of the federal court was attached to the paper. The defendants objected to its admission as evidence, because "it was not authenticated as required by law, incompetent,

irrelevant, and immaterial." The paper purporting to be an execution was in the usual form, and accurately stated the date, amount, and names of the parties mentioned in the judgment already introduced in evidence. Indorsed on the execution was the following:—

"NIOBRARA, NEB., Sept. 16, 1886.

"Received on the within execution:—

County warrants, as cash.....	\$838 00
Approved promissory note.....	2,000 00
	<hr/>
	\$2,838 00
Cash.....	478 20
	<hr/>
	\$3,316 20

"O. W. RICE,

"Attorney for Deere, Wells, & Co."

For the purpose of laying the foundation for its introduction, Solomon Draper was called, who testified, in substance, that he was an attorney at law residing at Niobrara, Nebraska, and was acquainted with O. W. Rice, who is an attorney residing at Creighton, and is acquainted with his signature; that the witness wrote the receipt, and he saw Rice sign it; that Rice was acting for Deere, Wells, & Co., the plaintiffs in that case; and that the execution was in the hands of the deputy United States marshal when the indorsement was made, and that the receipt was signed at the settling up of the matter. This evidence laid the foundation for its introduction for the purpose of proving payment. It is urged that it only showed that \$478.20 had been collected by the United States marshal. That sum was the cash payment. The balance, having been paid by county warrants and approved note to the attorney of Deere, Wells, & Co., who received the same as cash, will be treated as a payment in cash: *Ralston v. Woods*, 15 Ill. 159; 58 Am. Dec. 604; *Cox v. Reed*, 27 Ill. 438; *Wilkinson v. Stewart*, 30 Ill. 58.

Complaint is made because the instructions took from the jury every question of fact presented by the pleadings, except the question of the consent of the sureties to the delivery of the bond. As we view it, that was the only point upon which there was any conflict in the evidence. The plaintiff's testimony covered all the other issues of fact raised by the pleadings, and the defendants offered no testimony to the contrary. It was therefore only necessary to submit to the jury for de-

termination the issue of fact upon which the testimony was conflicting.

All the other errors assigned upon the giving and refusing of instructions have been already met by what we have said upon the conclusiveness of the judgment of the federal court, and will not be further considered.

The judgment of the district court is affirmed.

JUDGMENT AS EVIDENCE AGAINST SURETIES. — A judgment against a principal *prima facie* establishes the liability of the sureties who were not parties to the action; but they may impeach the judgment for fraud or collusion: *Charles v. Hoskins*, 14 Iowa, 471; 83 Am. Dec. 378, and extended note, in which this subject is fully discussed. A judgment reforming a lease concludes the sureties thereto who were not parties: *Stevens v. Pendleton*, 85 Mich. 137. The sureties on a debtor's bond are not concluded by a decree appointing a receiver: *State v. Sullivan*, 120 Ind. 197.

JUDGMENT—WHAT MAY BE RECEIVED IN PAYMENT OF. — Payment of a judgment made in property or securities may be received as cash in full satisfaction of the demand: *Ralston v. Wood*, 16 Ill. 159; 58 Am. Dec. 604. A judgment could be satisfied by payment made in confederate notes, if the contract sued on was predicated upon them: *Henly v. Franklin*, 3 Cold. 472; 91 Am. Dec. 296.

NEBRASKA AND IOWA INSURANCE COMPANY v. CHRISTIENSEN.

[20 NEBRASKA, 572.]

INSURANCE—WAIVER OF CONDITIONS RELATING TO PAYMENT OF PREMIUMS.

— Conditions contained in a policy of insurance, intended for the benefit of the company, and relating to the payment of premiums, may be waived by it.

INSURANCE—EVIDENCE SHOWING WAIVER OF PAYMENT OF PREMIUM.—

Evidence that an insurance company sued has often extended time to others and to the insured for the payment of premiums on other policies, that the policy in suit was delivered without payment of premium or subsequent demand therefor, and that the company accepted part of the premium due when tendered, is sufficient to prove a waiver of a condition in the policy exempting the company from liability unless the premium is actually paid; and it cannot, after loss, urge as a defense that the premium was not all paid.

INSURANCE—LEASED PREMISES—INCREASE OF RISK.—

Where the house insured was occupied by a tenant at the time of the delivery of the policy and of the loss, and the tenant, without the knowledge or consent of the insured, erected an addition to such house, such change does not avoid the policy, unless it contains a stipulation that an increase of risk by the tenant shall render it void, in addition to a condition that it shall be void if the risk is increased by any means within the knowledge or control of the insured.

INSURANCE—LEASED PREMISES—ILLEGAL USE.—Where a house insured is occupied by a tenant at the time of the delivery of the policy and of the loss, the fact that the premises were used for an unlawful purpose, as for prostitution, without the knowledge or consent of the insured, will not avoid the policy, when it does not prohibit such illegal use, and the loss does not result therefrom.

PRACTICE—SPECIAL FINDINGS OF FACT—DISCRETION.—Where trial courts are given discretionary power either to give or withhold questions for special findings of fact, a judgment will not be reversed in the absence of clear proof of an abuse of such discretion.

Scott and Scott, for the plaintiff in error.

Charles B. Keller, for the defendant in error.

NORVAL, J. This suit is upon a policy of insurance. The answer upon which the case was tried in the lower court admits that the defendant is a corporation, that it issued the policy declared upon by the plaintiff, and denies all the other allegations of the petition. The answer also pleads a breach by the assured of the following conditions of the policy:—

“1. The company shall not be liable by virtue of this policy, or any renewal thereof, until the premium therefor shall be actually paid.

“2. In case the building, whether intended for occupancy by owner or tenant, be or becomes vacant or unoccupied, or cease to be operated or used for the purpose stated in this policy, unless permission therefor be indorsed in writing, then and from thenceforth, so long as the same shall be unoccupied or cease to be operated, this policy shall cease and be of no force or effect.

“3. This policy shall be void and of no effect if, without permission therefor in writing hereon, any change take place in title, ownership, or possession (except by succession consequent upon the death of assured).

“4. This policy shall be void and of no effect if, without permission therefor in writing hereon, the risk be increased by any means within the control or knowledge of the assured.”

The reply denies a breach of any of the conditions of the policy, and alleges, in substance, that prior to the issuing of the policy sued on the defendant had issued other policies to the plaintiff, for which the defendant had been in the habit of receiving premiums from time to time as suited the convenience of the plaintiff; that it was the custom of the defendant to issue policies to insurers in said company without requiring the payment of the premiums at the time; that when the policy was issued, the defendant agreed that the premium

might be paid at such reasonable time thereafter as might suit the convenience of the plaintiff; that thereafter, on the eighth day of July, 1885, the plaintiff paid to the defendant nine dollars, part of said premium, and that the defendant at that time agreed to accept the balance at any time it should be convenient for the plaintiff to pay the same; that before the commencement of the suit he tendered to the company the balance of said premium, which it declined to accept; that the portion of the premium paid by the plaintiff was greater than the proportion of the time for which the premises had been insured under said policy before the destruction of the building by fire.

The cause was tried to a jury, and a verdict was returned for \$587.17, being the full amount of the policy, with interest, less the unpaid premium. Numerous errors are assigned in the petition in error on the rulings of the trial court on the introduction of testimony, but as they are not relied upon in the plaintiff in error's brief, they will not be considered here. The errors complained of consist in giving and refusing of instructions, and refusal to submit to the jury special interrogatories requested by the company.

The policy, which is the basis of the suit, was issued and delivered to the defendant on the thirtieth day of May, 1885, for the amount of five hundred dollars upon assured "one-story house, frame, shingle roof, building occupied as saloon, situated on lot 12, block 77, South Omaha Stock Yards," and to run one year from May 28, 1885. The amount of premium agreed upon was \$12.50. No part of it was paid when the policy was delivered, but a credit therefor was extended until such time as it should be convenient for the assured to pay the same, and that it was the custom of the company to extend credit for premiums, and to send its collectors to collect the same; but that was not done in this case. On July 8, 1885, the assured called upon the plaintiff and paid nine dollars of the premium, and it was then agreed that the balance should be paid when it suited the convenience of the insured. The building was entirely destroyed by fire November 29, 1885, and at that time it exceeded in value the amount for which it was insured. Proof of loss was made by the plaintiff in accordance with the terms of the policy. When the fire occurred, \$2.50 of the premium remained unpaid, but after the loss it was tendered, which the company declined to accept. At the time the policy was issued, the building was occupied as a

saloon by **Dug. Johnston, a tenant.** Johnston, at his own expense, without the knowledge or consent of the plaintiff, in August or September, 1885, built an addition to the building, which addition, without plaintiff's knowledge or consent, was used for the purpose of prostitution. There is evidence tending to show that it was not used for that purpose at the time of the fire, nor during two or three weeks prior to the loss. The fire originated in a hotel building standing a short distance from the saloon, from which the fire was carried to the saloon, the addition being the last to catch fire and burn.

On the question of the waiver of the conditions of the policy, the court, at the request of the plaintiff, instructed the jury as follows:—

“1. You are instructed that any condition or provision in a policy of insurance which avoids the policy, and which is placed there for the benefit of the insurance company, may be waived by the company, and such waiver may be either in expressed terms or by the conduct of the company.

“2. If you find from the evidence that the entire premium due upon the said policy of insurance had not been paid by the plaintiff to the defendant at the date of the fire, but that the mode of dealing and the conduct of said company or its duly authorized agent induced the plaintiff to believe that the prompt payment of the premium would not be insisted upon, as provided by the policy, such conduct on the part of the company would be a waiver of the right to forfeit the policy on account of such non-payment of a portion of the premium, and would not prevent the plaintiff from recovering in this action, nor the fact that he neglected the same before the fire affected his right to recover, if you find from the evidence that no demand for payment was made upon him by the said company for said balance of premium.

“3. You are further instructed that if you find from the evidence that sufficient money had been paid in on the policy of insurance, which is the basis of this action, to carry the policy at short rates beyond the date of the fire, and pay the company for such time for the risk assured, and such sum was received and accepted by the company without objection, and that a credit was extended by said company to said plaintiff for the balance of said premium, and no demand was ever made upon the said plaintiff for the said balance, then the fact that the entire premium specified in the policy had not been paid at the date of the fire would not prevent the plain-

tiff from recovering in this action; but you should deduct from your verdict, if you find for the plaintiff, the amount of the unpaid premium, with interest from May 28, 1885, to said date of its tender, December 14, 1885."

That the conditions contained in a policy of insurance intended for the benefit of the company may be waived by it is firmly settled by the decisions of this court; and the same is true as regards the terms of a policy relating to the payment of the premiums: *Phoenix Ins. Co. v. Lansing*, 15 Neb. 494; *Schoneman v. Western etc. Ins. Co.*, 16 Neb. 404. It is claimed that there is no evidence that the conduct of the company constituted a waiver. There is abundant evidence in the record that this company had often extended time to others for the payment of premiums; that the plaintiff had been given time by the defendant in which to pay premiums on other policies; that the policy in suit was delivered without payment of the premium; and that the company usually sent its collectors around to collect unpaid premiums, but had never demanded payment of the plaintiff. Again, long after the policy had been delivered, the defendant, without objection, received all but three dollars and a half of the amount agreed to be paid for carrying the risk for the year. The money thus paid was retained, and only after a loss did it occur to the defendant that it should be returned to the assured. When the nine dollars was offered, the defendant should have insisted that the balance be paid then, and if not so paid, it should have refused to receive the money. Instead of doing that, it accepted the amount tendered, and extended the time for the payment of the balance. Having elected to consider the policy in force by the acceptance of a part of the premium when tendered, it cannot, after a loss, urge as a defense that it was not all paid. More than enough had been received by the defendant to carry the risk past the date of the fire, at the customary short rates. It is also in evidence that Judge Doane, who was then representing the plaintiff, called upon the general manager of the company, Mr. Hart, after the fire, and called his attention to the fact that the whole premium had not been paid, and inquired if that was the objection to the payment of the loss. To this inquiry Mr. Hart replied that "he did not want to take advantage of that fact; if there was nothing else than that, that they were not disposed to take advantage of the fact that the premium had not all been paid." It is evident that the defendant regarded the condi-

tion of the policy in relation to the payment of the premium waived. Counsel for the plaintiff in error is mistaken when he says that the first instruction "assumes that the condition of the policy was placed in the policy for its own benefit." The language used will not bear such a construction. Besides, this condition is for the benefit of the company; it was not inserted for the benefit of the assured. That part of the second and third instructions relating to the failure of the defendant to demand the premium is based upon the testimony of Mr. Goodwin, the assistant secretary of the company, and other witnesses, to the effect that it was usual to send around a collector monthly to collect unpaid premiums. The plaintiff had a right to expect that the money would be called for. These instructions, taken together, fairly submitted to the jury the question of waiver by the company of the condition of the policy relating to the payment of the premium.

Error is assigned upon the refusal of the court to give the following requests of the defendant:—

"1. The jury are instructed that the plaintiff cannot recover in this case if the jury find that the entire premium contracted to be paid by plaintiff was not paid to the defendant before the loss occurred, unless you find that an agent of the defendant or officer of the company, or some one having authority so to do, waived the payment of the same, and that such waiver of payment was the reason why plaintiff did not pay the same.

"2. The jury are instructed that even though they find that some one had authority to waive the payment of the premium, or any portion thereof, until such time as might suit the plaintiff, and did so waive the same, and you further find that the plaintiff did have the means and could have paid the premium before the loss but for the fact that he forgot to do so, that the plaintiff cannot recover in this action, nor would the fact, if you should so find from the evidence, that the plaintiff offered or tendered to the defendant after the loss such unpaid part of the premium, relieve the plaintiff from his neglect to pay said premium before the loss, because he had forgotten so to do."

The first request doubtless stated the rule correctly, and its refusal would call for the reversal of the case were it not for the fact that the instructions given stated the law upon the question of waiver quite as favorable to the defendant. The defendant's second request was objectionable, in that it stated, "if the plaintiff did have the means and could have

paid the premiums before the loss, but for the fact that he forgot to do so, that the plaintiff cannot recover." It certainly was immaterial whether the plaintiff had the means to pay the premium or not. His right to recover for the loss did not depend upon that. The waiver of the conditions in the policy relating to payment of the premium did not depend upon the assured's ability to pay.

The company claims that after the policy was written, "the risk was increased by means within the control or knowledge of the assured." At the time of the issuing of the policy, and from thence until the loss occurred, the building insured was occupied by a tenant. In August or September preceding the fire, the tenant, at his own expense and without the knowledge or consent of the plaintiff, built an addition to the building insured. The assured did not know that the addition had been constructed until after the fire. Unless the owner is chargeable with the acts of the tenant, the policy is not invalidated by the erection of the addition. It cannot be said that the tenant was the agent of the plaintiff. The insured, therefore, was not bound by the acts of the tenant, committed without his knowledge or consent. We believe the rule to be this: That when a tenant, without the knowledge or consent of the insured, erects an addition to the house covered by the policy, it does not avoid the policy, unless it contains a stipulation to the effect that an increase of the risk by a tenant will render it null and void: *Merrill v. Insurance Co. of North America*, 23 Fed. Rep. 245; *Sanford v. Mechanics' etc. Ins. Co.*, 12 Cush. 541; *White v. Mutual Fire Assur. Co.*, 8 Gray, 586; *Boardman v. Merrimack etc. Ins. Co.*, 8 Cush. 583; *Franklin Fire Ins. Co. v. Gruver*, 100 Pa. St. 266.

The testimony establishes that the fire did not originate in the addition, but that the building insured was the first to take fire and burn. The company was not in the least injured by the erection of the addition.

On this branch of the case, the trial court instructed the jury that "if you find from the evidence that an addition was placed on said building after the insurance was taken, but that the same was placed there without the knowledge or consent or by the authority of the plaintiff, and was built by the tenant without the consent, authority, or knowledge of the plaintiff, and that the fire did not originate in said addition or in the building to which it was attached, then the building of such addition would not prevent the plaintiff from recover-

ing in this action." The idea conveyed by this instruction is in accordance with the views already expressed in this opinion, and receives our approval.

It is insisted by the company that the addition at the time of the loss was used as a place of prostitution. It is undenied that the addition was used for that purpose up to within two or three weeks of the fire. While there is testimony tending to show that it was so used when the building burned, the preponderance supports the opposite theory. Mr. Johnston, the tenant, testified that it had ceased at least two weeks before the fire. If his testimony be true, it was sufficient to authorize the jury in finding that prostitution had ceased before the loss occurred. If it was not thus used when the building was burned, the fact that prostitution was at one time carried on in the addition would not prevent a recovery. Even if the premises were used for the purpose of prostitution at the time of the fire, it would not invalidate the policy. The policy does not prohibit such illegal use. Again, it is shown beyond any question that the plaintiff had no knowledge that the premises were being used for such illegal purpose, and that the loss did not occur from such use: *Hall v. People's Mut. F. Ins. Co.*, 6 Gray, 185; *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247. The trial court correctly stated the rule thus: "If you find from the evidence that the plaintiff in this case did not authorize, and had no knowledge of, the use of said premises for prostitution, and that the property was not rented for that purpose, and that the plaintiff had no knowledge of its being used for such purposes, or control of the same, but that the same was perverted by the tenants without his knowledge or consent, the fact that it was used as a place of prostitution, if you so find from the evidence, would not prevent the plaintiff from recovering in this action, and the said policy would not be void for that reason."

The plaintiff in error asked the court to submit seven interrogatories to the jury for special findings of fact, which, being refused, are made the basis of an assignment of error. In *Floaten v. Ferrell*, 24 Neb. 347, it was held that "the statute confers a discretionary power upon the trial courts either to give or withhold questions for special findings of fact. Like other powers, the exercise of which are left to the discretion of courts, this is not to be abused or exercised arbitrarily, or through caprice." This is the correct construction of the statute. We fail to see any special reasons for presenting to the jury the questions propounded by the company, or that there

was any abuse of discretion in refusing them. We perceive no error in the record, and the judgment of the lower court is affirmed.

INSURANCE — WAIVER OF CONDITIONS RELATING TO PAYMENT OF PREMIUMS. — The right to declare a policy of insurance void for the non-payment of premiums may be waived, and the waiver may be manifested by conduct as well as by words: *Phœnix Ins. Co. v. Tomlinson*, 125 Ind. 84; 21 Am. St. Rep. 203, and note. A condition as to the prepayment of premiums may be waived in the same way: *Farnum v. Phœnix Ins. Co.*, 83 Cal. 246; 17 Am. St. Rep. 233, and note. A condition in a policy of fire insurance as to the time of payment of premiums may be waived by the company: *Susquehanna Ins. Co. v. Leavy*, 136 Pa. St. 499. A condition in a policy that the company would not be liable until the premium is paid may be waived: *Susquehanna Mut. etc. Ins. Co. v. Elkins*, 124 Pa. St. 484.

INSURANCE — ALTERATION OF PREMISES BY TENANT. — Alteration of premises by a tenant will not avoid the policy where it is done without the knowledge of the proprietor: *Padelford v. Providence etc. Ins. Co.*, 2 R. I. 102; 67 Am. Dec. 496, and note. An alteration of the insured premises by the erection of another building thereon will not avoid a policy which declares that such a change will make it optional with the company whether or not it will avoid it: *Commercial Ins. Co. v. Mehlman*, 48 Ill. 313; 95 Am. Dec. 443, and note. Repairs and alterations in the insured premises do not *per se* avoid the policy, but it places upon the insured the hazard of increasing the liability of the insurer: *Girard Fire etc. Ins. v. Stephenson*, 37 Pa. St. 293; 78 Am. Dec. 423, and note. An addition or extension to an insured building does not of itself operate as an increase in the risk and thereby avoid the policy: *Meyer v. Queen Ins. Co.*, 41 La. Ann. 1000. Where a tenant increases the risk without the consent of the insurer, and a loss occurs during such increase, the ignorance of the owner as to the increase will be no defense to a condition for its forfeiture: *Long v. Beeber*, 106 Pa. St. 466; 51 Am. Rep. 532.

DEAVER v. BENNETT.

[29 NEBRASKA, 612.]

WAGERS — RECOVERY FROM STAKE-HOLDER. — Money deposited with a stakeholder, as a wager on the result of a horse-race, can be recovered from him by the losing party depositing it, if demanded before it has been paid to the winner.

PLEADING. — INDEFINITE ALLEGATIONS IN PLEADINGS cannot be corrected and made more definite by demurrer. This can be done only by motion.

C. C. Flansburg and L. H. Kent, for the plaintiff in error.

J. L. Roberson and H. J. Whitmore, for the defendant in error.

NORVAL, J. This action was commenced in the county court of Harlan County by C. A. Bennett, the defendant in error, to recover four hundred dollars from Oscar H. Deaver,

the plaintiff in error, for money deposited by Bennett with Deaver as stake-holder, as a wager on a horse-race. The petition filed in that court states "that plaintiff, on or about the eleventh day of August, 1888, made a wager with one W. J. Fitch, upon the result of a certain horse-race which afterwards was to take place on the race-track in the town of Orleans, and thereupon plaintiff and said Fitch each paid over to the defendant, Oscar Deaver, the sum of four hundred dollars to abide the result of said race; and that afterwards said race took place, and by the said decision of the judges in said race, the plaintiff lost said wager. Plaintiff further alleges that he notified said stake-holder, Oscar Deaver, not to turn over said money to said Fitch, which the said Deaver refused to do, but paid the same over to Fitch, who still holds the same. Wherefore the plaintiff prays judgment against said defendant for four hundred dollars, and interest from August 11, 1888, and costs of suit."

The defendant demurred to the petition, alleging that it did not state sufficient facts to constitute a cause of action. The demurrer was overruled, and the defendant electing to stand on his demurrer, a judgment was rendered for the plaintiff for four hundred dollars. To reverse the judgment, the defendant prosecuted error to the district court where the judgment was affirmed. The case is here on error.

Two questions are raised by the demurrer: 1. Can money which has been deposited with a stake-holder as a wager on the result of a horse-race be recovered by the party depositing the same from the stake-holder, if demanded after the wager is decided and before the money has been paid to the winner? 2. Does the petition allege that a demand was made before the money was turned over by the defendant to Fitch?

The legislature, in 1887, amended section 214 of the Criminal Code to read as follows: "Every person who shall play at any game whatever for any sum of money or other property of value, or shall bet any money or property upon any gaming-table, bank, or device prohibited by law, or at or upon any other gambling device, or who shall bet at any game played at or by means of any such gaming-table or gambling device, shall, upon conviction, be fined in any sum not less than one hundred dollars and not exceeding three hundred dollars, or be imprisoned in the penitentiary not more than one year; and upon a second or any subsequent conviction shall be fined in any sum not less than three hundred dollars and not ex-

ceeding five hundred dollars, or be imprisoned in the penitentiary not more than two years; provided, that if any person or persons who shall lose any property or money in a gambling-house or other place, either at cards or by means of any other gambling device or game of hazard of any kind, such person, the wife or guardian of such, his heirs, legal representatives, or creditors, shall have the right to recover the money, or the amount thereof, or the property, or the value thereof, in a civil action, and may sue each or all persons participating in the game, and may join the keeper of the gambling-house or other place in the same action, who shall be jointly and severally liable for any money or property lost in any game or through any gambling device of any kind, and no title shall pass to said property or money, and in an action to recover the same no evidence shall be required as to the specific kind or denomination of money, but only as to the amount so lost."

The plaintiff insists that he is entitled to recover the money under the proviso clause of the above quoted section, claiming that horse-racing is a "game of hazard." As we construe the language of this section, it has no application to the case at bar. It only authorizes a recovery against the persons participating in the game, and the keeper of the gambling-house or other place where the money or property was lost. It is evident that where the stake-holder takes no part in the game, an action cannot be maintained against him under this statute: *Riddle v. Perry*, 19 Neb. 505. The petition does not allege that the defendant took a part in the race. Whether money lost on the result of such a race can be recovered from the persons participating therein we do not decide, as the question does not arise in this case.

There being no legislative enactment authorizing the maintenance of this suit, can the plaintiff recover under the principles of the common law? A similar case was before this court at the January term, 1886, in the case of *Riddle v. Perry*, 19 Neb. 505. The then Chief Justice Maxwell, in the opinion filed in that case, says: "At common law, where the wager is illegal, either party may claim the money deposited by him from the stake-holder, even after the wager is decided against such party, if the demand is made before the money is actually paid over. If, however, the stake-holder has paid the money over to the winner before notice or demand upon him by the loser, he is exonerated, and no action will lie against him by the loser to recover the same."

Undoubtedly that is a correct statement of the law on the subject, and it is well sustained by the decisions of the highest courts of the other states: *Collamer v. Day*, 2 Vt. 146; *Tarleton v. Baker*, 18 Vt. 1; *Stacy v. Foss*, 19 Me. 335; 36 Am. Dec. 755; *Bull v. Gilbert*, 12 Met. 397; *Perkins v. Eaton*, 3 N. H. 155; *Wilkinson v. Tousley*, 16 Minn. 299 (263); 10 Am. Rep. 138; *Bledsoe v. Thompson*, 6 Rich. 44; 57 Am. Dec. 777; *Cleveland v. Wolff*, 7 Kan. 184.

The statute in force when the cause of action in *Riddle v. Perry*, 19 Neb. 505, occurred made betting on a horse-race a penal offense, and it is conceded that that law was repealed by the legislature in 1887, when it adopted the above quoted section 214 of the Criminal Code. That case is therefore not authority now, unless contracts of wager on the result of a horse-race are illegal when not declared so by legislative enactment.

The rule at the common law was, that all wagering contracts that were contrary to good morals or public policy were illegal and void. The courts of England at an early day held that betting on a horse-race was not opposed to good morals. The courts of that country reluctantly followed this early precedent, until the common-law interpretation of wagering contracts was changed by the statutes of 8 and 9 Victoria, which made all contracts of wager void. Is betting on the result of a race contrary to good morals? We are not bound by the decisions of the courts of England in determining that question. Whether a thing in the eyes of the law is moral or immoral may depend largely upon when and where it occurred. An act may be upheld as moral in one country and be regarded as immoral in another. A wager contract might have been sustained a hundred years ago as being in conformity with good morals, and be condemned to-day as immoral. In this country, betting on a race is now generally regarded as against sound morals. As a general rule, the courts of this country, in the more recent decisions, have refused to enforce all wagering contracts, even though they are not declared illegal by statute. Such contracts are certainly against good morals, a detriment to society, and, under the principles of the common law, are illegal and void.

The case in all its facts like the one at bar is *Wilkinson v. Tousley*, 16 Minn. 299; 10 Am. Rep. 139. In that state, as in this, the betting on the result of a horse-race is not made illegal by statute. The court held in that case that the wager

was illegal and that the money was recoverable from the stakeholder by the loser. Berry, J., in delivering the opinion of the court, after reviewing the decisions of the court of England and this country on the subject, says: "From the standpoint from which the subject of wager contracts was viewed by the courts in England at the time when it was originally determined as a rule of law that wagers upon indifferent subjects or questions were valid contracts, they were not regarded as contrary to good morals or sound public policy. And this rule, having become established, has been followed, though, as remarked by Le Blanc, J., in *Gilbert v. Sykes*, 16 East, 156: 'It has often been lamented that actions upon idle wagers should ever have been maintained in courts of justice.' The practice seems to have prevailed before that full consideration of the subject which has been had in modern times. Whether it was necessary for the English courts to follow such a rule, after having clearly ascertained that it rested upon an unsound foundation, we need not inquire; but in announcing a rule where none has been before announced, the question is, whether we shall blindly adopt a doctrine which is admitted to have been originally wrong, both in morals and in law, and from which the courts of England would gladly escape were they not hampered by precedents, or whether we shall give full scope to the broad principle that contracts contrary to good morals and sound public policy are invalid, and that therefore wagers, as contracts of that character, are not to be sustained. We have no hesitation in adopting the latter course; and instead of resting our conclusion upon the ground taken in New Hampshire and Vermont, that the common law upon this subject has not been adopted here, we prefer to say that the rule by which these wager contracts have been tolerated was a perversion of the common law, and contrary to one of its fundamental principles; that it was based upon a false and mistaken notion of good morals and sound public policy; and that as all such contracts are condemned by the more enlightened views of morality and public policy which now prevail, they ought to be condemned by the courts. This is not to disregard or abrogate the common law, but to restore and to follow one of its acknowledged principles, from which the English courts have manifestly departed. We therefore hold the wager in this case illegal and invalid."

In *Bledsoe v. Thompson*, 6 Rich. 44, 57 Am. Dec. 777, the plaintiff sued to recover money deposited by him with the de-

defendant as stake-holder, as a wager on a horse-race. The wager was decided against the plaintiff, who notified the defendant not to pay the money over, but the defendant paid the money afterwards to the winner. The supreme court of South Carolina held the contract illegal, and that the plaintiff could recover his money, notwithstanding the statutes of that state did not make betting on such a race a penal offense. To the same effect are *Perkins v. Eaton*, 8 N. H. 152; *Hoit v. Hodge*, 6 N. H. 104; 25 Am. Dec. 451; *Stacy v. Foss*, 19 Me. 335; 36 Am. Dec. 755; *Wheeler v. Spencer*, 15 Conn. 28; *Hale v. Sherwood*, 40 Conn. 332; 16 Am. Rep. 87; *Cleveland v. Wolff*, 7 Kan. 184.

A wagering contract being illegal, either party to it may retrace the illegal step, and demand his money or property put up, at any time before it is turned over to the winner. The stake does not belong to the winner until received by him, nor does it belong to the stake-holder. While in the hands of the stake-holder, it belongs to the party depositing it. This case, therefore, falls within the rule laid down in *Riddle v. Perry*, 19 Neb. 505, and is governed thereby.

The point is made that the petition does not allege that a demand was made for the money before it was paid over. The petition states that the plaintiff notified the defendant not to turn over the money to Fitch, which he refused to do, but paid it over to Fitch. While the allegations of the petition in regard to the demand made by the plaintiff are not very full and definite, yet we think it sufficiently appears that the money had not been paid over when the defendant was notified that the plaintiff claimed it. If the defendant desired a more definite statement of the facts, he should have filed a motion for that purpose. The allegations are sufficient to resist a demurrer.

The judgment of the district court was right, and is affirmed.

WAGERS — RECOVERY FROM STAKE-HOLDER. — Money held by a stake-holder on a bet may be recovered by the depositor, provided he notifies him not to pay it over: *Gilmore v. Woodcock*, 60 Me. 118; 31 Am. Rep. 255, and note; *Alford v. Burke*, 21 Ga. 46; 68 Am. Dec. 449, and note; *Tarleton v. Baker*, 18 Va. 9; 44 Am. Dec. 358, and note; *Shackleford v. Ward*, 3 Ala. 37; 36 Am. Dec. 435, and note. The action may be maintained only after such request has been made to the holder: *Dancy v. Phelan*, 82 Ga. 242.

CASES

IN THE

COURT OF ERRORS AND APPEALS

OF

NEW JERSEY.

NATIONAL DOCKS AND NEW JERSEY JUNCTION CONNECTING RAILWAY CO. v. STATE, UNITED NEW JERSEY RAILROAD AND CANAL CO., AND PENNSYLVANIA RAILROAD CO.

[88 NEW JERSEY LAW, 217.]

RAILROADS — EMINENT DOMAIN — CONDEMNATION OF CROSSING. — One railroad may condemn a right of way to cross another which is intersected by its route. After such condemnation the place of crossing remains in the common use of both roads for the exercise of their respective franchises, and the manner of crossing must not be destructive of the ability of the road crossed, to fully, fairly, and freely exercise its franchises.

RAILROADS — EMINENT DOMAIN — CONDEMNATION OF CROSSING. — One railroad in condemning a right of way to cross another may determine by the location of its route how and where it will cross.

EMINENT DOMAIN — CONDEMNATION OF CROSSING BY RAILROAD — DAMAGES. — Where the petition for the condemnation of the right to cross one railroad by another prescribes the manner of crossing, the condemning company will be compelled to make compensation only for a crossing in the manner specified; and if such crossing is afterwards materially changed, compensation for the damage occasioned by such change must be made.

EMINENT DOMAIN — CONDEMNATION OF CROSSING BY RAILROAD — DAMAGES. — Where a petition for the condemnation by one railroad of a right of way to cross the road of another describes the exact manner of using the right of way to be acquired, compensation is limited to such damages as may result from such use; and it is not presumed, as in case of a general condemnation, that all damages, both present and prospective, including those occasioned by subsequent changes in the plan of crossing, have been considered and allowed.

EMINENT DOMAIN — CONDEMNATION OF CROSSING BY RAILROAD — CERTIORARI. — Where a petition by one railroad for the condemnation of a right to cross the road of another specifies the manner of crossing, the legality of the proposed plan may be conveniently and properly questioned be-

fore the condemnation proceeds only by the supreme court, under its general supervisory powers, upon *certiorari*.

EMINENT DOMAIN — CONDEMNATION OF CROSSING BY RAILROAD. — Ability to enjoy all its privileges and to perform all its duties in a proper and reasonable manner, being secured to a railroad company whose road is crossed by another, the former must, upon being fully compensated for the right of way, submit to the necessary inconvenience and damage which such crossing may occasion.

EMINENT DOMAIN — CONDEMNATION OF CROSSING BY RAILROAD — MEASURE OF DAMAGES. — Where a railroad, in its petition to condemn a right of way across another railroad, fails to define how it will cross, but seeks to condemn the privilege of crossing generally, damages should be assessed, not only for the manner of crossing at present lawful and necessary, but also for lawful changes in that manner of crossing in the future.

EMINENT DOMAIN — CONDEMNATION OF CROSSING BY RAILROAD — EQUITABLE REGULATION. — Where one railroad acquires the right to cross another, either generally or specially, by condemnation proceedings, equity may be invoked, in case of subsequent conflict between such companies, to secure to each the enjoyment of its privileges in a lawful manner.

EMINENT DOMAIN — CONDEMNATION OF CROSSING BY RAILROAD — DESCRIPTION. — In condemnation proceedings by one railroad company to obtain a crossing over the road of another, the land sought to be condemned must be within the located route of the condemning company, and must be described with such certainty as to be capable of definite and unmistakable ascertainment; otherwise the proceedings are void.

RAILROADS OF LESS LENGTH THAN ONE MILE ARE LEGAL, if of public use and benefit, and a connection between two existing railroads may be accomplished by an independent corporation organized for that purpose.

Gilbert Collins and John R. Emery, for the plaintiff in error.

James B. Vredenburg and Joseph D. Bedle, for the defendants in error.

Per CURIAM. The judges voting to reverse the judgment of the supreme court in the above-entitled cause concur in the opinion delivered by the chancellor, except so far as it holds the petition to be defective. Deeming the petition sufficient, we think the judgment below should be reversed.

The CHANCELLOR. The plaintiff in error was organized in pursuance of the provisions of the act to "authorize the formation of railroad corporations, and regulate the same," approved April 2, 1873 (Revision, p. 925), and its supplements, known as the general railroad law, for the purpose of building a railroad, about two thousand six hundred feet long, within the corporate limits of Jersey City. On the 10th of December, 1888, it filed a survey of the route and location of its proposed road. That survey provides that it is to commence at a point in the route of the National Docks railroad south of Montgomery Street, and run northerly several courses, about fifteen

hundred feet, to the lands of the defendants, and then, for more than one thousand feet, through the defendants' lands to a point in the route of the New Jersey Junction Railroad Company, thus forming a direct connection between the routes of the National Docks and New Jersey Junction railroads. The land of the defendants first traversed by this route is an embankment, immediately adjoining, running parallel with, and elevated about twenty-three feet above Railroad Avenue, one of the public streets of Jersey City. Upon this embankment, for many years, the main line of the defendants' railroad was constructed and operated, but that line now being shifted to the north, the embankment is occupied by a side-track. Immediately north of this embankment, for two or three hundred feet, is ground, raised to the grade of the old embankment by filling up a hollow, which the defendants propose to use, in connection with their old main line embankment, as a car-yard, made necessary by the elevation of their tracks through Jersey City. North of this land is an embankment, upon which the defendants' new main line is constructed, and then some partially filled but unused meadow. The terminus of the route is at or near the point where the New Jersey Junction railroad crosses the defendants' right of way, from their main line to their freight depots in Harsimus cove, over which, upon an elevated iron trestle or bridge, its freight tracks are laid.

When the New Jersey Junction railroad, as it is at present constructed, emerges from under the defendants' freight line, it curves to the east and ascends to the defendants' main line, making a connection with it, although its filed route shows that it was contemplated that the main line should not curve to the east, but continue in a southerly direction.

This curved extension to the connection with the defendants' road is in the location of Branch No. 7, represented upon the filed route of the New Jersey Junction railroad, and although, as constructed, it appears to be a continuation of the main line, it is called "Branch Railroad No. 7." At a point nearly opposite the commencement of this curve, or the place of departure of Branch No. 7 from the main line of the Junction railroad, the defendants have cut through the embankment upon which their new main line is constructed, walled the cut, and carried their main line over it upon a bridge. Through this cut, under the bridge, they have laid two tracks. It is in evidence that their purpose in making this cut was to pro-

vide an undergrade connection, through their land, with the National Docks Railroad, but that such intention has been abandoned. The plaintiff now proposes to utilize this cut for its road, and to continue it, with suitable walls, southerly, through the defendants' proposed car-yard to Railroad Avenue. As the plaintiff's road must cross that avenue above or below the street's grade (Revision, p. 930, sec. 14), and it appears to be impracticable for it to cross below the grade, it will be necessary for it, after it passes the defendants' main line, to gradually raise the bottom of its cut through the defendants' land, so that, at Railroad Avenue, it may be the requisite distance above the surface of that street. In that event, to enable the defendants to use their land between their main line and Railroad Avenue for a car-yard, on both sides of this cut, the grade must be gradually raised from the new main line southerly. The maximum of the change thus required will be at the embankment upon which the old main line was constructed, eight feet and a half above the present grade at that point, and three feet and ten inches above the grade of the defendants' new main line.

By its petition for the appointment of commissioners to assess the compensation and damages to be paid to the defendants for the proposed crossing, the plaintiff has specified the manner in which it intends to cross that part of the defendant's lands which appears to be necessary for railroad purposes. The cut, together with that now existing under the defendants' main line, is to be 524 feet long, walled on both sides with walls constructed of stone resting on solid foundation, twelve feet in width at the bottom and five feet in width at the top, with a batter on the inner face of half an inch to a foot. The inner faces of the wall are to be thirty feet apart at the level of the rails in the proposed road. These walls are to unite with and continue the walls which support the defendants' main line over the cut now existing under that line, and to gradually rise, upon a grade of eighty-two hundredths of a foot to each one hundred feet, until, at Railroad Avenue, they shall be thirty-one feet above the crown of the road-bed of that highway. The walls are to be competent to support half-through girder railroad bridges at every point; and the defendants are to have the right to use the walls to support such bridges, and for all other purposes which will not interfere with the proper use of the plaintiff's proposed railroad.

At this point in the statement of facts, two inquiries are pre-

sented: 1. Whether, in acquiring the crossing over an existing railroad, a condemning company may, by its petition, designate the manner of crossing, and make compensation for such crossing only, or whether it must condemn the right to cross generally, subject to such restrictions and requirements in the use of the right it may acquire as the court of chancery may reasonably prescribe, making compensation predicated upon anticipated and possible regulation; and 2. Whether a crossing which interferes with the present use or intended use of railroad lands for railroad purposes is lawful.

The right of one railroad to cross another which is intersected by its route is so plainly essential to its construction for any considerable distance that it has become indisputably established by implication from mere authority to build a railroad between given points: *Morris etc. R. R. Co. v. Central R. R. Co.*, 31 N. J. L. 205; *State National R'y Co. v. Easton etc. R. R. Co.*, 36 N. J. L. 182; *New Jersey Southern R. R. Co. v. Long Branch Comm'rs*, 39 N. J. L. 28; *New York etc. R. R. Co. v. Drummond*, 46 N. J. L. 644; and the general railroad law recognizes this right in railroads incorporated under it in terms so unambiguous as to be tantamount to express authority: Revision, p. 934, sec. 36; *State v. Hudson Tunnel Co.*, 38 N. J. L. 548. The right, however, is by implication from necessity, and its exercise must therefore be limited by the necessity of the condemning road.

In the condemnation of a crossing over the lands of another railroad which are necessary for railroad purposes, all that is acquired is a right of way. After such condemnation, the place of crossing remains in the common use of both railroads for the exercise of their respective franchises. The manner of crossing is not to be destructive of the ability of the road crossed to fully, fairly, and freely exercise its franchises: *State National R'y Co. v. Easton etc. R. R. Co.*, 36 N. J. L. 181; *New Jersey Southern R. R. Co. v. Long Branch Comm'rs*, 39 N. J. L. 28; *Lehigh Valley R. R. Co. v. Dover and Rockaway R. R. Co.*, 43 N. J. L. 528; *New York etc. R. R. Co. v. Drummond*, 46 N. J. L. 644.

It is not perceived that there can be tenable or sufficient objection to the designation of the manner of crossing in the petition in condemnation proceedings.

It is within the power of one railroad to determine by the location of its route where it will cross another: *National Docks R. R. Co. v. Central R. R. Co.*, 32 N. J. Eq. 755. And

it is impossible to perceive a sufficient reason why it may not also determine, within lawful bounds, how it shall cross the other. When a crossing is sought in a manner specified in its petition, the condemning company will make compensation for a crossing in that single manner, which, if it may thereafter be materially changed, may not be so changed, without additional compensation for the damage which the change may occasion. The specification, upon the record, of the exact method of using the right of way to be acquired, limits the compensation to the damages which may result from such use, and there can be no presumption, as in case of a general condemnation (Lewis on Eminent Domain, sec. 565; and *Van Schoick v. Delaware etc. Canal Co.*, 20 N. J. L. 249; *Ten Eyck v. Delaware etc. Canal Co.*, 18 N. J. L. 200; 37 Am. Dec. 233; *Delaware and Raritan Canal Co. v. Lee*, 22 N. J. L. 243; *Trenton Water Power Co. v. Chambers*, 13 N. J. Eq. 199), that all damages, both present and prospective, including those occasioned by subsequent changes in the plan of crossing, have been considered and allowed.

When the petition prescribes the manner of crossing, the effect upon the road crossed being thereby discernible, it is apparent that the legality of the proposed plan may be conveniently and properly questioned before the condemnation proceeds, not by the judge to whom the petition is presented, whose jurisdiction is limited by statute, but by the supreme court, under its general supervisory powers, upon *certiorari*: *Morris etc. R. R. Co. v. Hudson Tunnel Co.*, 38 N. J. L. 548.

At this point the second question suggested, whether a crossing which interferes with the present use or intended use of railroad lands for railroad purposes is lawful, arises.

As has been stated, in the acquisition of a right to cross, the ability of the existing company to fully, fairly, and freely exercise its franchises is not to be destroyed. It is not the policy of the law to cripple or destroy one highway for the purpose of erecting another. The purpose is to preserve, multiply, and maintain highways for the development of the country and the general public benefit. And this purpose is especially manifested in the general railroad law, where there exists a prohibition against the condemnation of lands used for railroad purposes, except for a mere crossing. But it does not follow that the precise existing use of the land crossed may not be interfered with. There can be no reason why such use should not yield, if the proposed interference with it

is necessary, and of a character that will not destroy the reasonably fair enjoyment and exercise of the franchises of the company whose road is crossed. Ability to enjoy all its privileges, and to perform all its duties in a proper and reasonable manner, being secured to the latter company, it must, upon being duly compensated, submit to the necessary inconvenience and damage which the crossing may occasion. This view of the law has already found expression in this court, both in *New York etc. R. R. Co. v. Drummond*, 46 N. J. L. 644, and *Morris etc. R. R. Co. v. Hudson Tunnel Co.*, 38 N. J. L. 548.

In recognizing the right of the condemning company to specify a lawful manner of crossing, and to condemn a crossing in that manner, the right to condemn without such specification must not be lost sight of. Where such a company fails in its petition to define how it will cross, but seeks to condemn the privilege of crossing generally, the damages are to be assessed, as in the case of the condemnation of lands of private individuals for railroad uses, not only for any manner of crossing at present lawful and necessary, but for lawful changes in that manner of crossing in the future.

That which is acquired in such a condemnation, as in the case where the manner of crossing is specified in the petition, is a mere privilege or easement in lands, which are subject to a like privilege in favor of the road which is crossed. If in the use of this common easement, whether it be acquired under proceedings to condemn a crossing in a specified manner or under proceedings to condemn a crossing generally, conflict should at any time arise between the companies, the interposition of equity may be invoked, according to the principles declared in *Delaware etc. R. R. Co. v. Erie R'y Co.*, 21 N. J. Eq. 298, and approved in this court in *National Docks R. R. Co. v. Central R. R. Co.*, 32 N. J. Eq. 767, to secure to each the enjoyment of its privilege in a lawful manner.

The proofs in the present case disclose that the projected crossing now considered cannot be effected without considerable inconvenience and damage to the defendants. It will necessitate a change in the proposed car-yard, which will not only be in itself expensive, but will also render the future operation of the yard more difficult and costly to its managers and dangerous to their employees, by reason of heavy grade and of a cut through its center, unless an expensive change in the proposed grade of the defendants' elevated tracks, now in course of construction through Jersey City, is made, and some

safe covering for the plaintiff's cut is devised. The necessities of the defendants appear to forbid the abandonment of their yard, or its transfer to another locality. But however serious this inconvenience and damage may be, it does not appear that they will be either destructive to the ability of the defendants to fully and fairly exercise their franchises and perform their duties, or of such character that they may not be adequately compensated in damages. In addition, it appears to be reasonably necessary that the plaintiff's projected crossing shall be effected in the manner and at the place proposed. East of that place is a closely built city, which can be passed through only at an enormous cost, and on the west is a network of the defendants' tracks and a rocky hill, which present almost insuperable obstacles in that direction. It is not suggested or perceived how a route more desirable or convenient to either the plaintiff or defendants, between the termini of the plaintiff's road, could be selected. The projected crossing, then, is not unlawful.

In addition to the crossing over the lands of the defendants, which appear to be necessary for their railroad purposes, the plaintiff proposes to acquire a portion of the unused meadow north of the defendants' new main-line embankment, "twenty-seven and a half feet wide on each side of its center line, except at or near the extreme northerly end thereof, where it requires thirty-seven and a half feet in width on the easterly side of said center line." The plaintiff's petition contains a particular description of the land thus sought to be condemned, in which the northerly end of that land is described as follows: "Thence curving to the left on a radius of five hundred and forty-six and two tenths (546.2) feet a distance of one hundred and sixteen (116) feet to a point opposite the southerly end of the westerly wall or abutment supporting the tracks of the Pennsylvania Railroad Company, known as the Harsimus cove or freight tracks; thence (S. 63° 50' E.) south sixty-three degrees and fifty minutes east, a distance of twenty-two and a half (22½) feet to the corner of said last-mentioned wall or abutment; thence (N. 26° 10' E.) north, twenty-six degrees and ten minutes east, along the face of said wall or abutment, a distance of eighteen and seventy-eight one hundredths (18.78) feet to a point five (5) feet westerly from station (25+94.8) twenty-five plus ninety-four and eight tenths feet, being the point of ending of said center line; thence in a course about (S. 63° 50' E.) south, sixty-three degrees and

fifty minutes east, a distance of forty-two and five tenths (42.5) feet, running through the end of said center line, as filed, to a point thirty-seven and a half feet easterly thereof; thence (S. 26° 10' W.) south, twenty-six degrees and ten minutes west, a distance of twenty-seven (27) feet to a point in the division line between the lands of said Pennsylvania Railroad Company and the New Jersey Junction Railroad Company."

It is objected that the land thus described is not within the plaintiff's located route, and that therefore it cannot be taken by condemnation. This view was adopted by the supreme court. The objection grows out of the uncertainty as to the location of the northerly terminus of the filed route. It is stated in the survey of that route to be a point on the line of the New Jersey Junction railroad as constructed, which is "the point of departure of Branch Railroad No. 7 of the last-mentioned railroad company, as filed March 2, 1886, in the secretary of state's office." Now, that which is filed in the secretary of state's office exhibits center lines only, and the point of departure of Branch No. 7, as there shown, is the point at which the center line of the branch leaves the center of the main line. If the point thus indicated be the terminus intended, it is clear that the condemnation contemplates the taking of land outside of the filed route of considerable and valuable proportions. The courses given in the survey of the route, however, do not lead to this point, and if those courses be run the distances given in the survey, without qualification, the terminus would be several feet northwest of the departure of the center line of the branch from the center of the main line of the Junction railroad, upon a curving rail on the westerly side of the westerly track of that road; a point which is not indicated upon any survey of the New Jersey Junction railroad which is filed in the office of the secretary of state. But the distances in the survey are qualified. It is expressly stated that they are to be taken "more or less." And thus the survey provides that the terminus is to control the distances. The terminus is not a visible monument, but it is capable of ascertainment, and by the express provisions of the survey it is given the character of a visible monument. The engineer of the plaintiff in error explains that the words "more or less" were designed to make the distances, which were expressed in figures, sufficiently elastic to reach the exact point on the curved westerly rail of the New Jersey Junction

railroad, as that railroad is now constructed, where it may be determined that the Branch No. 7 departs upon that rail from the main line, the exact point being uncertain. The courses of the survey lend credence to this explanation, but the description of the terminal point is at decided variance with it. It is impossible to reconcile all parts of the description. It is suggested that the court should consider the description of the terminal point elliptical, and supply words to make it conform to the theory of its meaning advanced by the plaintiff. We perceive no warrant for so doing, in view of the fact that the terminal point intended is not identified. It is deemed that the great value of the property, and the conflict of important railroad interests at this point, render it necessary that the disputed terminus should be so described that it will be capable of definite and unmistakable ascertainment. As it is now designated, it is so indefinite and uncertain that it is impossible to say that the land sought to be condemned is all within the plaintiff's located route. We think that this uncertainty vitiates the proceedings reviewed.

The defendants present two other objections to the proceedings considered which demand attention, because they question the plaintiff's legal existence. The first is, that the general railroad law does not authorize the construction of a railroad less than a mile in length; and the second is, that a connection between two railroads, incorporated under that law, cannot be accomplished by an independent corporation. It is argued, in support of the first of these propositions, that the rating of the deposit to be made with the state treasurer at the time of incorporation, and the charges that the company may make for transportation, and the minimum of the company's capital stock, by the mile, conclusively exhibits the legislative intent that the railroads contemplated by the law shall be more than a mile in length. The statute expressly provides for two classes of railroads, — those more than ten miles long, and those less than ten miles in length, — but it makes no minimum limit of length in the latter class. The design of the law is to subserve the public good. Consequently, every railroad incorporated under it is expressly required to transport such passengers and property as shall be properly offered for transportation at its depots: *Revision*, p. 932, sec. 26. The test of the road intended is its public use and benefit, and not its extent or length: *Long Branch Comm'rs v. West End R. R. Co.*, 29 N. J. Eq. 566; *National Docks R. R.*

Co. v. Central R. R. Co., 82 N. J. Eq. 755, 766. The law-makers apparently considered the utility of a legislative limitation of the length of a railroad to be so questionable, in view of the fact that capital will not seek unremunerative investment and duties, that they did not impose it. This interpretation of the statute is now too well established in our courts to be disturbed. The public convenience and benefit being subserved, which is exhibited by the investment of capital, the railroad may be less than a mile in length.

The second objection, that a connection between two railroads cannot be accomplished by an independent corporation, is claimed to be supported by the provisions of the twenty-third section of the general railroad law, which, it is said, contemplates an extension of or an addition to an existing road, to form a desired connection, and by the supplement of 1880 (P. L., sec. 94) to the "act concerning railroads": Rev. Sup., p. 823, sec. 7. The latter act appears to be directed to specially chartered railroads. But at best, both the laws referred to merely confer power to make railroad connections. I fail to find anything in the statute which prohibits the connection of two railroads by an independently incorporated company. In *Long Branch Comm'rs v. West End R. R. Co.*, 29 N. J. Eq. 566, above cited, it was said that the twenty-third section of the general railroad law expressly declares that a corporation whose road shall be constructed under this law shall have the right to connect its road with any railroads within this state or any other state, and that the sole purpose of the acquisition of corporate functions by the defendants in that case was to build a connecting road between two existing roads, and that such purpose is specially legalized.

We do not think that this objection is well taken.

Other objections go merely to the regularity of the plaintiff's proceedings, and as we think that those proceedings are vitiated by the uncertainty whether the land which the plaintiff seeks to condemn is within its located route, it is not necessary to consider them. Our conclusions upon the points stated lead to an affirmance of the judgment of the supreme court.

RAILROADS — EMINENT DOMAIN — RIGHT OF ONE RAILROAD TO CROSS ANOTHER. — Lands or right of way occupied by one railroad company for its corporate purposes cannot be taken as a right of way by another company except for mere crossings, and then only for crossing purposes: *Appeal of Pittsburgh Junction R. R. Co.*, 122 Pa. St. 511; 9 Am. St. Rep. 128; *Appeal of Sharon R'y Co.*, 122 Pa. St. 538; 9 Am. St. Rep. 133, and extended note.

See *Barre R. R. Co. v. Montpelier etc. R. R. Co.*, 61 Vt. 1; 15 Am. St. Rep. 377, and note, where cases are collected. One railroad may institute a statutory suit to condemn a part of the right of way of another company, but there must be no unnecessary interference with the free use of the older franchise: *Mobile etc. R. R. Co. v. Alabama etc. Ry Co.*, 31 Ala. 591. See *Mobile etc. R. R. Co. v. Alabama etc. Ry Co.*, 31 Ala. 520. Property devoted to public use, including franchises, may be taken under the right of eminent domain for other public uses if statutory authority therefor exists: *Appeal of Groff*, 123 Pa. St. 621.

ROTHHOLZ v. DUNKLE.

[58 NEW JERSEY LAW, 423.]

LIBEL. — PRIVILEGED COMMUNICATION is one made under such circumstances as to repel the legal inference of malice, and to throw upon the accused the burden of showing malice otherwise than by merely proving the falsity of the statement made.

LIBEL. — PRIVILEGED COMMUNICATION. — A voluntary communication, made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, whether made in response to an inquiry or not, if made to a person having a corresponding interest or duty, although it contains criminatory matter, which, without this privilege, would be actionable as libelous.

LIBEL. — PRIVILEGED COMMUNICATION. — A communication made by a cashier of a bank to a stockholder therein, regarding the financial standing of a surety on an official bond to the bank, is privileged, whether made in response to an inquiry by such stockholder or not.

August Stephany, for the plaintiff in error.

Howard Carrow, for the defendant in error.

VAN SYCKEL, J. This is an action for damages for an alleged libel contained in the following letter, written by Oliver R. Dunkle, the cashier of the Merchants' Bank, of Atlantic City:—

"ROBERT OHNMEISS, Esq.

"Inclosed please find one share of Merchants' stock received some time ago. Our board refuses to purchase at present, but hold under advisement. We have stricken your name from the bond of Mr. Carl Voelker, by request; also Samuel Rothholz's, as the latter has no financial standing.

"Respectfully,

"O. R. DUNKLE, Cashier.

Robert Ohnmeiss was a stockholder in the same bank, and he and Rothholz, the plaintiff, were sureties on the official bond of Carl Voelker, an employee of the bank.

Previous to the writing of this letter, Ohnmeiss had re-

quested Dunkle to have his name stricken from the said bond, but did not make any inquiry with respect to the plaintiff, Rothholz.

At the close of the plaintiff's case, the trial judge, regarding the communication a privileged one, ordered the plaintiff to be called.

Whether, under the given circumstances, the nonsuit should have been ordered, is the sole question in this court.

The statement that the plaintiff had no financial standing was libelous, and constituted a legal foundation for the recovery of damages, unless the occasion upon which it was uttered gave rise to the privilege of publishing what would otherwise be actionable.

The term "privileged," as applied to a communication alleged to be libelous, means simply that the circumstances under which it was made are such as to repel the legal inference of malice, and to throw upon the plaintiff the burden of offering some evidence of its existence beyond the falsity of the charge.

This court, in *King v. Patterson*, 49 N. N. L. 419, declared "that a communication, made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminary matter which, without this privilege, would be actionable."

In the case cited, the learned judge who delivered the opinion of the court referred, with approbation, to *Lawless v. Anglo-Egyptian Oil Co.*, L. R. 4 Q. B. D. 262, and to *Philadelphia etc. R. R. Co. v. Quigley*, 21 How. 202.

The first of these cases was an action for libel against a corporation for publishing a report made to the company by auditors in their audit of the manager's accounts, reflecting upon the plaintiff. The report was submitted at a general meeting of the share-holders of the company, and under a resolution of the meeting was printed and circulated among the share-holders. The court held that, inasmuch as it was the interest of all the share-holders to be informed of the report, the publication was privileged, on the ground, as Mellor, J., said, "that to print the report was a necessary and reasonable mode of communicating it to all the shareholders, who must be more or less numerous."

In the second case, a report, made to stockholders in writing,

and printed, with respect to the capacity and skill of one of one of the company's employees, was held to be a privileged communication. These cases are referred to for the purpose of showing that a communication to a share-holder of a corporation, touching matters which concern the corporate body, are within the rule of privilege, which secures immunity to the official who makes the publication.

Ohnmeiss, being not only a co-surety with Rothholz upon the official bond of Voelker, but also a share-holder in the bank, he had the right to receive the information imparted to him by Dunkle, the cashier. The fact that Rothholz's name had been taken from a bond held by the bank, and the reason for removing it, was a matter which concerned Ohnmeiss. As a stockholder, he could justly have complained if a competent security had been improperly surrendered by those who conducted the affairs of the bank.

It was not necessary, to justify the communication, that it should have been in response to an inquiry made by Ohnmeiss.

In *Waller v. Lock*, 45 L. T., N. S., 243, Jessel, M. R., says: "If an answer is given in the discharge of a social or moral duty, or if the person who gives it thinks it to be so, that is enough; it need not even be an answer to an inquiry, but the communication may be a voluntary one."

In my judgment, the circumstances under which the letter was written, upon which this suit is based, repel the inference of an improper motive on the part of defendant, and cast upon the plaintiff the burden of proving malice. No evidence having been produced in the trial court to show malice in the publication, the nonsuit was properly ordered, and the judgment below should be affirmed.

LIBEL — PRIVILEGED COMMUNICATIONS — WHAT ARE. — A privileged communication in libel is one made upon a proper occasion, from a proper motive, in a proper manner, and based upon reasonable or proper cause: *Conroy v. Pittsburgh Times*, 139 Pa. St. 334; 23 Am. St. Rep. 188, and note, in which the cases are collected; note to *Rude v. Nass*, 24 Am. St. Rep. 722.

SCHULTZ v. BYERS.

[88 NEW JERSEY LAW, 442.]

LATERAL SUPPORT. — Juxtaposition of lands gives no right of support to buildings erected thereon, unless conferred by grant, conveyance, or statute, and if they are injured by excavating on adjoining land, there is no liability, in the absence of improper motive, or carelessness in doing the work.

LATERAL SUPPORT — DUTY TO GIVE NOTICE OF EXCAVATION. — An owner making a reasonable excavation on his own land, and thereby causing injury to an adjoining owner's building, without giving him previous notice or without his knowledge, is liable in damages on the ground of negligence in executing the work.

W. W. Anderson, for the plaintiffs.

De Witt Van Buskirk, for the defendant.

SCUDDER, J. The declaration is framed on the idea that the plaintiff's land, dwelling-house, and building were entitled to support by the adjacent land of the defendant, and that by wrongfully digging away and removing such support the damage complained of was caused, whereby a right of action accrued. A demurrer was filed to this declaration, but it appears to have been waived, and the cause was tried on a plea of the general issue, and proofs. With this form of pleading, leaving the declaration unaltered, there is difficulty in holding the case in court to determine the exact cause of controversy between these parties. But as the court at the circuit heard and decided the cause as if the pleadings were amended to present the issue, and the question is important, it will be considered as it was there tried and decided.

It is almost unnecessary to say that the juxtaposition of lands gives no right of support to buildings erected thereon, unless conferred by grant, conveyance, or statute. As this is a case of recent erection of the building alleged to have been injured, the question of prescription, or lapse of time sufficient to infer a grant or conveyance, does not arise, nor has such right ever been conceded in our courts. The principle of the lateral support of lands and buildings was settled in this state by the case of *McGuire v. Grant*, 25 N. J. L. 356; 67 Am. Dec. 49 (1856). As to land in its natural condition, there is a right to such support from the adjoining land; as to buildings on or near the boundary line, injured by excavating on the adjoining land, there is no right of action, in the absence of improper motive, or of carelessness in the execution of the work.

This is the law as established by the cases prior to that decision; it has remained the unquestioned law in this state since that time, and it has been confirmed by many cases since in other courts. Some of the most recent are very valuable for reference, notably *Gilmore v. Driscoll*, 122 Mass. 199; 23 Am. Rep. 312; *Angus v. Dalton*, 6 Ch. App. Cas. 740, L. R. 3 Q. B. D. 85, where a most thorough examination of the subject will be found.

Although this law seems to give the owner of a building put upon his own land in a manner most advantageous and sometimes necessary to make it available for his use, especially in a closely built city, but little protection against the choice or caprice of another who may own the adjoining lands, yet it will be observed he is not entirely without protection. Neither can say, "It is lawful for me to do what I will with my own," as has been sometimes loosely stated in discussing this subject, and that it is a man's folly to build near the dividing line between his land and that of his neighbor, for it is more frequently his necessity that compels him to do so. The rights of the parties are equal, and are subject to modification by the conflicting right of each other.

Our statute relating to party walls (Revision, 809) shows that in some cases it has been thought necessary to fix authoritatively the mutual concessions and limitations in the rights of adjoining land-owners. This statute only applies where the excavation is more than eight feet in depth, while in this case the digging is but seven feet deep, but it is a recognition of the reciprocal right and duty which sometimes grow out of the mere vicinity of property. The maxim, *Sic utere tuo ut alienum non laedas*, is often invoked in such cases, and is of very wide application. In this case the limitation of this principle is, that if the owner of adjoining land would dig down beside the foundation of his neighbor's house, he must exercise his right to do so not carelessly, but cautiously. There was no proof, or offer to prove, at the trial, that the defendant was negligent in digging his cellar, whereby the plaintiff's house was caused to settle, and the walls to crack, beyond the mere fact that this was the result. This result alone was not sufficient, for it may have been caused by defects in the plaintiff's house. The special ground of complaint is, that it was done without the knowledge of the plaintiffs, and without notice to them, by which they might have been enabled to protect their property. It is argued that the defendant thereby took upon himself the

whole risk of injury to the building. The question whether such omission to give notice, under the circumstances stated, is evidence of carelessness in the execution of the work is an important one, and it cannot be said to be definitely settled. The case most frequently cited in this country in favor of requiring such notice is *Lasala v. Holbrook*, 4 Paige, 169, 172; 25 Am. Dec. 521. In this case Chancellor Walworth, while affirming the right of the owner of adjacent land to excavate for improvement on his own land, using ordinary care and skill, without incurring damages for injury to a building supported thereby, says: "From the recent English decisions it appears that the party who is about to endanger the building of his neighbor by a reasonable improvement on his own land is bound to give the owner of the adjacent lot proper notice of the intended improvement, and to use ordinary skill in conducting the same." He cites *Peyton v. Mayor of London*, 9 Barn. & C. 725; 4 Man. & R. 625; *Walters v. Pfeil*, 1 Moody & M. 362; *Massey v. Goyner*, 4 Car. & P. 161.

In *Peyton v. Mayor of London*, 9 Barn. & C. 725, 4 Man. & R. 625, it was held that the plaintiff could not recover, because the defendant had not given notice of his intention to pull down his supporting house, that not being alleged in the declaration as a cause of the injury. Lord Tenterden says, because of the failure to allege want of notice, the action cannot be maintained upon the want of such notice, supposing that, as a matter of law, the defendants were bound to give notice beforehand, upon which point of law we are not in this case called to give any opinion. In *Massey v. Goyner*, 4 Car. & P. 161, where notice was given to the occupier of adjoining premises of an intention to pull down and remove the foundation of a building, it was held he was only bound to use reasonable and ordinary care in the work, and not to secure the adjoining premises from injury.

In *Chadwick v. Trower*, 6 Bing. N. C. 1, 8 Scott, 1, it was decided in the exchequer chamber that the mere circumstance of juxtaposition does not render it necessary for a person who pulls down a wall to give notice of his intention to the owner of an adjoining wall. This case was first considered in 3 Bing. N. C. 334, and cited in 2 Scott N. R. 74, and 5 Scott N. R. 119. In the argument, when it was urged that if it be a duty imposed on a party not to do work so incautiously as to injure his neighbor's rights, and it is clearly a want of proper caution to omit giving such notice as may enable the

neighbor to take steps for his own security, Parke, B., replied: "The duty of giving notice in such cases seems to be one of those duties of imperfect obligation which are not enforced by the law." But if it be a duty affecting property rights, and the breach causes damage, it would seem that the law must afford a remedy.

In *Brown v. Windsor*, 1 Crompt. & J. 20, Garrow, B., said: "There may be cases where a man altering his own premises cannot support his neighbor's, and the support, if necessary, must be supplied elsewhere. In such case he must give notice, and then, if an injury occur, it would not be occasioned by the party pulling down, but by the other party neglecting to take due precaution."

There are no later cases, that I have found, in the English courts, which change the rule given in *Chadwick v. Trower*, and that is therefore supposed to be the present law in England relating to this subject, though the cases above cited refer to support by adjoining buildings.

There are very few cases in our country which bear directly on this point. *Shafer v. Wilson*, 44 Md. 268, is most frequently referred to, after *Lasala v. Holbrook*, 4 Paige, 169; 25 Am. Dec. 524. It is there said that notice to one's neighbor of an intention to make a contemplated improvement of property would seem to be a reasonable precaution in a populous city, where buildings are necessarily required to be contiguous to each other, and improvements made by one proprietor, however skillfully conducted, may be attended with disastrous results to his neighbors, who ought to have the opportunity to protect themselves and property. To the like effect is *Beard v. Murphy*, 37 Vt. 101; 86 Am. Dec. 693.

Chancellor Kent (3 Kent's Com. 437) has quoted the case of *Lasala v. Holbrook*, 4 Paige, 169, 25 Am. Dec. 524, and this has been referred to in *Shafer v. Wilson*, 44 Md. 268, and elsewhere. Washburn on Easements, 434, 435, Shearman and Redfield on Negligence, 497, 1 Thompson on Negligence, 276, and other text-books cite these cases, and from such quotations it is impossible to determine how far the requirement of notice has passed into the general law of the courts in this country.

None of these cases are of binding authority in this court, and in a case of doubt, like this, we should seek for that result which is most reasonable and just. Where the danger of loss in doing a legal act is not equally balanced, we should

lean to that side which most needs protection. Here a mere notice, which can cause but little trouble to one who is honestly exercising his right of excavating his land next to his neighbor's house, may enable the receiver of notice to shore or prop his walls to prevent its falling, or it may lead to some arrangement by which neither will be injured. It is more than a mere neighborly courtesy to give such notice, because it involves the right of one man to assert his right, regardless of the injury he may cause to his neighbor without such warning. The manner of giving notice may be only such as is reasonable under the circumstances, either to the owner of the property, or if there be difficulty in finding or serving it on him, then it may be given to the tenant or occupant who is interested in protecting the property. Where it can be shown that such owner had knowledge of the improvement that was about to be made, it would not be necessary to prove a formal notice given to him.

In this view of the case, there was error in rejecting the evidence which was offered to show that the defendant gave no notice to the plaintiffs of his intention to excavate the land adjoining the house of the plaintiffs, and the judgment will be reversed.

MAGIE, J., dissenting, maintained that an owner of land, who, in excavating it for a lawful purpose and in a manner not in itself negligent, has caused a building erected on adjoining land, and deriving support from the soil without having acquired any right to such support, to settle, is not liable to an action for the injury merely because he has given no previous notice to the owner of the building of the intended excavation. He based his opinion on principle, and the case of *Chadwick v. Trower*, 6 Bing. N. C. 1, cited and quoted from in the opinion delivered by the majority of the court. He referred to the quotation and cases cited from *Lasala v. Holbrook*, 4 Paige, 169, 25 Am. Dec. 524, in the principal opinion, and said: "I think it can be shown that this statement of Chancellor Walworth is the sole basis of the claim that the doctrine contended for is established by authority. The independent opinion of that eminent jurist would go far to establish the doctrine, but, as has been seen, no opinion was called for, and none was expressed by him." Judge Magie then reviewed the cases referred to in the case mentioned, and arrived at the conclusion that none of them justified or supported the statement made by Chancellor Walworth. He also reviewed the cases of *Shrieve v. Stokes*, 8 B. Mon. 453, 48 Am. Dec. 401, *Winn v. Abeles*, 35 Kan. 85, 57 Am. Rep. 138, and *Shafer v. Wilson*, 44 Md. 268, generally cited as maintaining the doctrine announced in the principal opinion, and arrived at the conclusion that none of them justified the doctrine contended for, and that what was said in them was merely incidental, or based on the statement referred to from *Lasala v. Holbrook*, 4 Paige, 169, 25 Am. Dec. 524, or the cases cited therein. In conclusion, he said: "This review, in my judgment, justifies the assertion that the doctrine contended for has not the sanction of

authority. In the only adjudicated case not based on mistaken citations, the determination was against the doctrine, and although the decision does not bind us, it must have great weight as a declaration of the obligations imposed by the common law on adjoining property owners by a court of eminent ability. Having found no support for the contention of plaintiffs, either in principle or authority, I am unwilling to join in imposing this burden on property owners. I have devoted much consideration to this case, from the sincere conviction that the rule to be promulgated will disastrously affect urban property, and without producing any practical good. A judicial determination that notice is necessary in cases such as that before us cannot prescribe the form of notice, or fix the time, or provide for constructive notice. Our determination will simply require reasonable notice, and whether in any case such notice has been given must be matter for the jury. An owner hereafter proposing to improve property so situated must give notice. Must the notice be in writing, or will verbal notice or knowledge suffice? How shall notice be given to the owner of the building if he be an infant, or non compos mentis, or non-resident? Such and other similar questions the owner, when confronted by the rule to-day promulgated, must determine according to his own view of what is reasonable, but conscious that a jury may disagree with his view and hold him liable. If the owner of the building be infant, idiot, or beyond seas, it would seem to be impossible to give the required notice. To add to the difficulties and risks which have before attended the putting down of a suitable foundation for building in such cases, the difficulty of giving notice, and the risk of its being ineffective, will retard the improvement of such property, and diminish its value." *Burns, J.*, joined in this dissenting opinion.

REALTY — RIGHT OF ADJOINING OWNER TO LATERAL SUPPORT. — The rule that the owner of land has the right to lateral support from the adjoining soil, and that the adjacent owner cannot remove his soil so as to take away the natural support of his neighbor's soil, applies only to land in its natural condition: *Moody v. McChesland*, 39 Ala. 65; 64 Am. Dec. 770, and note; *Richard v. Scott*, 7 Watts, 460; 32 Am. Dec. 779. The rule does not apply where the pressure is increased by the erection of buildings thereon: *Foley v. Wyeth*, 2 Allen, 181; 79 Am. Dec. 771, and note; *Burd v. Murphy*, 37 Vt. 99; 85 Am. Dec. 693, and note.

REALTY — RIGHT OF ADJOINING OWNER TO NOTICE OF EXCAVATION. — One who is about to endanger his neighbor's buildings by excavations on his soil is bound to give proper notice of such improvements: *Leach v. Helbrook*, 4 Paige, 169; 25 Am. Dec. 524, and note.

MCNEAL v. BRAUN.

[AS NEW JERSEY LAW, 417.]

SALES — VENDOR'S LIABILITY FOR LOSS DURING TRANSPORTATION — CARRIER AS AGENT FOR VENDOR. — Where a vendor specially agrees to carry and deliver goods to the purchaser at a specified place at his own expense, the delivery of the goods on board a vessel is a delivery to the master thereof, namely as the vendor's agent or bailee to perform the act of delivery for him in execution of his contract, and the vessel in which the goods are carried is *pro hac vice* the vendor's vessel; and until delivery is consummated in such manner as to be effectual between the vendor and the purchaser, the loss of the goods through the negligence of such master or the condition of such vessel, or from any other cause not due to the fault of the purchaser, must be borne by the vendor, as, until delivery, the goods are at his risk.

SALES — VENDOR'S LIABILITY FOR LOSS DURING TRANSPORTATION — PURCHASER'S RIGHT TO INSPECT AND REMOVE GOODS. — Where a vendor specially agrees to carry and deliver goods to the purchaser thereof at a certain place and at his own expense, the purchaser is entitled to a reasonable time, within business hours, after their arrival, to inspect and examine them, to ascertain whether they correspond with the invoice, and to receive and remove them. During this period the carrier remains the agent of the vendor, and the loss of the goods is at the latter's risk.

SALES — VENDOR'S LIABILITY FOR LOSS DURING TRANSPORTATION — RIGHT OF PURCHASER TO SELECT PLACE FOR DISCHARGING GOODS. — Where a vendor specially agrees to carry and deliver goods at his own expense, and selects a vessel as the carrier, the purchaser has an option to designate the wharf for discharging the goods, and the master of the vessel must obey the purchaser's directions in that respect, if the option is exercised in a reasonable time and manner. The purchaser, in exercising his option, is bound to select a wharf which is safe, as well for the vessel as for the discharge of the goods, and if the sinking of the vessel and the loss of the goods are caused by the condition of the wharf selected, without the negligence of the master or the unseaworthy or defective condition of his vessel, the purchaser must bear the loss.

SALES — LIABILITY OF PURCHASER FOR DELAY IN DELIVERY. — Where a vendor agrees to carry and deliver goods at his own expense, and selects a vessel as the carrier, the detention of such vessel beyond the lay days named in the contract of affreightment, or for an unreasonable time if no lay days are named, because of the crowded condition of the wharf selected by the purchaser for the discharge of the goods, or for any other fault on his part, will entitle the master to discharge the goods elsewhere, and warehouse them, or to demurrage or reasonable damages for the detention of the vessel, but it will not release him, as the agent of the vendor, from the duty of delivering the goods.

DEPOSITIONS — ADMISSIBILITY OF. — A deposition taken before a commissioner, sworn before an officer lawfully authorized to administer oaths in the state where the commissioner resided, is admissible in evidence in the courts of another state.

Samuel H. Grey, for the plaintiff in error.

Charles E. Hendrickson, for the defendant in error.

DEPUÉ, J. Braun, the plaintiff below, in 1883 was a wholesale dealer in coal at Philadelphia. McNeal, who is now plaintiff in error, was engaged in the foundry business at Burlington, in this state.

On the 14th of June, 1883, McNeal ordered from the plaintiff ninety-eight tons of lump and steamboat coal, to be delivered at Burlington, at \$4.10 a ton delivered. The coal was shipped in a barge called the Wayward, on the 21st of June. The barge arrived at Burlington on the 23d, but it was not until the 26th that she was laid alongside of the wharf. On the afternoon of that day the defendant's foreman notified the captain of the barge to place it alongside of the defendant's wharf. In order that the boat might be so placed that the steam-hoist could be used for unloading, the boat was separated into its two parts. The forward part was made fast to the wharf, being separated from the wharf by a float about three feet wide, furnished by the defendant, for the purpose of steadying the boat in a position that was necessary for the working of the iron buckets on the steam-elevator. The after part of the boat was moored on the river side of the other part.

When the forward compartment of the boat was placed in position, the buckets of the hoisting works were lowered upon the boat, and preparations were made by the defendant's servants for unloading the coal. They completed their preparations about ten minutes before six o'clock, and stopped work at six, the usual time for quitting work. During the night this compartment of the boat sank, with the coal that was in it.

The compartment that was moored in the river remained in safety. After the sinking of the forward compartment, the coal that was in the other compartment was unloaded and taken by the defendant. The suit was for the whole quantity of coal sold, but the controversy at the trial was with respect to the coal that was sunk and entirely lost. Under the charge of the court, the jury found for the plaintiff the full contract price for the entire shipment.

The order for the coal was given by the defendant to Arkless, the agent of the plaintiff, at the plaintiff's place of business in Philadelphia. The order was for a cargo of coal of an approved size and quality. The coal was not, at that time, separated from the plaintiff's stock on hand. The price to be paid was \$4.10 per ton delivered at Burlington. The carrier was selected by the plaintiff, and he took from him a bill of lading, signed by the master, in these words:—

"Shipped by Charles Braun, in good order, on board the boat called Wayward, now lying at Philadelphia, and bound for Burlington, N. J., ninety-eight tons of Thomas Lehigh coal, which I promise to deliver at the aforesaid port of Burlington, in like good order, the dangers of the seas only excepted, unto A. H. McNeal or — assigns, he or they paying freight for the same at the rate of twenty one-hundredths dollars per ton.

25 tons lump.

73 tons steamboat.

—
98

"Captain to tend guy."

The contract price of \$4.10 a ton was the price of the coal delivered at Burlington. If the defendant paid freight pursuant to the direction in the bill of lading, the freight paid was to be deducted from the contract price.

Responsibility for loss in transportation, in carriage by sea, has occasioned considerable discussion in the English courts. The rules on this subject are stated by Lord Cottenham in *Dunlop v. Lambert*, 6 Clark & F. 600, 619-621, and by the court of queen's bench and the exchequer chamber in *Calcutta Co. v. De Mattos*, 32 L. J. Q. B. 332, 33 L. J. Q. B. 214, and particularly by Mr. Justice Blackburn, whose opinion in that case is quoted at considerable length in 1 Corbin's Benjamin on Sales, sec. 503, and more fully in Blackburn on Sales, Blackstone's ed., *234.

It is sometimes stated as a general rule that delivery to the carrier is delivery to the consignee, and that the goods are to be carried to their destination at his risk. But an examination of the decisions to that effect will show that this doctrine prevails only where the contract of sale, as between the consignor and consignee, was concluded at the place of shipment, and the undertaking to ship was collateral to the contract of sale, as in *Tregelles v. Sewell*, 7 Hurl. & N. 573. It will also be found that the rule uniformly adopted in the line of decisions is, that the risk of loss in transportation depends upon the nature of the transaction, the terms of the contract, and the intention of the parties. In *Dunlop v. Lambert*, 6 Clark & F. 600, 619-621, Lord Cottenham said: "When the party undertaking to consign undertakes to deliver at a particular place, the property, till it reaches that place and is delivered according to the terms of the contract, is at the risk of the consignor." In *Calcutta Co. v. De Mattos*, 32 L. J. Q. B.

282, 28 L. J. Q. B. 214, Mr. Justice Blackburn said: "There is no rule of law to prevent the parties from making whatever bargain they please. If they use words in the contract showing that they intend that the goods shall be shipped by the person who is to supply them, on terms that when shipped they shall be the consignee's property and at his risk, so that the vendor shall be paid for them whether they are delivered at the port of destination or not, this intention is effectual. . . . If the parties intend that the vendor shall not only deliver them to the carrier, but also undertake that they shall actually be delivered at their destination, and express such intention, this is also effectual. In such a case, if the goods perish in the hands of the carrier, the vendor is not only not entitled to the price, but he is liable for whatever damage may have been sustained by the purchaser in consequence of the breach of the vendor's contract to deliver at the place of destination."

The DeMattos case, above cited, was decided in the queen's bench by an equally divided court, and in the exchequer chamber there was a diversity of opinion among the judges. But on the question of law pertinent to this case, there was entire unanimity of opinion among the judges in both courts. The contract of sale had been negotiated by correspondence, and the material facts were briefly these: De Mattos contracted to deliver the company one thousand tons of coals, delivered at Rangoon, alongside, etc., at forty-five shillings a ton, — payment, one half by bill at three months on handing over bill of lading and policy of insurance on the cargo to cover the payment, and the balance in cash on delivery at Rangoon. De Mattos chartered a ship, and shipped on board 1,166 tons of coal, and delivered to the company the bill of lading and the policy of insurance, and the company paid the half of the invoice price. On the voyage the ship became disabled, and, in fact, the coals were not delivered under the contract. Cross-suits were brought, — the one by De Mattos to recover the unpaid contract price, the other by the company to recover back the money paid on the contract. The queen's bench (Cockburn, C. J., and Wightman, J.) decided that De Mattos could not recover the residue of the contract price, and that the company was entitled to recover back the money paid as damages arising from the breach of contract. Blackburn and Meller, JJ., concurred in the view that De Mattos could not recover, but held that the company was

not entitled to recover back the half contract price it paid, for the reason that, by their construction of the contract, the portion of money paid to De Mattos was to be absolutely his on handing over the policy and the bill of lading. In delivering his opinion, Cockburn, C. J., said: "In every contract of sale there is, on the part of the vendor, an obligation not only to transfer the property in the thing sold, but also to deliver possession to the buyer. When and how that delivery of possession shall take place, whether in the interval the thing sold shall be at the risk of the buyer or of the seller, so that if it be lost without default on the part of the latter, he shall nevertheless be entitled to demand the price or to retain it if already paid, must depend on the agreement of the parties as expressed, or to be gathered from the contract. If, by the terms of the contract, the seller engages to deliver the thing sold at a given place, and there be nothing to show that the thing sold was, in the mean time, to be at the risk of the buyer, the contract is not fulfilled by the seller unless he delivers it accordingly."

In the exchequer chamber the majority of the court concurred in the views of Blackburn and Mellor, JJ., in the company's ease, by a divided court, but all the judges concurred in the judgment of the queen's bench, that De Mattos's action could not be maintained. It will be observed that of the ten judges who sat in both courts, Cockburn, C. J., and Wightman, Blackburn, and Mellor, JJ., in the queen's bench, and Erie, C. J., Willes, J., Channell, B., and Williams, J., held that the property in the coals passed to the company by force of those terms of the contract in relation to insurance of the cargo, and the transfer of the policy, and the delivery of the bill of lading, but that the vendor was nevertheless debarred from recovering the unpaid contract price as a consequence of his failure to deliver the coals according to contract.

It was undisputed in the case now before the court, and in fact was conceded by the plaintiff's counsel, that delivery of the coal by the plaintiff, at Burlington, at his own expense, was a material term in the contract of sale. Under a contract of this sort, delivery of the coal on board the barge was delivery to the master as the plaintiff's bailee or agent to perform for him the act of delivery in execution of his contract: 1 Corbin's Benjamin on Sales, sec. 566. Meanwhile, and until delivery was consummated in such a manner as to be effectual as between vendor and purchaser, the coal was at the plaintiff's risk.

On the main issue, which the learned judge declared to be the question whose loss was the coal which sank, his instruction was, that this issue would depend upon whether the sale had been completed before the loss occurred; that where parties have bargained, the one that he will sell and the other that he will buy, the duty rests upon the seller to deliver the article in pursuance of the agreement he has made, and that to complete the sale there must be an acceptance by the purchaser of the article which he purchased, in accordance with that agreement; that when that has been done "the sale is completed, and any loss after that time falls upon the man who bought. I mean any loss which is the result of no wrongful or intentional negligence of the parties."

The court also instructed the jury that if there was an acceptance by the defendant, then the position of the captain became changed, and his duty as the agent of the plaintiff was at an end. And this question was left to the jury upon the acts and conduct of the defendant's servants before they stopped work that night, with the instruction that if the jury should determine from the testimony "that the defendant or his employees so acted that they recognized that that coal was there at their disposal, under their dominion, within their power, and that they so acted as to show that they were dealing with it as if it were McNeal's, from those acts you may determine that there was an acceptance of the coal as being the coal which had been bought under that bargain."

The transaction between the parties was an order for a certain quantity of coal, part lump coal and part steamboat coal, of an approved quality. It was in effect a contract of sale by sample. On such a sale of goods, it is a condition implied by law that the buyer shall have a fair opportunity, by examining the goods, to satisfy himself that they are in accordance with the contract: 2 Corbin's Benjamin on Sales, secs. 910, 1025, 1042; *Isherwood v. Whitmore*, 11 Mees. & W. 347; *Startup v. McDonald*, 6 Man. & G. 593; *Croninger v. Crocker*, 62 N. Y. 152. And under a shipment of goods by a carrier, the consignee is entitled to inspect and examine the goods to ascertain whether they correspond with the invoice, and to a reasonable time within which to receive and remove the goods. For that purpose, a reasonable time within usual business hours must be allowed, and during that period the liability of the carrier as carrier remains undischarged: *Bradstreet v. Heron*, Abb. Adm. 209, 214; *Salmon Falls Mfg. Co. v. The Bark Tangier*, 1

Cliff. 396; *Dibble v. Morgan*, 1 Woods, 406; *The Tybee*, 1 Woods, 358, 363; *The Barque Idd v. Kemball*, 8 Ben. Adm. 297; 5 Myer's Fed. Dec., tit. Carriers, secs. 802, 803, 846, 852, 1009; *The Eddy*, 5 Wall. 481, 493; *Price v. Powell*, 3 N. Y. 822; *Dunham v. Boston etc. R. R. Co.*, 46 Hun, 245; *Miller v. Steam Nav. Co.*, 10 N. Y. 431; *Hedges v. Hudson Riv. R. R. Co.*, 6 Rob. (N. Y.) 119; reversed in court of appeals, but not on this point, 49 N. Y. 223; *Moses v. Boston etc. R. R. Co.*, 82 N. H. 523; 64 Am. Dec. 381; *Graves v. Hartford etc. S. B. Co.*, 38 Conn. 143, 152; 9 Am. Rep. 369; *Richardson v. Goddard*, 23 How. 28, 39; *Bourne v. Gatliffe*, 3 Man. & G. 643, 687; 11 Clark & F. 45, 70; note to *Columbus etc. R. R. Co. v. Luddem*, 3 Lew. Ann. R. R. etc. Rep. 54.

The acts done by the defendant's servants before they quit work were of a twofold character: 1. In directing the barge to be laid alongside of the wharf for unloading. The captain made the boat fast to the wharf, and remained in charge during the night. The designation by the defendant of his wharf as the place for unloading was an act in performance of the defendant's duty as consignee to provide a place for the discharge of the cargo. 2. In the preparations for unloading. The barge was laid alongside the float about ten minutes before six. The buckets were lowered down upon the barge, and possibly a small quantity of coal was unloaded. The hands quit work at six, and replaced the buckets on the wharf. In these acts there was no evidence of an acceptance of the entire cargo, nor of a discharge of the carrier from his responsibility. Under the rules of law I have stated, the defendant was entitled to a reasonable opportunity to unload the entire cargo for examination, to ascertain whether the coal corresponded with his order and had arrived in good condition. By law he was secured these rights without discharging the liability of the carrier. Even if the goods had been accepted so as to pass title as between vendor and purchaser, the defendant, under the plaintiff's undertaking to deliver them at Burlington, still had a right to a reasonable time to unload them under the plaintiff's contract to transport and deliver the goods.

When the defendant's employees quit work that evening the float was removed, leaving the barge riding free. She sank in a falling tide about three in the morning, listed over away from the wharf. There was no unusual condition of the tide or weather. One of the witnesses testified that after the men

quit work he saw that the lines with which she was tied were taut, and that he told the captain that his line was taut, and that if he did not give her more rope the lines would have to part, or else tear the cleats off the boat, and that the captain said he knew his own business. The same witness testified that in the night he heard the noise of the creaking of the lines and found the barge sinking; that the captain was there making an effort to save her, and tried to slack the lines, but they were so taut that he could not slack them, and that the boat sank with the lines fastened to the wharf and taut. Besides evidence in relation to the acts and conduct of the captain, there was evidence tending to show that the boat was rotten and unseaworthy.

The defendant asked the court to charge, first, that the defendant was entitled to reasonable time within ordinary business hours for discharging the cargo; and plaintiff was bound to furnish a boat that would float long enough to be discharged. This instruction was refused, and the court charged "that a good delivery implied that the goods should be delivered in such a vessel as would stand the ordinary length of time and the ordinary stress of weather; that if even after acceptance it became evident that the loss was the result of the utterly unsuitable condition of the craft chosen by the plaintiff, then he still might be liable under one set of circumstances, and that is, if he had shown negligence in selecting that boat, — that is, if in selecting the boat he had not acted as a prudent business man ought to have acted."

To the refusal to charge as requested, and the charge as given, the defendant excepted.

Another request of the defendant was, that the court should charge that the captain was the agent of the plaintiff, and that the plaintiff was chargeable with his want of care and want of skill. This request was denied, and the court charged that "the plaintiff is not responsible for the way the captain managed his boat. The captain was not his servant. The captain was his instrument to complete the sale, but he was not under his personal control as to how he should manage his boat. Therefore, the mere negligent conduct of the captain cannot be imputed to the plaintiff. He could not have controlled his movements. The plaintiff, if he had been there, could not have dictated to the captain how he should manage his boat."

To the refusal to charge as requested, and to "that portion

of the charge touching the law of negligence, and the relation which the plaintiff bore to the captain of the boat, and that the negligence of the captain was not imputable to the plaintiff," the defendant excepted.

These instructions might have been correct if the plaintiff had been the agent of the defendant in the shipment of the coal. But the plaintiff, instead of being an agent to procure transportation, had himself contracted to deliver the coal, and these instructions ignore the fact that under a contract of that sort the undertaking to deliver is absolute and unqualified, and delivery of the goods is a condition precedent to the right of the vendor to sue for the contract price. If the goods be lost or destroyed before delivery is consummated, the vendor must bear the loss. Under such a contract, the carrier selected by the vendor is his agent to perform the contract, to deliver, and the vessel in which the goods are carried is *pro hac vice* the vendor's vessel. For the negligence of the one and the condition of the other, and indeed, for failure to make delivery of the coal according to contract for any cause not due to the fault of the purchaser, the responsibility is upon the vendor.

There is some conflict in the testimony as to whether the contract was for delivery at the port of Burlington generally or alongside of the defendant's wharf. Whether the contract was in the one form or the other is immaterial in this suit. The discharge of the cargo is the joint act of the freighter and the consignee. Each must participate in unloading the cargo, and each has duties to perform in the premises. The consignee must provide a suitable place for discharging the cargo, and if the contract of affreightment is for delivery at a port generally, the consignee, if he owns the entire cargo, has the option to designate the place for discharging the cargo, and it is the master's duty to obey the consignee's directions in that respect if the option be exercised in a reasonable manner: *The Felix*, L. R. 2 Ad. & E. 273, 280; Abbott on Shipping, 876; Carver on Carriers by Sea, secs. 479, 460; *The Boston*, 1 Low. 464.

The barge reached Burlington with its cargo in safety. The defendant's agent selected the defendant's own wharf for discharging the cargo, and there was some evidence that the wharf was out of repair and in a dangerous condition. The consignee, in exercising his right to select the wharf, was bound to provide a wharf which was safe as well for the ves-

sel as for the discharge of the cargo. If the sinking of the barge was caused by the condition of the wharf, without the negligence of the captain in the management and care of the boat, and was not due to its unseaworthy or defective condition, the defendant must bear the loss.

The barge reached the port of Burlington on the 23d, and was not laid alongside of the wharf until the evening of the 26th, on account of the crowded condition of the wharf. The detention of a vessel beyond the lay days named in the contract of affreightment, or for an unreasonable time if no lay days are named, because of the crowded condition of the wharf selected by the consignee, or for any fault of the consignee, will entitle the master to discharge the cargo elsewhere and warehouse it, or to demurrage or reasonable damages for the detention of the vessel, but will not release him from his duty to deliver the goods: MacLachlan on Shipping, 3d ed., 438, 449; Carver on Carriers by Sea, sec. 627. No injury happened to the barge or its cargo while it lay at port. The disaster occurred after it was placed alongside of the wharf to be unloaded. The reasonable time allowed the consignee for unloading the cargo is to be computed from the time the barge was laid alongside of the wharf ready for the discharge of the cargo.

The exceptions above noted were well taken, and upon them the judgment should be reversed.

Exception was taken to the admission of the deposition of Arkless, taken under a commission, on the ground that it did not appear that the commissioner was sworn before a person lawfully authorized to administer an oath in the state where the commissioner resided, in compliance with the statute: Revision, p. 383, sec. 33. The commission was sent to the state of Ohio, and the commissioner, who resided in that state, was sworn before a notary public. In the *jurat* affixed to the oath, the notary certifies under his official seal that he "was lawfully authorized to administer an oath in the said state of Ohio." Ever since the *dictum* of Chief Justice Horblower in *Ludlam v. Broderick*, 15 N. J. L. 273 (decided in 1836), and of Mr. Justice Ford in *Den v. Thompson*, 16 N. J. L. 72, it has been considered that the certificate of the officer before whom the oath is taken in this form is sufficient: See *Den v. Applegate*, 23 N. J. L. 115, and *Lawrence v. Finch*, 17 N. J. Eq. 234. This rule of practice is of too long standing

to be now disturbed. The deposition of the witness was properly admitted in evidence.

SALES — LOSS DURING TRANSPORTATION. — The general rule is well established that when the contract of purchase is silent as to the person or mode by which the goods bought are to be sent, a delivery by the vendor to a common carrier, in the usual and ordinary course of business, transfers the property to the vendee, and the loss of the goods thereafter during their transit is at his risk: *Magruder v. Gage*, 33 Md. 344; 3 Am. Rep. 177; *Janney v. Sleeper*, 30 Minn. 473; *Hobart v. Littlefield*, 13 R. I. 341; *Whiting v. Farrand*, 1 Conn. 59. The contrary rule is maintained in *Loyd v. Wight*, 20 Ga. 575.

In *Whiting v. Farrand*, 1 Conn. 63, the court said: "When a contract is made for the sale of goods which are not delivered, but are to be sent to the purchaser, if the vendor send them in the mode of conveyance agreed on by the parties or directed by the purchaser; or if no agreement be made or direction given, in the usual mode; or if the purchaser, being informed of the mode, assents to it; or if there have been sales and conveyances of other goods, and the vendor continues to send them in the same mode, — then the goods are at the risk of the purchaser during their passage." So in *Magruder v. Gage*, 33 Md. 344, 3 Am. Rep. 179, the court said: "The question as to what acts are necessary to be performed by the vendor under an executory agreement for the sale of unspecified goods, in order to transfer the title to the vendee and subject him to the risk of the carriage, depends entirely upon the agreement, either express or implied, between the parties. If the vendor undertakes to make the delivery himself at a distant place, thus assuming the risk in the carriage, the carrier becomes the agent of the vendor, and the property will not pass until the delivery is actually made. On the other hand, if the goods are delivered to a carrier specially designated by the purchaser, he becomes the agent of the latter, and the title to the property, as a general rule, will pass the moment that the goods are dispatched. Should the contract of purchase be silent as to the person or mode by which the goods are to be sent, a delivery by the vendor to a common carrier in the usual and ordinary course of business transfers the property to the vendee," and consequently casts the risk of loss during transportation on him. Again in *Hobart v. Littlefield*, 13 R. I. 342, the court said: "In general, the delivery of goods to a common carrier, and *a fortiori* to one specially designated by the buyer, is a delivery to the buyer. Unless the seller has contracted to deliver them to the buyer at some particular place or in some particular manner, everything the seller has to do concerning delivery is then completed," and the goods are henceforth at the risk of the buyer. So in *Janney v. Sleeper*, 30 Minn. 474, the court said: "If no place be designated by the contract, the general rule is, that the articles sold are to be delivered where they are at the time of the sale. The store of the merchant, the shop of the manufacturer, the farm of the farmer, at which the commodities sold are deposited or kept must be the place of delivery when the contract is silent upon the subject, — at least when there are no circumstances showing that a different place was intended. This is a rule of construction predicated upon the presumed understanding of the parties when making the contract." In such cases the loss of the goods sold during their transportation is at the risk of the purchaser.

RISK ON PURCHASER WHEN GOODS ARE SHIPPED AT HIS DIRECTION. — It seems to be well settled that when a merchant at one place orders goods of

another at a different place, to be shipped in a certain manner, and the vendor ships the goods according to order, the delivery on board ship or to the carrier is a constructive delivery to the vendee; and they are from that time at the risk of the latter, so that in case of loss during transportation, and before final delivery into his hands, such loss must be borne by him: *Ramsey v. Higby*, 4 Wis. 154; 5 Wis. 62; *Diversy v. Kellogg*, 44 Ill. 114; *Orcos v. O'Donnell*, 44 N. Y. 661; *Gill v. Benjamin*, 44 Wis. 362; 54 Am. Rep. 619; and other cases cited *supra*. The rule is thus stated in *Diversy v. Kellogg*, 44 Ill. 114: "If the party of whom goods have been ordered shall ship within a reasonable time the amount and quality ordered and in the manner directed, the property thereupon vests in the purchaser, and is henceforth at his risk. If after such shipment a portion of the goods are abstracted and others of an inferior quality substituted, so as to render the whole of an inferior quality, the loss must be borne by the purchaser." In such case the shipper is not bound to give notice of the shipment to the purchaser, in order to vest the title in him, and to cast upon him the risk of loss. In *Pilgreen v. State*, 71 Ala. 368, it was decided that when goods are forwarded through an express company, and by instructions of the purchaser marked C. O. D., the carrier is the agent of the purchaser to receive the goods from the seller, and the agent of the seller to collect the price from the purchaser. The sale is complete when the goods are delivered to the carrier, and their loss during transportation is then on the vendee. In *Gill v. Benjamin*, 44 Wis. 362, 54 Am. Rep. 619, the vendor agreed to sell to the purchaser one thousand cords of wood, to be delivered from the vendor's pier in Michigan, over the rail of the purchaser's vessel, from time to time as wanted, during the season of navigation, said wood to be piled as taken from said vessel, and to be measured and paid for when piled on the purchaser's dock in Milwaukee. One cargo of the wood was thus delivered under the contract on board such vessel, and lost with the vessel before reaching Milwaukee. In an action by the vendor to recover the value of the goods shipped, it was decided that the contract, as to such cargo, became an executed sale, vesting the title to the wood in the purchaser, who thereupon became liable for its price. Opposed to this rule, and to the better reasoning, is the case of *Rosenthal v. Kala*, 19 Or. 571, where the vendor agreed to furnish the purchaser with two thousand nine hundred cords of wood, more or less, at a certain price per cord, on board the cars at a certain place, the wood to be paid for when measured and received by the quartermaster at Walla Walla, Washington Territory. It was decided that the title to the wood did not pass to the purchaser until it was received and measured by the quartermaster at Walla Walla, and that the loss of any portion of it during transportation, after being delivered on board the cars as designated in the contract, and before being thus received and measured, must be borne by the vendor.

Delivery of Bill of Lading in Vendor's Name to Vendee Places Risk on Latter. Where the bill of lading for the goods shipped is taken in the name of the vendor, who assigns it to the vendee, and receives payment for the goods from him while such goods are yet in transitu, delivery takes place at the time of the assignment of the bill of lading, and the goods are thereafter at the risk of the vendee. Thus in *Forchheimer v. Stewart*, 65 Iowa, 593, 54 Am. Rep. 30, where a vendor delivered goods to a carrier for transportation, and took a bill of lading to himself, indorsing it in blank, and attaching to it a sight draft on the purchaser, depositing both in bank, and getting credit at the bank for the amount of the draft, and the draft and bill of lading being forwarded to the purchaser, he paid the draft and accepted the bill of lading,

before the transportation of the goods was completed, it was decided that the goods were not delivered so as to pass the title until the bill of lading was delivered to the purchaser; but after that time, there was such delivery as to place the risk of loss or damage to the goods during the remainder of the transit on the purchaser, in the absence of any agreement to the contrary. The court said: "Where the shipper retains the right of disposing of the property while in the hands of the carrier, there is, of course, no delivery to the consignee. The object, generally, which the shipper has in taking the bill of lading in his own name, when he does so, is to enable him to retain such right. What the defendant's (vendor's) object was, there can be no doubt. He proceeded at once to transfer the bill of lading to the bank as security for the draft, the amount of which was credited to him in his bank account. There was then no delivery made to the plaintiffs (purchasers) by delivery to the carrier at Council Bluffs. Having reached the conclusion that the goods were not delivered by the defendant to the plaintiffs by delivery to the carrier at Council Bluffs, we come to inquire whether they were delivered by delivery to them later of the indorsed bill of lading. In our opinion they were. The defendant, from the time of such delivery, had no right or interest in the goods, and the *jus disponendi*, or right of disposing of the goods, had become absolute in the plaintiffs. The goods could not be sold nor encumbered by the defendant, nor properly taken upon attachment or execution by his creditors. This being so, it would seem to follow that the risk of damage from the elements, in the absence of any agreement to the contrary, should be borne by the plaintiffs. It is true that the plaintiffs could not be considered as having had an opportunity to inspect the goods at the time when the transfer was made to them of the bill of lading, but we do not see how the plaintiffs' inability to inspect at that time could give the transfer of the bill of lading an effect different from what it otherwise would have had. The plaintiffs were not bound to accept the transfer at that time. The defendant had put the goods in transit without a tender of delivery. The plaintiffs might unquestionably have withheld payment of the draft and acceptance of the bill of lading until the goods reached their destination. But for reasons satisfactory to themselves they preferred to pay in advance. It was their right to do so if they preferred, and secure whatever advantages there might be from such payment and such acceptance. But in securing these advantages we think they took upon themselves whatever risk there might be of damage from the elements from that time forward."

When Seller is to Deliver, and Takes Bill of Lading in his Own Name, Loss Falls on Him. Thus where a manufacturer, on receipt of an order for an article, selects and forwards it by railroad as directed, taking the bill of lading in his own name, attaching to it the draft for the price, and indorsing it to the carrier's agent at the place of destination, with directions to "deliver to bearer," an intention is shown on the part of the vendor to retain title until payment of the purchase price, and loss before delivery to the purchaser must be borne by the seller: *Jones v. Brewer*, 79 Ala. 545. To the same effect is *Parkins v. Eckert*, 55 Cal. 400.

When Directions to Carrier are so Imperfect that He is Unable to Deliver Loss Falls on Vendor. Where the vendor delivers goods to a carrier, and neither the bill of lading nor the direction upon them enables him to deliver them to the purchaser, and they are lost in consequence, the loss must be borne by the vendor, and the purchaser may recover the price paid by him to the vendor for the goods: *Finn v. Clark*, 10 Allen, 479; 12 Allen, 322.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

CITIZENS' BANK v. WILLIAMS.

[128 NEW YORK, 77.]

PARTNERSHIP IS NOT GUILTY OF DEFRAUDING ITS CREDITORS WHEN IT MAKES AN ASSIGNMENT of its property for the benefit of all its creditors, among whom it includes the holders of a note executed by both partners, though one signed it simply as the surety of the other.

FRAUD UPON THE CREDITORS OF ANY PERSON CANNOT RESULT from his appropriating his property to the payment of a debt for which he is liable. Therefore, one jointly liable with others as a member of a firm, or otherwise, may appropriate his individual property to the payment of a joint debt, and if all the members of a partnership are liable on an obligation, they may appropriate the firm property to its payment, though it is not a partnership debt.

B. Frank Drake and Owen Harris, for the appellant.

Eugene M. Bartlett, George F. Danforth, and Morris A. Loe-foy, for the respondent.

EARL, J. The defendants were copartners in the mercantile business at Perry, Wyoming County, under the firm name of Williams & Co., and in their firm name they executed a note to the plaintiff for borrowed money. It commenced this action, and obtained an attachment against them, on the ground that they had assigned their property with intent to defraud their creditors. They made a motion to set aside the attachment, based upon the same papers upon which it was granted, and the motion was denied at the special term, and the decision there was affirmed at general term, and then the defendants appealed to this court.

The allegation of fraud against the defendants is based upon

the following facts: At the time the defendants became partners, Helen A. Williams owed E. M. Clark about eight hundred dollars, and for that indebtedness they gave him their two joint and several promissory notes signed by them. L. Sophia Williams, however, signed the notes simply as surety for Helen A. Williams, who was and remained the principal debtor. Thereafter, in February, 1890, the defendants, having become insolvent, both as a firm and as individuals, executed a general assignment of all their firm and individual property for the benefit of their creditors, in which they directed the two notes held by Clark to be paid out of the proceeds of the firm property; and the fraud alleged by the plaintiff consists in this direction, the claim being that the notes were not firm debts, but the individual debts of Helen A. Williams, for which L. Sophia Williams was only surety, and that therefore it was necessarily a fraud in law upon the firm creditors to appropriate the proceeds of firm property for their payment.

We think the learned courts below fell into error in granting and upholding the attachment upon the grounds specified. These notes were joint debts of the defendants, for which they were jointly liable to Clark, and it was therefore not a fraud to appropriate their joint property for their payment. Clark could have recovered a judgment upon the notes against the defendants, and could, by execution, have seized the firm property to satisfy the judgment, and a purchaser at the execution sale would have obtained a full and absolute title to the firm property purchased. Although the defendants were insolvent, they could have paid these debts either in money or in property belonging to the firm, and in so doing they would have perpetrated no fraud upon their creditors. As they could pay the debts either with firm money or firm property, we cannot perceive why they could not, through an assignee, direct the same debts to be paid out of the proceeds of the firm property. It certainly cannot be a fraud upon firm creditors to apply firm property to the payment of debts for the satisfaction of which such property could be taken.

It is a mistake to suppose that the firm property is now in the hands of a court of equity for distribution and application upon equitable principles. No suit whatever is pending in equity, and no application has been made to a court of equity in reference to the firm property. The defendants have made an assignment of their firm property authorized by law, a

the assignee is to dispose of it, not in accordance with the directions of any court, but in precise accordance with the terms and conditions of the assignment. It may be that if these firm assets were to be administered in a court of equity, according to equitable principles, the court would direct the firm debts to be paid before these debts to Clark, although it is not certain that it would do so, and it is not now necessary to determine whether it would or not: *Hoare v. Oriental Bank*, L. R. 2 App. Cas. 589. These defendants, being jointly liable to Clark, have themselves provided that his claims shall be paid out of the firm assets, and there is no room for the interference of any court. As between him and them, his claim upon the firm property is just as meritorious and equitable as the claim of firm creditors.

After the execution of the assignment, and the provision made therein for the payment of these debts, L. Sophia Williams had no equitable claim that the firm property should not be applied precisely as she had directed that it should be applied. Hence, on the principles of subrogation, the firm creditor can take no equity from her which they can enforce against the firm property, upon principles laid down in the case of *Saunders v. Reilly*, 105 N. Y. 12; 59 Am. Rep. 472, and cases therein cited.

If these notes had been the individual debts of Helen A. Williams, for which L. Sophia Williams was in no way liable, then the provision in the assignment for their payment out of firm assets would have been a fraud upon the firm creditors, within the case of *Wilson v. Robertson*, 21 N. Y. 587. The ground of that decision was, that the joint property was appropriated for the payment of an individual debt of one of the members of the firm, for which the other member was in no way liable. But no case can be found holding that it is a fraud upon the firm creditors for the members of a firm to appropriate the firm property to the payment of debts for which they are all liable. It is never a fraud upon the creditors of any person to appropriate his property for the payment of a debt for which he is liable; and so one who is jointly liable with others as a member of a firm, or otherwise, may appropriate his individual property for the payment of a joint debt, for the reason that he is liable to pay the joint debt, and his property could be seized by virtue of an execution issued upon a judgment for the joint debt to satisfy the same: *Creek v. Rindskopf*, 105 N. Y. 476.

No benefit or ultimate advantage is secured to L. Sophia Williams by the appropriation of the firm property for the payment of debts which, as between her and Helen A. Williams, are the debts of the latter. Upon payment of these debts there will be in the hands of the assignee a claim for the reimbursement of the firm against the individual estate of Helen A. Williams. That claim will be in the hands of the assignee, to be administered and disposed of under the assignment, and no benefit therefrom can come to either member of the firm until after the payment of all the firm and individual debts.

We therefore see no reason to doubt that the assignment was valid and free from the imputation of fraud.

The orders of the general and special terms should be reversed and the motion granted, with costs in all the courts, and ten dollars costs of the motion.

PARTNERSHIP—FRAUD ON CREDITORS.—The assumption by a partnership of a debt of one of its members is not a fraud upon the partnership creditors, if the firm is solvent: *Hage v. Campbell*, 78 Wis. 572; 23 Am. St. Rep. 422, and note. A partner may appropriate partnership funds for the payment of his debts, so long as he does not draw therefrom a sum in excess of his individual account: *Davis v. Atkinson*, 124 Ill. 474; 7 Am. St. Rep. 373, and extended note. One member of a firm cannot bind the firm by a mortgage executed to secure his notes. Such a mortgage does not secure firm paper indorsed by him: *Bank of Buffalo v. Thompson*, 121 N. Y. 230. Where a creditor, at the time the debt is contracted, receives the joint and several obligations of the individual members of a partnership for whose benefit it was contracted, he can enforce his claim against the estate of a deceased member, and share with the other creditors at the distribution: *Estate of Gray*, 111 N. Y. 404.

PARTNERSHIP—JUDGMENT AGAINST MEMBERS AS INDIVIDUALS.—A judgment against all the members of a partnership as individuals, though not for a firm debt, takes priority over a subsequent judgment against the same persons for a partnership debt: *Davis v. Delaware etc. Canal Co.*, 109 N. Y. 47; 4 Am. St. Rep. 418, and note. As to the rights of creditors of individual members of a partnership and creditors of the partnership, with respect to its assets, see *Powers v. Lorge*, 69 Wis. 621; 2 Am. St. Rep. 767, and note; *Sanborn v. Bell*, 105 N. Y. 14; 59 Am. Rep. 472.

PEOPLE v. MOST.

[128 NEW YORK, 108.]

CRIMINAL LAW — UNLAWFUL ASSEMBLY — NUMBER OF PERSONS WHO MUST PARTICIPATE THEREIN. — The offense of an unlawful assembly can be committed only when there is a concert of three or more persons who unite in an attempt or in a threat to do one or more of the things specified in the statute.

CRIMINAL LAW — UNLAWFUL ASSEMBLY — THREATS, WHO MAY BE DEEMED TO PARTICIPATE IN. — Persons may be regarded as participating in a threat made by another though they did not utter or repeat the words used by him, if they were present and under the influence of similar sentiments, and by their conduct assented to and adopted his language as their own.

JURY TRIAL — THREATS, WHAT ARE, WHEN A QUESTION FOR THE JURY. — Whether language indicating that persons denounced by the speaker will suffer for acts imputed to them by him was used and intended as a threat or as a mere prophecy is a question to be determined by the jury.

UNLAWFUL ASSEMBLY. — THE THREATS NECESSARY TO THE COMMISSION OF the crime of unlawful assembly may relate to acts to be performed at some future time, when affairs shall be ripe for their performance.

UNLAWFUL ASSEMBLY. — THREATS OF VIOLENCE AGAINST PERSONS RESIDENTS OF ANOTHER STATE are within the statute of New York defining the offense of unlawful assembly.

UNLAWFUL ASSEMBLY AT THE COMMON LAW WAS A DISTURBANCE OF THE PEACE by persons assembling together with an intention to do a thing which, if executed, would make them rioters, but neither executing it nor making a motion towards its execution.

EVIDENCE — ANARCHISTS. — EVIDENCE THAT PERSONS ASSEMBLED AT A MEETING WERE ANARCHISTS is competent to aid the jury in determining whether such meeting joined in threats made by defendant, who was one of the speakers thereat.

PROSECUTION under subdivision 8 of section 451 of the Penal Code, declaring that "whenever any three or more persons, being assembled, attempt or threaten any act tending towards a breach of the peace, or injury to person or property, or any unlawful act, such assembly is unlawful, and every person participating therein, by his presence, aid, or instigation, is guilty of a misdemeanor." The meeting was held in a hall in the rear of a saloon in the city of New York, on the evening of November 12, 1887. Two policemen who were present testified to the effect that the meeting was addressed by the defendant, Most, and was attended by about one hundred people, most of whom were anarchists, and that the defendant avowed himself to be an anarchist. He was greeted on entering the hall by, "Here comes our leader, Father Most." In addressing the meeting, among other things, he said: "Brother anarchists, we were to have a meeting in Second Avenue in

Florence Hall, over our dead brethren who were murdered in Chicago. . . . I have just received word that Captain McCullagh and his bloodhounds have stopped our meeting. . . . Let them beware; hereafter our meetings will be held in secret, and God help them if we catch them in our socials. . . . It was a shame, and that the police spies—the police hounds and capitalistic press, their teeth were filed, were sharp, but that they would be blunted.” The dead brethren to whom the speaker referred were Spies and others, who had, on the day preceding the meeting, been hanged at Chicago for the murder of a number of policemen by means of dynamite bombs and explosives. Further referring to them, and to persons whom he thought instrumental in causing their death, he said: “They were not properly hung; the weight was not heavy enough to break their necks; but their blood cries to heaven for revenge, and we will revenge them. Our brethren in Chicago had not a fair trial; there was perjured evidence; there were capitalists on the jury; they held our brethren in prison until they could get perjured evidence to convict them. If I had known the executioner who murdered, who strangled, our brothers, I would never rest until he had shared their fate. The day of revolution will soon come. First of all will be Grinnell; then comes Judge Gary; then the supreme court of Illinois; then the highest murderers of the land, the supreme court of the United States. The most cowardly of all, Oglesby, the governor of Illinois. He must not think because he pardoned two of our brethren to a lingering death of life imprisonment, he will be spared. I again urge you to arm yourself, as the day of revolution is not far off; and when it comes, see that you are ready to resist and kill those hirelings of capitalists. What do we care for a few soldiers? We have a weapon a hundred-fold worse than theirs. They think they kill five of our brethren, but we will have a hundred or five hundred for every one they have murdered. I am an anarchist, and am willing to die for its cause.” He closed his address, with the exclamation, “Rise, Anarchy! Long shall it live!” The audience cheered him at times during his address, and appeared to be greatly excited, and to approve the sentiments he uttered, and when he declared that “the day of revolution is not far distant,” one of the audience excitedly exclaimed, “Why not to-night? for we are ready and prepared.” It was claimed that the conduct of the district attorney, was unfair, in this that he made repeated offers, which in

each instance were overruled, to place in evidence before the jury the fact that the defendant was the author of a book entitled "A Manual of Revolution Warfare," and each of the offers made references to the contents of the book. The defendant, being convicted, appealed to the general term, where the judgment of conviction was affirmed, and thence he appealed to this court.

William F. Howe, for the appellant.

McKenzie Semple, assistant district attorney, for the respondent.

ANDREWS, J. But three of the questions presented on the brief of the appellant's counsel can be considered on this appeal. One of these questions is raised by the exception to the denial by the trial judge of the motion of the counsel for the defendant, made at the conclusion of the evidence on the part of the people, for an instruction to the jury to acquit the defendant, on the ground that the evidence was legally insufficient to justify a conviction. An exception was taken to a question put to a witness for the defendant on cross-examination by the prosecuting officer, and which was allowed by the court, as to his belief in a Supreme Being. A third exception was taken to evidence offered by the prosecution, and admitted, that the persons present at the meeting at Kramer's Hall on the evening of November 12, 1887, were anarchists.

By the decision of the general term, affirming the conviction and judgment of the trial court, questions as to the credibility of witnesses and the weight and preponderance of evidence are eliminated from the controversy, as well as every consideration bearing upon the propriety of granting a new trial, in the exercise of judicial discretion, upon the ground that the jury were prejudiced by offers of evidence persistently made by the prosecuting officer, and repeatedly overruled, which offers, as is claimed, were persisted in in order to bring before the jury irrelevant facts having no legitimate bearing upon the issue to be decided. If, in the opinion of the general term, for any reason appearing in the record, justice required a new trial, it had the power in its discretion to grant it. But this court, as a general rule, deals with questions of law only, and it cannot review an exercise of the discretion of the general term in granting or refusing new trials in criminal cases.

The main question relates to the sufficiency of the evidence

to support the charge in the indictment. In order to ascertain in what the offense of an unlawful assembly consists, reference must be had primarily to the statute which defines it. It was an offense well known at common law, and common-law definitions are a material aid in many cases in the interpretation of statute definitions of common-law offenses. But as it is competent for the law-making power to create new offenses not before known, so it may extend common-law definitions of particular offenses so as to include acts not punishable under the common law, and not embraced within the common-law definitions of the offense. In other words, identity in the name of offenses at common law and under a statute does not necessarily imply that the same precise constituents, and no others, enter into each.

The third subdivision of section 451 of the Penal Code, under which the defendant was indicted, requires that in order to constitute the offense of unlawful assembly, three or more persons, being assembled, should attempt or threaten any act "tending towards a breach of the peace, or an injury to person or property, or any unlawful act." The offense can only be committed when there is a concert or combination of three or more persons who unite in the attempt or in the threat to do one or more of the things specified in the statute. A threat made by one or by two persons only, in which no others participated, would not be indictable under this statute, although made in an assembly of many persons. It was also the rule of the common law that three or more persons should be assembled and participate in the unlawful purpose, in order to constitute the offense of unlawful assembly, or the cognate offenses of rout and riot: 4 Bla. Com. 146; 1 Russell on Crimes, 288.

Unless, therefore, the jury were authorized to find that the threat charged in the indictment was made not only by the defendant, Most, but also at least by two other persons on the occasion in question, the offense was not made out. In determining whether others participated with Most in the threat alleged, it was not necessary that it should affirmatively appear that other persons present uttered or repeated the same words used by Most. Their participation could be shown by an adoption of his language, exhibited by their conduct. If the jury were authorized to find that the persons present were under the influence of similar sentiments, and that they (to the number of two or more) adopted his language as their own,

then the threats, although only uttered by him in words, were also those of the persons who by their conduct united in and assented to them. "If any person," said Mansfield, C. J., in *Clifford v. Brandon*, 2 Camp. 370, "encourages, promotes, or takes part in riots, whether by words, signs, or gestures, or by wearing the badge or ensign of the rioters, he is himself to be considered a rioter." Within this principle the requisite concurrence of the statutory number in the threats uttered by Most was shown, or at least there was sufficient evidence of that fact to go to the jury. The assembly had met under the excitement of the hanging of the Chicago anarchists the day before. It was in sympathy with Most, and when he entered the room the persons present hailed him as their leader. They applauded his utterances, and cheered him when he denounced the murderers of their "friends and comrades," and threatened revenge. But it is insisted that no threats were proved to have been made by Most; that what he said were prophecies of what would be likely to happen, and not threats that he or others in sympathy with him would commit violence or murder to vindicate their "murdered brethren." It is unnecessary to recall the specific evidence upon this point. The language of Most would, under ordinary circumstances, be regarded as the ravings of a madman rather than the deliberate utterances of one who had formed the purpose of avenging supposed wrongs by murder and revolution. It was for the jury, however, to interpret the language used. The denunciations of the government and the officers of the law, with which Most's speech abounded; his advice to arm and to be prepared for the revolution "not far distant"; his declaration that they would avenge the blood of their comrades; his references to the judges and the officials who were concerned in their trial, conviction, and execution, and the declaration that Governor Oglesby, although he had commuted the sentences of two of the condemned, would not be "spared" in the general destruction; his reference to the "police bloodhounds," and his exclamation, "God help them if they are found in our socials,"—presented evidence from which the jury had a right to say whether or not words, some of which were unmistakably in the form of threats, were in fact used and understood as such, and their finding upon this point adversely to the defendant is conclusive here.

Nor is it, we conceive, an answer to the indictment that the threats related to acts not presently to be done, but to be per-

formed at some future time, when affairs were ripe for the revolution predicted. The main purpose of the common law and of the statute relating to unlawful assemblies is the protection of the public peace. Incendiary speeches, under the circumstances disclosed in this case, before a crowd of ignorant, misguided men, are not less dangerous because the advice to arm for the redress of grievances, and the threats of murder, are accompanied with the suggestion that the time is not quite come for action. This is illustrated in this case by the circumstance appearing in evidence. When Most said, "The day of revolution is not far distant," one of the audience rose and said excitedly, "Why not to-night? We are ready and prepared." No one can foresee the consequences which may result from language such as was used on this occasion, when addressed to a sympathizing and highly excited audience.

The point that threats of personal violence made in this state against persons in another state, although made at an assembly here, are not within the statute, is untenable. The offense of an unlawful assembly of which the defendant was convicted was committed here. We are administering our own laws, and not the laws of a foreign jurisdiction, and our state may properly pass laws to punish plotters here against the public peace of a sister state. We are of opinion, on the main question, that a case within the statute was made out for the jury. The common-law offense of unlawful assembly is defined to be "a disturbance of the peace by persons assembling together with an intention to do a thing which, if executed, would make them rioters, but neither executing it nor making a motion towards its execution": 1 Russell on Crimes, 275. It is unnecessary to decide whether the circumstances of the present case constitute the offense within this definition. They bring the case within the statute definition, and that is sufficient.

The exception to the question put to the witness on cross-examination as to his belief in a Supreme Being is frivolous.

The exception to the proof that the persons assembled at the meeting of November 12th were anarchists is also without force. That they were in the main anarchists appears by other testimony. They were addressed by Most as "brother anarchists," and they saluted him as their leader. Moreover, proof that they were anarchists was competent to aid the jury in determining, in connection with other circumstances, the

point whether the meeting joined in the threats made by the defendant.

We discover no error in the record, and the judgment should therefore be affirmed.

UNLAWFUL ASSEMBLY — WHAT CONSTITUTION, and other questions kindred thereto, are discussed in *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 390, and note.

GILMAN v. TUCKER.

[128 NEW YORK, 190.]

CONSTITUTIONAL LAW — GIVING ONE PERSON'S PROPERTY TO ANOTHER. — An act of the legislature which provides for the involuntary transfer of property from one person to another without due process of law, whether with or without compensation, violates the principle of the fundamental law, whatever may be the pretext upon which it is founded.

CONSTITUTIONAL LAW — DENIAL OF RELIEF IN THE COURTS. — It is not competent for the legislature to deny, for any cause, to a party who has been illegally deprived of his property access to the constitutional courts of the state for relief.

CONSTITUTIONAL LAW — DEPRIVING PERSON OF PROPERTY, WHAT IS. — A statute which assumes to destroy or invalidate a party's annuities of title is just as effective in depriving him of his property as one which bestows it directly upon another.

CONSTITUTIONAL LAW — VALIDATING VOID EXECUTION SALE. — A statute declaring that if the title of a grantee under an execution sale, or his assignee, shall, for any cause whatsoever, be adjudged null and void in an action brought by the judgment debtor, or his assignee, such judgment shall have no force or effect, unless, within twenty days after its entry, the plaintiff shall pay to such grantee, or his assignee, the sum of money which was paid upon the sale, with interest from the time of the sale, including the costs and expenses of the defendant in defending the action in which such judgment was recovered, and in the event of the plaintiff's failure to pay such purchase-money and expenses within the time specified, said title shall be valid in such grantee, attempts to deprive a person of property without due process of law, and is void.

Esek Cowen, Everett P. Wheeler, and Tucker, Hardy, and Wainwright, for the appellant.

Charles E. Hughes and George H. Fletcher, for the respondent.

RUGER, C. J. This appeal involves the construction and constitutionality of section 1440 of the Code of Civil Procedure, as amended by chapter 681 of the Laws of 1881, relating to the sale, redemption, and conveyance of real property sold on execution.

The questions arise upon the affirmance, by the general term, of an order of the special term denying the defendant's motion to set aside and vacate a judgment entered herein for the plaintiff. No claim was made but that the judgment was regular and authorized by the evidence in the case, or that it had been paid or satisfied, or that there was any statute or rule of law which required the court to set aside such judgment. The purposes of the act referred to, if valid, do not require an order of the court to render them effective. The contention is, that the defendant is entitled to the relief asked for, because the plaintiff did not, within twenty days after the recovery of the judgment, make certain payments to the defendant required by the statute, in default of which the section referred to declares the judgment to be of "no force or effect."

Even if it be conceded that the provisions of the code are valid, it does not follow that the defendant is entitled, as of course, to the relief demanded. It is not required by the language of the statute, and the court might well have said, in the exercise of its discretion, that the defendant should be left to the remedies which the statute gave him, and that it would not determine the controversy in a summary way upon motion. But we are disinclined to dispose of the appeal on this point, as important questions are raised by the case which, in the interest of justice, require an early disposition.

The evidence in the case shows that previous to the commencement of this action, the defendant had, as a subsequent judgment creditor of the plaintiff, acquired the right to a deed from the sheriff, by the redemption from the purchaser upon an execution sale, of a house and lot in New York belonging to the plaintiff; and she, believing the sale to have unauthorized and illegal, brought this action to compel a determination of the defendant's claim under such redemption.

In answer to the action, the defendant set up title in himself through the proceedings to redeem from the former judgment creditor, who had bid it in on an execution sale upon a judgment in his favor against the plaintiff. The question litigated upon the trial was as to the validity of the execution upon which such sale was had. The trial court found that it was "a void process, and that therefore the sale under that void process was also void and of no effect, and therefore the defendant Tucker could and did take no valid title by reason of his redemption from a sale which was void": *Place v. Riley*, 98 N. Y. 1. Judgment was therefore rendered in favor of this

plaintiff, with costs, and that judgment was affirmed, not only by the general term, but also by this court, with costs. It is now claimed that this judgment is ineffective, because the plaintiff did not, within twenty days after its recovery, in compliance with section 1440, pay to the defendant the moneys required to be paid by that section. The section, as amended, reads as follows: "The right and title of the judgment debtor, or of a person holding under him, or deriving title through him, to real property, sold by virtue of an execution, is not divested by the sale, until the expiration of the period within which it can be redeemed, as prescribed in this article and the execution of the sheriff's deed. But if the property is not redeemed and a deed is executed in pursuance of the sale, the grantee in the deed is deemed to have been vested with the legal estate from the time of the sale." Then follows the amendment: "And if the title of such grantee, or his assignees, is adjudged, for any reason or cause whatsoever, to be null and void in any action for that purpose brought by the judgment debtor, or his assignees, such judgment shall have no force or effect, unless within twenty days after the entry of such judgment the plaintiff shall pay to such grantee, or his assignees, the sum of money which was paid upon the sale, with interest from the time of the sale, as prescribed in this article, including the costs and expenses of defendant in defending the action in which such judgment was recovered, to be adjusted by a judge of the court in which said action was brought; and in the event of plaintiff's failure to pay such purchase-money and expenses within the time aforesaid, said title shall be valid in said grantee."

It was also provided that if, in any pending action to recover such property, an appeal had been taken, the plaintiff should have twenty days from final judgment in his favor to make the payments required.

In considering the meaning and effect of the amendatory act, it is desirable to have in mind the previous condition of the law on the subject. The Code of Civil Procedure, which was a substantial re-enactment of the provisions of the Revised Statutes in respect to this subject, provided that on a sale of lands on execution, the debtor's title should not be divested until fifteen months after the sale. This period was allowed him and his judgment and mortgage creditors to enable them to redeem from the sale. The first year was allowed to the debtor, and the three succeeding months to the creditors en-

titled to the benefit of the redeeming statute. On the expiration of the fifteen months, in case there was no redemption by the owner, the sheriff was bound to execute a deed of the premises to the purchaser on the sale, or to his assignees, or to the person entitled thereto under the provisions of the statutes relating to redemption: Sec. 1471. Upon a redemption by the judgment debtor, or his heirs, executors, or assignees, the sale and certificates thereof become null and void, and no conveyance, therefore, was required to be executed, as the judgment became satisfied to the extent of the sum collected and applied on the execution, and the title of the property sold remained in the judgment debtor: Sec. 1448.

In case of a redemption by a judgment or mortgage creditor, he was required not only to pay the amount specified by the statute to the person from whom he redeemed, but also to execute a satisfaction of his judgment or mortgage, stating that the redemption satisfies the judgment or mortgage in full, or to a specified amount: Sec. 1463. The purchaser of real property, sold by virtue of an execution, who has been evicted from the possession thereof, or against whom judgment is rendered in an action to recover the same, in consequence, first, of any irregularity in the proceedings concerning the sale, or second, of the judgment upon which the execution was issued, being vacated or reversed, or set aside for irregularity, or error in fact, may recover the purchase-money paid by him, with interest, from the person for whose benefit the property was sold: Sec. 1479.

In case of a sale vacated upon an "irregularity in the proceedings concerning the sale," the judgment under which the sale was made is revived and becomes valid, to enable the judgment creditor to collect the sum paid on the sale with interest: Sec. 1480. It is also provided that a judgment creditor who completes proceedings for redemption acquires all the right, title, and interest in the property which the purchaser acquired by the sale: Sec. 1471.

The protection which this scheme affords persons who have purchased land on an illegal sale is apparently sufficient for all of the requirements of justice or equity, independent of the amended section. Thus when such sale is declared void, the security of the judgment creditor is restored for the purpose of enabling him to reimburse himself for the moneys paid on the sale, and a purchaser on a sale whose title is defeated for any of the causes specified is authorized to recover the pur-

chase-money paid by him from the judgment creditor, or those who represent him.

These provisions gave an adequate and sufficient remedy to all of the parties interested where there had been an illegal sale on execution. The judgment creditor lost no rights by making such sale, and the innocent purchaser and his assignees were protected, as well where the judgment was founded upon irregularities in the proceedings concerning the sale as when it had been reversed or vacated.

There could of course be no just foundation for a claim by the judgment creditor to be reimbursed by any one when his judgment had for any reason been reversed or set aside, because in that event his claim would itself be extinguished, and he would have suffered no loss.

A point is made by the respondent, upon the language of the act, that the defendant, being a redeeming creditor, does not come within its terms. By the express language of the act, its provisions would seem to be operative only where the land had not been redeemed. There can be no question, we think, but that, under the language of the statute, the land had, within its meaning, been redeemed, and the defendant was therefore precluded by its terms from availing himself of its benefits. If this should be held to be the true construction of the act, its operation would then be confined to those who purchased on the sale, and their assignees alone, and would thus exclude the defendant from the benefit of the act.

It is contended, however, by the appellant that a redeeming creditor comes within the spirit of the act, and should therefore be held to be within its meaning.

We should be reluctant, under any circumstances, to extend by construction the scope and application of a statute which seems to be so uncalled for and inequitable as this, and particularly so when the redeeming creditor has an adequate remedy for any loss which he may have incurred; but where a party is excluded from the benefit of an act by its express language, the court is not at liberty to extend its operation by construction, for the purpose of bringing him within its spirit. But however this may be, we think that it is due to the gravity and importance of the questions raised that we should base our decision upon those more important points presented by the objections to the validity of the amendment.

It is to be observed, in the first place, that the act is predicated upon the existence of a final judgment, determining not

only that the property to be affected has been illegally sold, but that it still belongs to the plaintiff therein, and that the defendant has no legal claim thereto, but also awarding to the plaintiff the costs of the action, and impliedly holding that defendant is not entitled to such costs. The act contains, therefore, the most ample concession that the party against whose rights it is aimed is, in law, the absolute owner of the property to be affected by the amendment, and is a judgment creditor of the defendant to the extent of the costs included in the judgment. It then proceeds to declare how he may be divested of this title and property, and provides that after recovering such judgment, unless he pays within a limited time to the defendant an arbitrary sum, his property shall, by force of the act alone, be transferred to his adversary.

The sole aim of the statute thus seems to be to effect a change of title, and to wrest from one person the property which has been finally adjudged to be his, and vest it in another by mere force of the legislative will. No obligation to make the payments referred to existed at law, and none was created by the act; but it simply declared that unless they are made, the defaulting party shall forfeit his property, and it shall be transferred to another, who has neither legal nor equitable claim to it. In effect, it reverses the judgment, and gives to one that which the court has deliberately adjudged to another.

The plaintiff contends that the statute is unconstitutional, because it deprives the owner of his property without due process of law, and we are of the opinion that the claim is well founded.

It cannot be the subject of doubt that an act of the legislature which provides for an involuntary transfer of property from one person to another, without due process of law, whether with or without compensation, violates the principles of the fundamental law, whatever may be the pretext upon which it is founded.

It was said by Justice Jewett in *Embury v. Conner*, 3 N. Y. 511, 53 Am. Dec. 325, after a review of the authorities, that "I think these decisions should be regarded as having settled the point that a statute is unconstitutional and void which authorizes the transfer of one man's property to another without the consent of the owner, although compensation be made."

And it is laid down in *Cooley's Constitutional Limitations*

(at page 444), as an elementary principle, that a party cannot, "by his misconduct, so forfeit a right that it may be taken from him without judicial proceedings, in which a forfeiture shall be declared in due form. Forfeiture of rights and properties cannot be adjudged by legislative acts, and confiscation, without a judicial hearing after due notice, would be void, as not being due process of law."

The act comes clearly within the spirit of our decision in *Cromwell v. MacLean*, 123 N. Y. 474, where Judge Peckham, in relation to a tax sale, says: "Holding, as we must, that no title or interest in fact passed to the purchaser at these tax sales, and that the original owner, therefore, still retained his title, the effect of the act in question, if valid, is by legislative fiat to transfer the title of the property of Edward C. Wilson, as trustee, to the lessees under these invalid leases. . . . Has the legislature of this state the right to take the property of A and transfer it to B, under the guise of confirming sales made of such land *in invitum*, but by which no title, in fact or in law, passed from the owner to the purchaser? The statement of the question should be its best answer. The property thus taken is not taken by due process of law. . . . What difference does it make to say that the legislature is acting only in a way of validating proceedings to collect a tax which, in justice, the owner of the land ought to pay. The answer is, that the proceedings have been so fatally defective that no title has passed, and the owner has his title to his property the same as if no proceedings had been taken. Where is the authority in such case for the legislature to itself transfer the title of his property to some one else?"

It is obvious that if the legislature could not directly confirm such a sale, the court ought not to strain to discover such an illegal intention in the words of an act whose motives and purposes are ambiguous and indefinite.

Tested by these rules, we are unable to see how this act can be supported, and at the same time effect be given to the constitutional guaranty. It was said by Judge Earl in *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289, that "the constitutional validity of a law is to be tested, not by what has been done under it, but by what may by its authority be done."

A consideration of the results which may be reached through the provisions of this act, when construed according to the plain meaning of its language, demonstrates the im-

possibility of reconciling its provisions with the requirements of the fundamental law. The obvious intention of the act is to take away from the owner all remedy for the recovery of his property, except upon the payment by him to his adversary of a sum of money which must frequently be greater than the value of the property itself. If he remains in possession of the property, he is deprived of any remedy to protect his possession, and if his adversary has succeeded in obtaining possession, he is deprived of any remedy to recover it, except upon the condition that he pays as much, or more, than it is probably worth. An owner may, therefore, under this law, be stripped of his property under a void proceeding; be turned out of possession and denied any affirmative relief in the courts, unless upon the condition that he pays for the property its value, as determined by a judicial sale, and in addition thereto, a sum for costs and expenses, the amount of which he has no means of ascertaining, and which may also exceed the value of the property in litigation. A more effectual scheme to deprive an owner of his property could hardly be conceived. Whether he abandons it to the wrongdoer or elects to seek his remedy in the courts, the property, as a subject of value, has passed from him irrecoverably.

It is not claimed by the appellant that the change of title intended to be effected by this statute is to be produced by any process of law, or as the result of any judicial proceeding whatever; and the statute, in plain language, declares that it shall take place as a consequence of the owner's successful attempt to establish his right through any action at law, upon a failure to make the payments required. The statute is intended to execute itself, and pass the title upon the expiration of the time limited by the statute.

One of the arguments by which the statute is attempted to be sustained is the claim that the legislature has, in effect, required the owner to repay certain sums of money which had theretofore been appropriated to her use, and inasmuch as she has had the benefit of the amount bid on the sale, it is argued that it is in accordance with equitable rules that she should be required to repay such sums before recovering back her property.

We do not think it is competent for the legislature to deny, for any cause, to a party who has been illegally deprived of his property, access to the constitutional courts of the state for relief.

If, as we have seen, he is denied all remedy for the wrong inflicted upon him, the deprivation of his property becomes just as effectual as though it had been taken from him by direct legislative enactment. But however this may be, the act does not seem to furnish any foundation for the argument. The plaintiff has never in fact been relieved from her liability to pay the original judgment, and has not derived any benefit from the attempted sale. That liability was revived against her in favor of the judgment creditor when she recovered judgment for the land, and no provision is made by the act for the satisfaction of that lien, although the payment required by the statute be actually made by her. The lien is given to one party and the payment is required to be made to another, and, in the absence of any provision in the statute making such payment a satisfaction, it is difficult to see why the lien does not remain and the judgment stand unsatisfied.

The payment required was also unnecessary for the protection of the redeeming creditor, as he had his right of action to recover back the money paid by him from the person to whom it was paid. The section, as amended, thus secures to the judgment creditor not only a lien on the land for the original debt, but leaves him in possession of an equivalent sum received from the redeeming creditor, and the redeeming creditor is entitled to receive not only the money required to be paid under this statute by the owner, but also acquires a cause of action against the judgment creditor to recover back the money expended by him on redemption.

Both of these parties, therefore, have, by this act, double security for the same debt, and no provision is made by the statute that the payment required to be made by the owner shall satisfy any of these liabilities. It would therefore seem that, in fact, no benefit accrued to the plaintiff from the moneys paid on the sale, and no pretense was left for the requirement made by the statute.

But a further answer to the claim is found in the fact that the statute proceeds upon no such theory, and purports to make no such application. No reference is made in it to the liabilities of the judgment debtor, or provision made for their satisfaction, and the sum required to be paid by her has no reference to the existence of any lien or debt, or its amount. Indeed, it requires the payment as well when it has been judicially pronounced that there is no debt as when one may, in fact, exist. The act makes no distinction between cases

where the judgment itself upon which the sale was made has been reversed and set aside, and those in which the process alone has been adjudged to be void. It wholly ignores any such distinction, and requires the payment to be made as well where no claim ever existed as where a legal claim has been illegally attempted to be enforced. It furnishes no argument in favor of the legality of this act to say that some of the consequences following its enactment could, under special conditions, have been constitutionally produced, if provided for in some other way. The broad question here is, whether this enactment, construed according to its plain meaning and intent, enables one person to acquire the property of another against his will, except by due process of law. If it does, the courts must condemn it as violative of the fundamental law. The vicious purpose of the act is so thoroughly interwoven with the whole scheme of the enactment as to render it impossible to eradicate its objectionable features without reconstructing the entire section. It is not, therefore, a case where any part of the act can be supported.

We also think the act violates the constitutional guaranty, because it assumes to nullify a final and unimpeachable judgment, not only establishing the plaintiff's right to the premises in dispute, but also awarding him a sum of money as costs. After rendition, this judgment became an evidence of title, and could not be taken from the plaintiff without destroying one of the instrumentalities by which her title was manifested. A statute which assumes to destroy or nullify a party's muniments of title is just as effective in depriving him of his property as one which bestows it directly upon another: *Matter of Jacobs*, 98 N. Y. 98; 50 Am. Rep. 636, and authorities there cited. In the one case it despoils the owner directly, and in the other renders him defenseless against any assault upon his property.

Authority which permits a party to be deprived of his property by indirection is as much within the meaning and spirit of the constitutional provision as when it attempts to do the same thing directly. Even assuming that it might be lawful for the legislature to impose a condition upon the right of a party to maintain a particular action to recover real property, no such case is here provided for. This statute makes any action at law to establish his right subject to its provisions, and thus deprives him of all remedy for the wrong done him. It not only does this, but it attempts to reverse a judgment, and give to the defeated party the fruits of a recovery awarded

to another. We must bear in mind that a judgment has here been rendered, and the rights flowing from it have passed beyond the legislative power, either directly or indirectly, to reach or destroy. After adjudication, the fruits of the judgment become rights of property. These rights became vested by the action of the court and were thereby placed beyond the reach of legislative power to affect.

We have been referred to no authority which justifies legislation taking such rights away arbitrarily, and we know of no theory upon which it can be sustained. Instances where land, subject to a lien for taxes, has been sold therefor, and the owner has been required to pay the taxes, as a condition of maintaining an action to recover the land, or the borrower of money, at usurious rates, is required to repay the sum equitably due before maintaining a suit in equity to enforce a forfeiture of the securities held by the creditor, are obviously not analogous to the case under consideration.

We are therefore of the opinion that the repugnancy between the law and the constitutional rights of the citizen is so irreconcilable that the law must fail.

Another serious objection to the law seems to exist in the ambiguity of the provisions relating to the time limited for making the payments required by it. The language of the statute requires the payment to be made within twenty days after judgment, and the subsequent portions of the section, providing that in case of pending appeals the payment might be made within twenty days after final judgment, would seem to imply that in other cases the time must be limited by the original judgment. If this be so, it might be that a defendant, by taking an appeal and staying proceedings, could defeat any effort of the owner to make the payments, and thus compel him to lose his land, although he might be willing to comply with the statute. This seems to show the recklessness with which the owner's interests were regarded, and the injustice which may be perpetrated under its provisions.

It is not without a feeling of satisfaction that we have found this amendatory statute unconstitutional, for in every view in which it may be considered it impresses us with the conviction that it is grossly inequitable and unjust. We can discover no reason in the situation of the purchaser at an illegal execution sale under the existing law which justifies the adoption of the careless, ill-considered, and inequitable provisions which distinguish this legislation.

The amended section is subject to many other criticisms which we have not felt called upon to make, as those already referred to fully justify the conclusion we have reached in the case.

The order should therefore be affirmed, with costs.

STATUTES—GIVING ONE PERSON'S PROPERTY TO ANOTHER.—The legislature has no power to bestow the property of a dissolved corporation upon the municipality in which it had its existence: *People v. O'Brien*, 111 N. Y. 1; 7 Am. St. Rep. 684. A statute providing for divesting out of a purchaser of land one third of the fee and bestowing it upon the widow of his grantor is unconstitutional and void: *Strong v. Clem*, 12 Ind. 37; 74 Am. Dec. 200, and note. Where a tax sale is void and no title is conveyed, the legislature cannot impair the rights of the owner by validating the sale: *Cromwell v. MacLean*, 123 N. Y. 474. The legislature cannot provide for the forfeiture of lands of unknown owners, upon their failure to produce evidence of title within a certain time: *Schorf v. Tucker*, 73 Md. 378. See *Mannell v. Grace*, 85 Ala. 577.

STELTZ v. SHRECK.

[128 NEW YORK, 263.]

HUSBAND AND WIFE.—TENANCY BY ENTIRETY is created by a conveyance of land to a husband and wife which does not state the manner in which they shall hold such land.

HUSBAND AND WIFE.—TENANCY BY ENTIRETY, WHAT DESTROYS.—An estate by entirety, being founded upon the marital relation and upon the legal theory of the absolute oneness of husband and wife, cannot continue after that relation is destroyed, and the legal unity existing between the parties to it has been terminated through their separation by divorce.

HUSBAND AND WIFE.—DIVORCE.—ENTIRETY.—Land acquired and held by husband and wife as tenants by entirety on their divorce vests in them as tenants in common.

HUSBAND AND WIFE.—TENANCY BY ENTIRETY.—IT IS NOT AN IMPLIED CONDITION, annexed to an estate by entirety, that each of the grantees shall remain faithful to the obligations of the marriage state, and shall not cause the dissolution of the marital relation upon which the estate depends; and the disregarding of such obligation, resulting in a divorce, does not, therefore, terminate the interest of the guilty spouse in the land held by the entirety.

George H. Kracht, for the plaintiff.

Edward W. Scudder Johnston and Lewis S. Goebel, for defendant Shreck.

S. Jones, for guardian *ad litem*.

PECKHAM, J. We agree in this case with the views expressed by the learned judges who delivered the opinions at

the special and general terms of the supreme court. The sole question arises out of the decree of divorce which the husband obtained from his first wife on account of her adultery.

Did that divorce have any, and if so what, effect upon the character of the holding of the real property by the former husband and wife? By the conveyance, the husband and wife took an estate as tenants by the entirety: *Bertles v. Nunan*, 92 N. Y. 152; 44 Am. Rep. 361; *Zornitsein v. Bram*, 100 N. Y. 18.

Such a tenancy differs from all others. In one respect it is like a joint tenancy, in that there is a right of survivorship attached to both, but it is not a joint tenancy in substance or form: *Barber v. Harris*, 15 Wend. 615; *Jackson v. McConnell*, 19 Wend. 175; 32 Am. Dec. 439; *Bertles v. Nunan*, 92 N. Y. 152; 44 Am. Rep. 361.

It originated in the marital relation, and although the survivorship presents the greatest formal resemblance to joint tenancy, instead of founding the estate by the entirety upon the notion of joint tenancy, all the authorities refer it to the established effect of a conveyance to husband and wife, pretty much independent of any principles which govern other cases: *Jackson v. McConnell*, 19 Wend. 175; 32 Am. Dec. 439.

At common law, husband and wife were regarded as one person, and a conveyance to them by name was a conveyance in law to but one person. These two real individuals, by reason of this relationship, took the whole of the estate between them, and each was seised of the whole, and not of any undivided portion. They were thus seised of the whole because they were legally but one person. Death separated them, and the survivor still held the whole, because he or she had always been seised of the whole, and the person who died had no estate which was descendible or devisable.

Being founded upon the marital relation, and upon the legal theory of the absolute oneness of husband and wife, when that unity is broken, not by death, but by a divorce *a vinculo*, it stands to reason that such termination of the marriage tie must have some effect upon an estate which requires the marriage relation to support its creation. The claim on the part of the counsel for the first wife is, that it is only necessary the parties should stand in the relation of husband and wife at the time of the conveyance, and at that time the estate vests, and no subsequent divorce can affect an estate which is already vested. But the very question is, What is the character of the estate which became vested by the conveyance? If it were

of such kind that nothing but the termination of the marriage by the death of one of the parties could affect it, then of course the claim of the counsel is made out, but it is an assumption of the whole case to say that the estate was of the character he claims. When the idea upon which the creation of an estate by the entirety depends is considered, it seems to me much the more logical, as well as plausible, view to say, that as the estate is founded upon the unity of husband and wife, and it never would exist in the first place but for such unity, anything that terminates the legal fiction of the unity of two separate persons ought to have an effect upon the estate whose creation depended upon such unity. It would seem as if the continued existence of the estate would naturally depend upon the continued legal unity of the two persons to whom the conveyance was actually made. The survivor takes the whole in case of death, because that event has terminated the marriage and the consequent unity of person. An absolute divorce terminates the marriage and unity of person just as completely as does death itself, only instead of one, as in the case of death, there are in the case of divorce two survivors of the marriage, and there are from the time of such divorce two living persons in whom the title still remains. It seems to me the logical and natural outcome from such a state of facts is, that the tenancy by the entirety is severed, and a severance having taken place, each takes his or her proportionate share of the property as a tenant in common without survivorship. It is said that in such case it ought to be a joint tenancy, but I see no reason for that claim. As it has been held that seisin by the entirety does not create a joint tenancy either in substance or form (*Jackson v. McConnell*, 19 Wend. 175; 32 Am. Dec. 439), and as a tenancy by the entirety depended wholly upon the marital relationship, there can be no reason why the seisin should be turned into a joint tenancy by virtue of the very fact which terminated the unity of persons upon which the right of survivorship is itself founded, and to which it owed its continued existence.

It is true that a conveyance of this kind, if made to two persons who were not husband and wife, would, at common law, have created a joint tenancy. But our statute provides that every estate granted or devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be a joint tenancy: 1 Rev. Stat., p. 727, sec. 44. This statute did not reach an estate by the entirety, nor did the

statutes of 1848 and 1849, and 1860 and 1862: *Bertles v. Numan*, 92 N. Y. 152; 44 Am. Rep. 361. It therefore still exists under our law.

We have seen, however, that a tenancy by the entirety is not a joint tenancy in form or substance. Upon what principle should the termination of a tenancy by the entirety resulting from an absolute divorce be changed into a joint tenancy, in the face of our statute relating to joint tenancies? The conveyance did not expressly declare that the tenancy was to be a joint tenancy, and therefore, when the original character of the tenancy by the entirety is changed, it cannot be transformed into that of a joint tenancy without a clear violation of our statute.

The counsel for the defendant urges that we are giving by this decision a retroactive effect to a decree of divorce in a case not warranted by the statute, and in violation of the well-settled rule in this state as to the effect of such a decree. He says that we change the effect of the deed of conveyance, and that the decree of divorce not only severs the unity of person from the time of its entry, but that we allow it to date back to the date of the conveyance, and to give an effect to such conveyance that it did not have at the time of its execution. We think not.

We do not at all question the contention of the defendant's counsel that a decree of divorce in this state only operates for the future, and has no retroactive effect, or any other effect than that given by the statute. But we hold that the character of the estate conveyed was such in its creation that it depended for its own continuance upon the continuance of the marital relation, and when that relation is severed, as well by absolute divorce as by death, the condition necessary to support the continuance of the original estate has ceased, and the character of the estate has for that reason changed. The estate does not revert in the grantor or his heirs, for no such condition can be found in the law or in the nature of the estate, and it must therefore remain in the grantees, but by an altered tenure. Their holding is now a holding of two separate persons, and, for the reasons already given, such holding should be by tenancy in common, and of course without any survivorship.

I think the contention that the first wife is entitled to the whole of the estate as the survivor of her husband cannot be maintained. Although the question is new in this state, it has been somewhat debated in the courts of some of the other

states. In *Harrer v. Wallner*, 80 Ill. 197, and *Lash v. Lash*, 58 Ind. 526, and *Ames v. Norman*, 4 Sneed, 683, 70 Am. Dec. 209, similar views to those we have herein stated are set forth. A contrary decision has been made in Michigan, in *Appeal of Lewis*, 85 Mich. 340; 24 Am. St. Rep. 94. We have read the opinion in that case, but we feel that our own view is more in accord with legal principles, and we cannot therefore follow it.

Upon the defendant's appeal, the judgment ought to be affirmed.

Upon the appeal of the plaintiff, her counsel contends that there is a condition annexed to the estate by the entirety which is implied by law, and the condition is, that each of the grantees shall remain faithful to the obligations of the married state, and shall not, by his or her misconduct, cause a dissolution of the marriage relation upon which the estate depends. I find no warrant for implying any such condition in the character of the holding, and still less for the result which, as he claims, flows from a violation of such condition. Its violation (judicially determined) results, according to the plaintiff's argument, in the immediate vesting of the whole estate in the innocent party to the marriage, just the same as if the other party thereto were actually dead instead of divorced. None of the authorities treats the estate as dependent upon any such condition, and however proper it might be to enact by legislative authority a condition of that nature, this court has not that power.

It is unnecessary to add anything further to the views which have been expressed by the learned judges of the supreme court in this case, and we are of the opinion that the judgment appealed from should be affirmed, and as neither party appealing has succeeded here, the affirmance should be on both appeals, without costs.

HUSBAND AND WIFE — TENANCY BY ENTIRETY — HOW CREATED. — Where real estate is conveyed to husband and wife jointly they take as one person: *Town of Corinth v. Emery*, 63 Vt. 505; 25 Am. St. Rep. 780, and note; *Hulett v. Inlow*, 57 Ind. 412; 26 Am. Rep. 64, and note 65-68; *Den v. Hardenburgh*, 10 N. J. L. 42; 18 Am. Dec. 371, and extended note 377-389; *Wilson v. Wilson*, 43 Minn. 398.

HUSBAND AND WIFE — TENANCY BY ENTIRETY — EFFECT OF DIVORCE ON. — The tenancy by entirety is not destroyed or affected by the divorce of the grantees: *Appeal of Lewis*, 85 Mich. 340; 24 Am. St. Rep. 94. This case is in direct conflict with *Blackinton v. Blackinton*, 141 Mass. 432; *Engcart v. Kaylor*, 118 Ind. 34; 10 Am. St. Rep. 94, and note.

STAPLES v. NOTT.

[128 NEW YORK, 408.]

CONFLICT OF LAWS — CONTRACT, WHEN DEEMED TO BE MADE. — When an agreement to give and accept a promissory note is made in the state where the payee resides, and it is then drawn up pursuant to the agreement and given to the maker for execution, who takes it to his home in another state, where he signs it and procures it to be indorsed and transmitted to the payee at the latter's place of residence, it must be deemed a contract of the state wherein the latter resides, though it is made payable in the state of the maker's residence, and if not usurious by the law of the state where the payee resides, cannot be attacked for usury in the state in which it is payable.

CONFLICT OF LAWS. — **THOUGH AN INDORSEMENT** of a note is made in one state, yet if the indorser transmits it to another state to be there received by the payee, and this is done pursuant to an agreement made in the latter state, the obligation of the indorser is to be determined by the law of the state in which the note was received by the payee.

M. M. Waters, for the appellant.

John C. McCartin, for the respondent.

GRAY, J. The promissory note in suit bears date at Washington, District of Columbia, April 5, 1889; was made payable at a bank in Watertown, New York, and carried interest at the rate of seven per cent per annum. The appellant was indorser upon it, and defends on the ground of usury. If the contract of the parties, which is evidenced by this note, was governed by the laws of this state, the defense should have prevailed; but if made under the laws of the District of Columbia, the judgment was right, and should be sustained.

The note was given in renewal of a balance due upon a prior note, made by and between the same parties, which bore date at Washington, District of Columbia, April 5, 1888, was payable one year after date at a bank in Washington, bore the same rate of interest, and was similarly indorsed. Some payments were made on account of the principal, but before its maturity, the maker requested of plaintiff, a resident of Washington, by letter, to renew for the balance remaining due. Failing to receive any reply, he went on to Washington, and there prevailed upon the plaintiff to agree to take a new note for his debt. This note was then drawn by the plaintiff and handed to the maker for execution, who took it back to his home in Syracuse, New York, where his and the appellant's signatures were affixed as maker and indorser respectively. It had been agreed with the plaintiff that upon this new note

being returned to him, he would send back the original note, and the appellant himself mailed the renewal note to the plaintiff in Washington.

These facts, which were not disputed, should make it perfectly obvious that there was here every essential to a valid contract under the laws of the plaintiff's domicile, and the only accompaniment lacking to a full local coloring was the foreign place named for payment. For the affixing of the signatures to the note by the maker and the indorser, however important as acts, was yet but a detail in the performance and execution of the contract which had been agreed upon with the plaintiff. But naming a New York bank as the place where the maker would provide for the payment of the note did not characterize the contract in one way or the other. That arrangement was one simply for the convenience of the maker. It could have no peculiar effect. The transactions which resulted in an agreement to extend the time for the payment of the debt and to accept a new note took place wholly in the District of Columbia, and what else was enacted in the matter elsewhere neither added to nor altered the agreement of the parties. Though the engagement of the indorser, in a sense, was independent of that of the maker, that proposition is one which does not affect the local character of the contract, but which simply concerns the question of the enforcement of the indorser's liability. Whatever the previous knowledge of the appellant as to the negotiations and the agreement for a renewal of the promise to pay between the maker of the old note and the plaintiff, the question is without importance. When he indorsed the note, which had been prepared and was brought to him, and sent it through the mail to the plaintiff, his engagement was with respect to a contract validly made according to the laws of the District of Columbia, and when the note was received by the plaintiff the transaction was then consummated in that place. In *Lee v. Selleck*, 33 N. Y. 615, it was said, with respect to an indorsement in Illinois of a note made in New York, that the fact of the indorser writing his name elsewhere was of no moment. Upon delivery by his agent to the plaintiffs in New York, it became operative as a mutual contract.

The agreement which was made in Washington for the giving of the promissory note in question was the forbearance of a debt already due, upon which the appellant was liable; and the renewal of his engagement as indorser upon the note, with-

out any qualification of his contract of indorsement, was in fact an act in ratification and execution of the previous agreement. That agreement between the plaintiff and the maker in Washington took its concrete legal form in a note, prepared there by the plaintiff, with a rate of interest sanctioned by the laws of his domicile, adopted by the appellant by indorsement in blank, and made operative as a mutual contract by delivery to plaintiff in Washington through the mails.

For the court to hold, because the note was not actually signed and indorsed in the District of Columbia where the agreement it evidenced was made, or because it was made payable in another state, that the contract was void as contravening the usury laws of the place of signature and of payment would be intolerable, and against decisions of this court: *Wayne Co. Sav. Bank v. Low*, 81 N. Y. 566; 37 Am. Rep. 533; *Western T. & C. Co. v. Kilderhouse*, 87 N. Y. 430; *Sheldon v. Haxtun*, 91 N. Y. 124.

I think the plaintiff was entitled to recover as upon a contract made under the government of the laws of the District of Columbia, and therefore valid and enforceable in any state.

The judgment should be affirmed, with costs.

INTEREST — CONFLICT OF LAWS. — The laws of the state where a negotiable instrument is made will fix the rate of interest that it is to draw: *McAllister v. Smith*, 17 Ill. 328; 65 Am. Dec. 651, and note; *Dugan v. Lewis*, 79 Tex. 246; 23 Am. St. Rep. 332, and note. A note executed in Georgia but payable in New York is governed as to interest by the laws of Georgia: *New England etc. Co. v. McLaughlin*, 87 Ga. 1. A note executed in Alabama but payable in Georgia is governed by the laws of Alabama: *Hanover Nat. Bank v. Johnson*, 90 Ala. 549.

HURLBURT v. HURLBURT.

[128 NEW YORK, 420.]

ATTORNEYS — PRIVILEGED COMMUNICATIONS. — If TWO OR MORE PERSONS CONSULT AN ATTORNEY AT LAW for their mutual benefit and make statements in his presence, he may disclose such statements in any controversy between them or their personal representatives or successors in interest, but not in controversies between them or either of them and third persons.

EVIDENCE. — DECLARATIONS OF A TESTATOR OR INTENTATE binding on him or his estate may be given in evidence against his personal representative, in all cases where they would have been competent against himself had he been living and a party to the action.

APPELLATE PRACTICE — JURY TRIAL. — Where the charge of a judge to the jury does not contain any erroneous statement of the law, but tends to improperly bias the jury and to influence their verdict, it may be a ground in the court below to set aside the verdict upon a motion for a new trial, but it will not be considered by the court of appeals where it has been urged in the court below and the motion for a new trial denied.

Charles McLouth, for the appellants.

S. B. McIntyre, for the respondent.

EARL, J. This action was brought to recover the sum of \$6,682, with interest thereon, which it is alleged Charles F. Hurlburt, the plaintiffs' intestate, placed in the hands of his son Theron, defendant's intestate, as his agent, and for his benefit, in the latter part of the year 1881. Theron was a son of Charles, and he died December 25, 1883, and Charles died January 6, 1884.

The defendant claimed that the money was a gift to her husband, and that he was never under any obligation to repay the same. The plaintiffs were unable to produce any writing of any kind evidencing any obligation on the part of Theron to repay the money. They are the sons of Charles, and were the sole witnesses to establish their claim, and this they attempted to do by testifying to certain conversations which they overheard between their father and Theron.

Upon the trial, the defendant rested her case mainly upon the conceded fact that for about two years before the death of her husband the money claimed had been in banks to his credit, and had been managed and controlled by him, and she produced proof of certain declarations and admissions made by Charles, tending to show that the money was transferred by him to his son as a gift, and not to be held for his benefit.

During the progress of the trial, the plaintiffs made objections to evidence, which were overruled, and they now claim some of the rulings were erroneous. We will briefly notice some of them.

Theron and Charles, in the spring of 1883, went together to consult a lawyer by the name of Aldrich as to the best mode of disposing of or adjusting the prospective interest of the plaintiff Lyman as an heir in the farm belonging to his father, and several plans were suggested by Theron in the presence of his father, and assented to by him to accomplish that end. The statement was there made by Theron to the lawyer, and assented to by his father, that Lyman had had all his share in his father's personal property; and other state-

ments were there made by Theron, and assented to by his father, of similar import. Aldrich was called by the defendant to prove these statements and admissions. The plaintiffs objected to his evidence, on the ground that he was an attorney consulted professionally, and that the communications to him were privileged. The court overruled the objection, and received the evidence.

We think that in receiving this evidence there was no violation of section 835 of the code, which provides that "an attorney or counselor at law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment." This section is a mere re-enactment of the common-law rule, and it cannot be supposed, from the general language used, that it was intended to change or enlarge that rule as it had been expounded by the courts. It has frequently been said that the object of the rule embodied in the section is to enable and encourage persons needing professional advice to disclose freely the facts in reference to which they seek advice, without fear that such facts will be made public, to their disgrace or detriment, by their attorney. Such a case as this is plainly not within the rule. Here Theron and his father were both interested in the advice which they sought, and they were both present at the same time, and engaged in the same conversation. Each heard what the other said, so that the disclosures made were not, as between them, confidential, and there can be no reason for treating such disclosures as privileged. It has frequently been held that the privilege secured by this rule of law does not apply to a case where two or more persons consult an attorney for their mutual benefit; that it cannot be invoked in any litigation which may thereafter arise between such persons, but can be in a litigation between them and strangers: *Root v. Wright*, 21 Hun, 347; *Sherman v. Scott*, 27 Hun, 331; *Foster v. Wilkinson*, 37 Hun, 244; *Rosenburg v. Rosenburg*, 40 Hun, 91; *Whiting v. Barney*, 30 N. Y. 330; 86 Am. Dec. 385; *Hebbard v. Haughian*, 70 N. Y. 54; *Root v. Wright*, 84 N. Y. 72; 38 Am. Rep. 495. Therefore, if Charles and Theron had been alive and parties to this action, this evidence would have been competent. And as it would then have been competent, it is equally competent in this action between their personal representatives. The fact that these plaintiffs are personally interested in the estate of their father can make no difference in the application of the rule. They

are parties to this action only in a representative capacity. They legally stand as the representatives of their father, and no one else. Evidence which would have been competent against him in his lifetime is competent against his personal representatives. So we think that this case is not within the reason of section 835; and even if it should be regarded as within its letter, it should be taken out of the letter by the application of the familiar maxim, *Cessante ratione legis cessat ipsa lex*.

Several witnesses were permitted to give evidence of declarations made by the plaintiffs' intestate, tending to show that he had made a gift of this money to his son, and this evidence was objected to by the plaintiffs as incompetent. It is familiar law, for which no citation of authorities is needed, that the declarations of a testator or intestate binding him, or binding or impairing his estate, may be given in evidence against his personal representatives in all cases where they would have been competent against himself if he had been living and a party to the action. His executor or administrator represents him, and stands in his place, and his declarations admitting a debt or obligation, or tending to discharge a debt or obligation due him, or to impair his estate in any way, are competent in any litigation to which his personal representatives are a party. Therefore, the evidence of material admissions made by Charles in his lifetime were competent against these plaintiffs.

It is further claimed that much of the evidence thus received was wholly immaterial, and should therefore have been excluded. We have carefully scrutinized the evidence, and while much of it has but a slight and remote bearing upon the case, yet we cannot say that any of it was wholly immaterial. It was competent for the defendant to prove the relations between Theron and his father, and, to some extent, the dealings between them, and the relations between the father and the different members of his family.

Complaint is made of the charge of the judge. Our attention is called to no erroneous rule of law laid down by him, and the most that can be said is, that the charge shows a significant leaning in favor of the defendant, and that the judge was strongly impressed with the merits of the defendant's case. But the mere intimation of an opinion by the judge upon evidence, or upon the merits of the case, or his comments upon the evidence, though unfavorable to the party

complaining, furnish no ground for a reversal here, so long as the whole case is submitted to the jury upon a charge which lays down no improper rule of law. If a judge in his charge to the jury uses such language as to improperly bias their judgments or influence their verdict, that may be ground for the court below, upon a motion for a new trial, to set aside the verdict, if satisfied that injustice has been done. But upon an appeal to this court, where the court below has refused to set aside the verdict, and has affirmed the judgment entered thereon, we can review only errors of law which have been properly excepted to.

A careful examination of the whole case leads us to the conclusion that the exceptions of the plaintiffs point out no legal error, and that there is no ground for a reversal of the judgment.

The judgment should be affirmed, with costs.

ATTORNEY AND CLIENT — PRIVILEGED COMMUNICATIONS. — Where an attorney acts for several persons, he cannot testify in actions between them or any of them and third persons, but he may testify in controversies between the parties themselves: *Michael v. Foil*, 100 N. C. 178; 6 Am. St. Rep. 577, and note. Where two parties submit a difficulty to an attorney in the presence of each other, such communications as they may make are not privileged: *Jordan v. Westerman*, 62 Mich. 170; 4 Am. St. Rep. 836; *Goodwin Gas Stove etc. Co.'s Appeal*, 117 Pa. St. 514; 2 Am. St. Rep. 696, and note; *Currey v. Carey*, 108 N. C. 267.

EXECUTORS AND ADMINISTRATORS — DECLARATIONS OF TESTATOR, WHETHER BINDING ON REPRESENTATIVE. — When an executor brings suit to recover rent from a person who has been in possession many years, parol evidence that testator declared that such person was to pay no rent is admissible: *Cox v. Baird*, 11 N. J. L. 105; 19 Am. Dec. 386.

PAPPENHEIM v. METROPOLITAN ELEVATED R'Y Co.

[128 NEW YORK, 436.]

TRESPASS, CONTINUING, DAMAGES RECOVERABLE FOR. — The building, maintaining, and operating of an elevated railway is, as to lots abutting upon the street, to the owners of which no compensation has been made, a continuing trespass; but in an action at law for the recovery of damages for such building and maintenance, the compensation must be limited to the injuries suffered up to the time of the commencement of the action, because the railway company is under a legal obligation to remove the road and structures, and to cease its trespass, and the law presumes it will do so.

TRESPASS, CONTINUING, FIXING DAMAGES FOR PERMANENCE OF. — In a suit in equity to enjoin the continuance of a trespass, the court may determine

the amount of damages which the owner will sustain if the trespass shall be permanently continued, and it may provide that upon payment of that sum the plaintiff shall give a deed or convey a right to the defendant, and it will refuse an injunction when the defendant is willing to pay upon receipt of a conveyance. If the case is one in which the defendant has no right to acquire the property, and the plaintiff wishes to stop further trespass, an injunction will issue without imposing on him any condition to convey when tendered the amount which would compensate him for the permanent continuance of the trespass, and the damages recoverable will be limited to the commencement of the action.

EMINENT DOMAIN, DAMAGES AT TIME OF CONDEMNATION, WHEN NOT A PROPER TEST. — If a railway corporation enters upon a street, and there constructs and maintains a railway, by which the value of the property abutting on the street is depreciated, and after such depreciation has taken place commences proceedings for condemnation, the amount which it must be required to pay should be determined by ascertaining what would be the fair market value of the property at the time of the condemnation without the railway, and deducting from that sum such value with the railroad in existence.

EMINENT DOMAIN — PURCHASER OF REAL PROPERTY AFTER THE CONSTRUCTION IN FRONT THEREOF of a railroad by which it is depreciated in value is, when proceedings are subsequently commenced to obtain the right to maintain such railroad, entitled in the assessment of damages to have the land valued as if such railway had not yet been constructed. This assessment cannot be diminished by the fact that because of the existence of the railroad when he purchased he was able to secure the property at less than its former value, on account of the depreciation occurring while it was the property of his vendor, from the construction and maintenance of the railroad.

TRESPASS, CONTINUING, DAMAGES RECOVERABLE FOR BY VENDOR. — If an elevated railway is constructed and maintained in front of a city lot, interfering with the owner's easements of light, air, and access, without making any compensation, whereby the market value of the property is depreciated, and he afterwards sells it, his vendee is entitled to maintain suit to recover damages sustained during his (the vendee's) ownership, and to enjoin the further maintenance of the railroad unless compensation is made for permanent loss and damage, and in estimating the amount of such permanent damage, is entitled to have the lot valued as though such road were not yet in existence. In other words, his damages should not be diminished by the fact that the property had, before his purchase, already depreciated in value on account of the railway, and loss had thereby already resulted to his vendor.

ACTION to enjoin the defendants from operating their railroad in front of plaintiff's premises, to compel the removal of the structures already built there, and to recover for loss and damage sustained by reason of the past operation of the road; and in the event that the defendants should be allowed to operate their road, that they first be required to pay plaintiff the amount of the permanent loss and damage sustained by reason of such operation. Defendants' road was built in the year 1880, under the provisions of an act of the legislature of

the year 1875, commonly known as "The Rapid Transit Act," which, while it authorized the construction of the road, did not attempt to confer authority to take property without compensation. The plaintiff, however, was not the owner of the property at the time the road was built and its operation commenced, but became such owner by purchase about three years afterwards. It was found that the injuries sustained by plaintiff from the time of her purchase to the trial of the action amounted to eighteen hundred dollars, and that if the road should be permanently maintained and operated, damages in the further sum of two thousand dollars would result. Judgment was rendered for the plaintiff, with the provision that an injunction should not issue if the defendants elected to pay the amounts above named upon the execution to them by plaintiff of a deed conveying to them plaintiff's interest in the easements taken by them. From this judgment the defendants appealed to the general term, where the judgment of the trial court was affirmed, and thereupon defendants prosecuted a further appeal to this court.

Julien T. Davies and Brainard Tolles, for the appellants.

Charles Gibson Bennett, for the respondent.

PECKHAM, J. The structure erected by defendants in Second Avenue, in front of the plaintiff's premises, was as to her an illegal structure, and inconsistent with the use of the avenue as a public street. At the time of building the railway a trespass was committed by the defendants upon the property now owned by the plaintiff, although she did not own it at that time. Such trespass has been continued from the time when the road was built up to the time when the judgment in this action was entered. By continuing the trespass, the defendants laid themselves open to continuous actions, in which the recovery would be for the damage sustained up to the time of the commencement of each action. These propositions are clear, and are now undisputed. They have been settled by the cases of *Story v. New York etc. R. R. Co.*, 90 N. Y. 122, 48 Am. Rep. 146, and *Uline v. New York etc. R. R. Co.*, 101 N. Y. 98, 54 Am. Rep. 661, so familiar to the court and the bar. The structure being illegal as to plaintiff, and constituting a continuing trespass, the railroad company is under a legal obligation to remove it, and the law presumes that the company will do so.

In an action at law, the owner of the property interfered

with or trespassed upon cannot recover damages to his premises, based upon the assumption that such trespass is to be permanent. He can recover only the damages which he has sustained up to the commencement of the action. The judgment entered for the damages sustained does not operate as a purchase of the right to continue the trespass. But the owner may resort to equity for the purpose of enjoining the continuance of the trespass, and to thus prevent a multiplicity of actions at law to recover damages; and in such an action the court may determine the amount of damage which the owner would sustain if the trespass were permanently continued, and it may provide that upon payment of that sum, the plaintiff shall give a deed or convey the right to the defendant, and it will refuse an injunction when the defendant is willing to pay upon the receipt of a conveyance. The court does not adjudge that the defendant shall pay such sum and that the plaintiff shall so convey. It provides that if the conveyance is made and the money paid, no injunction shall issue. If defendant refuse to pay, the injunction issues. It may be that in the case of a railroad actually running its cars upon or through property of another, it would not be justified in refusing to pay upon the delivery of the conveyance, and instead thereof submitting to an injunction. Public interests might have a right to be heard in that respect. But it is enough to say that in the cases where permanent damage is to be paid, there is a condition that a conveyance shall be made, and the defendant thus secures title to the property used. In cases where the owner wishes to actually stop the further trespass, and where the defendant has no legal right to acquire the property, such condition would not be inserted, and an injunction would issue upon the right of the owner being determined: *Henderson v. New York Cent. R. R. Co.*, 78 N. Y. 423.

The plaintiff, if he receive the amount of the permanent damage, is by the court compelled to convey the interest to the defendant which the defendant pays for in that way. Condemnation proceedings are thus avoided. It is conclusively determined that the trespass is to be continuous, and defendant concedes it when it avails itself of the condition and pays the permanent damage in order to receive the conveyance. It is only in this way that the owner recovers as for a permanent damage to his property.

In a case where the defendant has no power to condemn the

property, if the owner in that event proceed in equity, he recovers only his damage up to the entry of the judgment, and at the same time secures an injunction which prevents the future trespass. If the owner sue at law, he recovers his damages as stated. If the owner, without having brought any suit in equity, sell his property at a loss caused by the erection of the railroad, the question at once arises as to what rights are acquired by the purchaser, and what claim, if any, has the vendor against defendant. The vendee has in such case purchased and the vendor has sold to him in fee-simple absolute the premises fronting the street, to which premises are attached, as property passing to him by the conveyance, the easements of light, air, and access, which the defendants have already interfered with and trespassed upon by the erection and operation of the road: *Story v. New York etc. R. R. Co.*, 90 N. Y. 122; 43 Am. Rep. 146; *Lahr v. Metropolitan etc. R'y Co.*, 104 N. Y. 268; *Kane v. New York etc. R. R. Co.*, 125 N. Y. 164. The vendee finds the railroad making use of a portion of his property without right, and in the character of a mere wrongdoer. That use depreciates the value of the remaining part of the owner's property, and causes him daily damage. He institutes his action, either at law or in equity, to recover damages up to the time of the commencement of the action or permanently, and for an injunction, as the case may be, and in answer to proof of ownership and daily or permanent damage, he is told by way of defense that the railroad company paid or is liable to pay to his vendor the difference between what the vendor sold the property for to him and what it could have been sold for if the railroad were not there, and therefore it has the right to continue the act which, by such payment or liability, has been changed from a trespass to a valid action. It is true that the railroad has not received any conveyance of any right to continue the trespass. On the contrary, the vendor conveyed to plaintiff the absolute fee-simple in the property, and all the ordinary rights of ownership passed with such conveyance. It was after such conveyance, and when the vendor was no longer owner, that, according to defendants, the company paid, or became liable to pay, his alleged loss caused by such sale, and which payment or liability defendant now claims has altered the situation so effectually. The vendee who obtained the property at what may have been a low price has, nevertheless, the rights of a general owner, which are not dependent upon the

price which he paid for his title. Every day that the company operates its road over or through the property of the plaintiff it commits an illegal act or trespass, and the character of that act with respect to the property of the plaintiff is not in any degree affected by the fact that the plaintiff's vendor sold his property at a loss, which that vendor says he sustained from the illegal action of the defendant. There is no doubt that the same easements which were appurtenant to the premises owned by the plaintiff's vendor passed to his vendee, the present plaintiff, by the conveyance to her. They passed because they were appurtenant, and the vendor never attempted to reserve them, assuming even that such reservation were a legal possibility. As these easements passed to the vendee and became her property, as much so as the land itself, how is it that the railroad company has become possessed of the right to appropriate such easements, or any portion of them, without payment to her? Her private property is taken without compensation to her under such circumstances, if defendant have the right to permanently enter upon and use these easements, and thus a constitutional guaranty is violated in her case, and she is without redress. The answer to this assertion is made by the counsel for defendants in a very ingenious argument, the foundation of which is, however, laid in what seems to me an erroneous application of a general rule relating to the measure of damages in condemnation proceedings, and from which it is argued that the real actionable loss falls upon the owner of the property when the road was built, provided he sells his property in a depreciated market. They claim that such an owner has a cause of action to recover the loss he has sustained by a sale of his property in a market depreciated by the wrongful act of defendants in entering upon or appropriating the easements appurtenant to such property.

The argument, of course, assumes that if such a cause of action be made out, it must follow that none arises in favor of a subsequent purchaser who obtains the land at a price reduced on account of the existence of the road. Unless the one cause of action exclude the other, the defendants would accomplish nothing by proving the existence of one in favor of the original owner.

The defendants' counsel assert that the permanent damage to the property was sustained by the vendor at the time he sold to the plaintiff, and that the company is liable to pay the same to him. Hence they say that in taking from the present

owner the easements spoken of, which, when separated from the land to which they are appurtenant, are of themselves but of nominal value, the defendants would only be condemned to pay therefor a nominal sum, such as six cents; and as to the resulting loss in value to the adjoining land of the vendee, caused by the erection and operation of the railroad, the vendee has not sustained that loss, because she has only paid for the property the sum to which it had depreciated by reason of the existence of the road in front of it. Continuing the argument, the counsel for the defendants state that if the present owner (the vendee) should commence an action to restrain the further trespass, the defendants could at once commence proceedings to condemn the easements, and that the rule of damages would be the difference between the present market value of the whole property and that portion which would be left after the taking, and that difference would be nominal only. So that when the present owner commences her action to restrain the further commission of the trespass, the whole matter may be adjusted in such suit, and the same rule of damages would obtain. The result would be either that the defendants would be enjoined from further operating their road until they paid six cents, the nominal damage sustained by the present owner of the easements, or else the bill would be dismissed entirely, on the ground that the aid of equity could not be invoked for the purpose of compelling the payment of merely nominal damages. This course of argument does not, as it seems to me, answer the claim of the present owner to enjoin the further trespass upon her property unless she is paid the damage which such trespass will permanently cause her. That damage is not merely nominal.

In 1880, the defendants erected their road, and by its erection and operation depreciated the value of the property now owned by the plaintiff. In erecting their road they trespassed upon the easements appurtenant to that property, and such trespass has been continuous ever since. By these wrongful acts the market value of the plaintiff's property has been greatly depreciated. If they were compelled to resort to condemnation proceedings, the defendants say it is the present market value which they must pay. The vice in this argument lies in the erroneous statement of the measure of damages. In such case and under these circumstances, where the value has been depreciated by the wrongful entry of defendants upon the property, it is not the present market value of such

property thus damaged that the defendants must pay. Actual market value at the time of the institution of the condemnation proceedings is usually the inquiry. But when the defendant has already entered upon the property, and has depreciated its value thereby, it is plain that the simple question of value at the time of condemnation is not the proper rule. In such case, the inquiry must be, What would be the fair market value of the whole property at the time of condemnation without the railroad? and the difference between that sum and the present market value of the property left, with the railroad in existence, would constitute the measure of damages to which the owner would be entitled.

This inaugurates no new rule of damages in condemnation proceedings in this state. As the entry was unlawful, it is for the purpose of arriving at the value of the property regarded as not made, and the inquiry is, What is the present value of such property without the presence of a structure which is there without right, and which cannot be continued without payment in full for all damage done? Its existence cannot be considered for the purpose of diminishing what would otherwise be the present market value of the property. I think the same rule would hold in the case put by the defendants, where the city or any other body having the power should seek to take the owner's property, even though such owner had himself purchased subsequent to the erection of the road. The city would have no right to take the property from its owner on a valuation based upon the permanent character of a trespass which the law regards as temporary. The inquiry in the case supposed would still be, What would be the fair market value of the property with the railroad away? That sum the city would have to pay, and when it acquired the title, it would have the same right as any other owner to compel the defendants to desist from their trespass or pay the amount of permanent damage they caused by its continuance. Under this rule, the amount which the present owner may have paid for the property will be wholly immaterial. As the act of the defendant in trespassing upon or appropriating any portion of the property was unlawful, any depreciation in the value of the property caused by such illegal action cannot be regarded in fixing the value of the property to be taken or the damage to that which will remain. The claim of the defendants, that the loss from the depreciation in value was suffered by the original owner when he sold, and that it is a personal claim in

his case against them for which they are responsible, cannot, as it seems to me, be maintained. Such a doctrine would do away with the the right of an owner of property to prevent a continuous trespass upon it by another. The defendants would say that, because the original owner transferred the property to his vendee, the defendants, by reason thereof, were thereby invested with the right to continue forever the original trespass, and the consideration for such license rested in their liability to pay (not necessarily in the payment to) the vendor the difference between the sum which he actually received for the conveyance of his land and that which he would have been able to secure had it not been for the acts of the defendants. Whether such sum had been paid or not would be immaterial so far as concerned the present owner. That would be a matter between the original owner and the defendants. But the present owner, on account of the transfer of the land to him, would really have no right to prevent the trespass, no matter how much in truth his property was damaged, and although the defendants had no more title to the property trespassed upon than they ever had. They could have no title because the original owner transferred it to his vendee, and after such transfer, of course, that owner could not again transfer any portion of the property to any one else. The vendee took the title, and he certainly has not conveyed it to the defendants, but, on the contrary, still retains it absolutely. Thus with no title the defendants have, by this course of reasoning, been, in substance, invested with a right to perpetually appropriate property belonging to the plaintiff because of a liability on their part, as they allege, to pay a former owner certain damages which he alleges he sustained by selling his property to the plaintiff at a reduced value, caused by defendants' illegal act. This mere liability of the defendants to reimburse the vendor operates, by defendants' argument, as a bar to the rights of the vendee. If not paid by the defendants, the liability still remains, and of course the bar still continues; and thus the general right which follows the possession of property to protect it from a trespass is denied an owner, because the defendants are, they say, liable to a former owner on a personal claim by him for a loss occasioned by a sale. Heretofore absolute ownership or legal possession of property has been regarded as sufficient to enable the owner to protect it from a trespass. It has been sufficient to permit him to maintain an action to restrain its continuance, even though he

was fortunate enough to secure the property at one half its value. The inquiry in such cases, where the owner sought to restrain the future trespass, has never been in regard to the price which the owner paid, or whether the former owner sold at a loss on account of the trespass. The inquiry has been whether the plaintiff was the owner or entitled to the possession, and whether the acts of the defendants were illegal. That is all that should now be required.

I have thus far referred to the case of the vendee for the purpose of inquiring what rights appertained to him as the present owner of the property. But the argument in favor of the vendor, who owned the property when the road was built, and who sold his land in a depreciated market, caused by the wrongful acts of the defendants, is not, to my mind, very strong.

In the first place, he had his right of action to recover for all damage caused by the trespass up to the time of the commencement of his action, and the subsequent conveyance of the land would not in any way affect that right. If he desired to restrain the further continuance of the trespass, or to recover for the permanent damage caused, he could, while owner, commence and maintain his action in equity. In that action he would obtain full relief. If he chose to sell instead of using the remedies which the law gives him, that was a matter, legally speaking, of his own choice. The defendants did not compel or limit or restrain such sale. Nothing that they did could be said to amount to any compulsion by them. The law says their action cannot be regarded as a permanent trespass, for the very reason that it is unlawful, and the law will not presume that an unlawful act is to be forever continued. His choice to sell, rather than avail himself of the remedies given him by the law, does not furnish a cause of action against the defendants to reimburse him for a loss arising because of the presumption he has indulged in, that the trespass would be continuous and unpaid for. He has chosen to regard the trespass in a light opposite to that in which the law regards it, and the loss he has suffered thereby is not one which the law can regard as caused by the defendants. If the original owner thus choose to sell his property without enforcing those rights which he has only by virtue of such ownership, the purchaser at any rate takes his fee, and with it the rights of such an owner. The right to enjoin the continuance of the trespass has not escaped by the conveyance. It cannot rest with the vendor, for he has no longer any interest in the

land. Unless it passed to the vendee it has vanished, and yet no conveyance by any one having the right to convey has been made to the trespasser, and so far as the legal title to the property is concerned, the trespasser has no lot or parcel in it. It seems to me the right passed to the vendee.

I can see no similarity in the case of the owner of property who has thus sold at a loss, to that of one who has suffered from a slander of his title. To start with, there is in the case at bar no slander. And again, there is no malice. The erection of a structure on plaintiff's property by defendants cannot be twisted into a slander of plaintiff's title by them. No one asserts that the defendants built their road knowing they were wrong-doers or trespassers. The findings in this case substantially negative any such idea. The court finds that the road was built in conformity with plans prescribed by boards of commissioners appointed under legislative authority. It has been held that punitive damages ought not to be awarded against defendants for the taking of the property of abutting owners by the building of their road: *Powers v. Manhattan R. Co.*, 120 N. Y. 178. In brief, all the substantial facts which constitute a cause of action for slander of title are absent in this case, and the facts which exist have no analogy to those which constitute such a cause of action. The wrong by the defendants in the erection of the railroad does not directly or proximately cause the sale of the vendor's property at a loss. The defendants' counsel lays down the rule broadly, that "whoever, by a wrongful act, limits or restrains another in respect to his lawful right to dispose of his property in the market to the best advantage, is liable in an action at law for the damages thereby occasioned." Without stopping to question the accuracy of the rule, which the defendants here lay down as an abstract proposition, I think no case can be found where it has been enforced under such circumstances as this case presents. All the facts must be here taken into account. It must be remembered that the law regards the act as a temporary wrong only, and as such it provides a full remedy for it. It provides a full equitable remedy if the owner choose to pursue it and the act be of a permanent nature.

If, instead of resorting to his legal or his equitable remedy, he choose to sell, it cannot be said that, in a legal sense, he has been limited or restrained in respect to his lawful right to sell his property by defendants' wrongful act. The connection between the sale and the alleged cause is too remote and indefi-

nite; it is not proximate or direct. Further than this, however, the right of action with respect to the damage inheres in the owner and possessor of the land, and it is by reason of such ownership and possession that the right of action accrues: *Broistedt v. Southside R. R. Co.*, 55 N. Y. 220; *Corning v. Troy etc. Factory*, 40 N. Y. 191. A perpetual injunction was sustained in the first above-entitled case, which was obtained by a purchaser of land abutting on the street, restraining the further operation of the road, although it was operated prior to his purchase. Nothing that has been said in any other case in this court is opposed to these views. On the contrary, they are in the line of all its previous utterances. The point was not decided in the *Henderson* case, nor has it been decided in the *Lawrence* case against these same defendants (reported in 126 N. Y. 483). The question in the last case was in relation to the validity of the defense alleging that the property was used for the purposes of a house of prostitution. The defense was disallowed, for the reasons stated in the opinion of Andrews, J., and the rule of damages stated in the *Uline* case was reiterated,—that of diminished rental value. The case of *King v. Mayor etc.*, 102 N. Y. 171, simply held that the right to compensation for the property taken belonged to him who was the owner of the fee at the time the city took possession, although before the award under the statute the original owner had conveyed the premises. This was upon the ground that the statute authorizing the taking contained an adequate and certain method for raising the money on the part of the city to pay for the taking, and that when the possession was taken by the city under the statute it was a legal possession, and the award which was subsequently made paid for the title at the time the possession was taken, and that was in the original owner who conveyed before the award was made. *Tallman v. Metropolitan E. R'y Co.*, 121 N. Y. 119, does not assert or assume that the plaintiff could recover for the diminished rental value for a term any portion of which was in the future. The recovery in that case had been allowed for a possible use of the premises which the plaintiff had not, in fact, attempted to make, and the possible profits for such possible use we held he was not entitled to recover. I have, as is seen, alluded to but a few of the many cases cited by counsel in the very elaborate briefs submitted to us. I have, however, read them, and I feel confident that nothing is laid down herein which is opposed to anything heretofore decided by this court. What the ultimate

rights of lessor and lessee, as against defendants, may be, we of course do not decide in this case. Their rights are not before us. Whether there is or is not any distinction between the rights of a vendor in fee and those of a lessor is not the question, and we do not, therefore, discuss it. The judgment here should be affirmed, with costs.

IN THE OPINION in the principal case, it is said that in assessing damages, "the inquiry must be, What would be the fair market value of the whole property at the time of the condemnation without the railway? and the difference between that sum and the present market value of the property left, with the railroad in existence, would constitute the measure of damages to which the owner would be entitled." From this statement, we inferred that the proper course of proceeding at the trial of a cause involving issues like those presented in the principal case would be to obtain some witness or witnesses whose knowledge and experience were such as to qualify them to make the two estimates apparently required, — in other words, persons who were best fitted to state what is the value of the premises with the railroad existing and in operation, and what would be such value if the railroad were not in existence. This is, however, precisely the course of proceeding which the same court declared to be erroneous, in an opinion written by the same judge just one week after the principal case was decided. The opinion of the court in this latter case, so far as applicable to this point, was as follows: —

"Upon the trial, a witness was called on behalf of the plaintiff, and testified that he was a real estate broker, and had carried on that occupation in the city of New York for twenty-eight years; his transactions had extended throughout the whole city, and had involved both leasing and selling; he knew the property in question, and was familiar with the value of that property, and of the property in the neighborhood; he had made an examination of the property with a view of seeing what the physical effects to the abutting property were, produced by the railroad and its trains, commencing at least six months ago, on four or five different occasions; he had given special attention to the effect upon abutting property produced by the elevated railroad and the passing of its trains; he had been examined a large number of times as a witness on the subject, and in reference to property scattered all over the city; he had made it his business to be familiar not only with the selling but the rental values of property along Third Avenue since the railroad came there; he had informed himself about such transactions not only in reference to this property, but other property; so far as experience from personal transactions was concerned, he had none in that vicinity since the building of the railroad, in renting or in selling; he had been engaged by property owners for the last three years to make examinations and testify as an expert witness, and it had been a considerable part of his business, and in every case in which he had testified he had testified against the railroad company; he was paid one hundred dollars to come and give these opinions; he did not know but that the property at the upper end of Third Avenue had been benefited to some extent; his opinion was, that rapid transit had helped Harlem; the building up of the upper end of Harlem had been due to the growth and filling up of all the cross streets; the growth and filling up of the cross streets had been due to the rapid transit afforded by the elevated railroad in large part.

"The following question was put to him: 'To what extent, if at all, in your judgment, is the value of Mr. Roberts's four buildings on the Third Avenue, — excluding from consideration the houses on Ninety-ninth Street, — to what extent, in your judgment, is the value of that property damaged, if at all, by the presence of the structure and the running of the trains?'

"Under objection and exception, the answer was permitted, and the witness stated that the diminution extended from about one hundred and ten thousand dollars to eighty thousand dollars, including the loss to the fee value simply.

"The court then said: 'That is, you think that the four houses fronting on Third Avenue are worth eighty thousand dollars now?' Witness: 'Yes, sir.' Court: 'And that they would be worth one hundred and ten thousand dollars if the structure and road were not there?' Witness: 'Yes, sir.' Q. 'What do you estimate the rental value of the property to be, the railroad not being there? I refer to the Third Avenue front only.'

"Same objection and exception. A. 'Nine thousand dollars.' Q. 'And the railroad being there? A. 'Six thousand four hundred dollars, — as collectible rents, I mean.'

"Upon this appeal the question is, Were these objections of the defendant properly overruled?

"By resorting to a court of equity, and seeking the aid of such court to prevent the operation of the defendants' road until all his damages consequent upon the illegal construction of its road in front of his premises have been paid once for all, the plaintiff has brought before the court the question, What were the damages to the fee of the premises owned by him, consequent upon this wrongful act of the defendant? The amount of damages thus caused to plaintiff's fee is the precise question which the court or jury must determine, and for such amount the court gives judgment upon condition of the plaintiff executing a deed to the defendant of the property wrongfully taken or interfered with by it.

"The first question asked of this witness, to which exception is taken as above noted, calls for his opinion as to the amount of such damage, and the second question is of substantially the same nature, except that it refers to the injury to the rental value of the property instead of the injury to the fee. The precise and specific question which is to be determined by the court and jury is by this interrogatory placed before the witness for his opinion and decision. To permit it to be asked and answered is beyond all question against the great mass of authority in this and other states.

"It is now asked that this court, in view of the alleged abnormal character of the litigation growing up in the city of New York over the erection and operation of these elevated railroads, shall sanction in regard to them a departure from well-established rules of law touching the admission of expert evidence. It seems to me that neither the nature nor the extent of the litigation affords the slightest justification for such departure.

"Expert evidence, so called, or, in other words, evidence of the mere opinion of witnesses, has been used to such an extent that the evidence given by them has come to be looked upon with great suspicion by both courts and juries, and the fact has become very plain that in any case where opinion evidence is admissible, the particular kind of an opinion desired by any party to the investigation can be readily procured by paying the market price therefor. We have said lately that the rules admitting the opinions of experts should not be unnecessarily extended, because experience has shown it is much safer to confine the testimony of witnesses to facts in all cases where

that is practicable, and leave the jury to exercise their judgment and experience on the facts proved. As is stated by Earl, J., in *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544: 'It is generally safer to take the judgments of unskilled jurors than the opinions of hired and generally biased experts.'

"It is the general rule that testimony should consist of facts, and not opinions, and the admission of opinions forms an exception to that general rule. Mr. Justice Cowen said, in speaking of the opinions of witnesses as to the then present value of real estate, that they were barely admissible, and that to receive them at all was a departure from the general rule of evidence, and that judges who preside at nisi prius sometimes have reason to regret that they should in practice form an exception. He referred to *Rochester v. Chester*, 3 N. H. 349, 384-386, where the court refused to receive the opinions of witnesses as to the value of land, even from those skilled in the market. They said the land must be described, and the jury must then judge from the facts: See *Matter of Pearl Street*, 19 Wend. 654.

"I refer to this, not for the purpose of throwing any doubt upon the admissibility of expert evidence upon the question of the past or present value of real estate, where the witness is shown to be competent to give an opinion thereon. That was decided years ago by this court, and has been continuously approved since that time: See *Clark v. Baird*, 9 N. Y. 183; but I cite it for the purpose of showing the opinion of learned judges regarding evidence of this kind when it first came into practice, and the questions thereon first came up for decision.

"The only inquiry here is, whether this is one of those cases in which the testimony is allowable.

"The precise question has been decided by this court as lately as *McGean v. Manhattan R'y Co.*, 117 N. Y. 219. The question there asked was, 'What would have been the fair rental value in the years 1879, 1880, and 1881 if the railroad had not been built?' And we decided it to be improper. It was so held because it is merely speculative, and it is speculative upon the very question and upon the only question which the court or the jury is called upon to decide, and the question calls for the opinion of the witness upon that very subject. Some criticism has been made in regard to that case by the learned counsel for the plaintiff herein, and we are asked substantially to review it, and to reverse our decision therein. We have carefully considered the arguments of counsel on both sides, and have again looked through the cases decided in this court upon the subject, and we are unable to see that there has been any error in the McGean case, but on the contrary, we think it is in strict conformity with the law as heretofore laid down by this court.

"I shall refer to but a few of the cases cited by the appellant herein to sustain his claim that the court below erred in admitting the question in controversy. They are all contained in his very voluminous brief upon the subject submitted to us, and out of them the following are all I deem it necessary to comment upon: *Morehouse v. Matthew*, 2 N. Y. 514, was an action brought by the plaintiff to recover damages for a breach of contract by the defendant in not feeding to the plaintiff's cattle as good hay as had been agreed upon. The plaintiff asked a witness what damage had occurred in consequence of feeding the cattle upon the hay in question instead of that agreed upon. Under objection, the witness answered he thought the damage would be fifty dollars. This court reversed the judgment, on the ground that the evidence had been erroneously admitted, and that the question called simply for the opinion of the witness as to the amount of damage sustained by the plaintiff.

"*Van Deusen v. Young*, 29 N. Y. 9, was an action under the Revised Stat-

uses to recover treble damages for cutting trees on a certain piece of land owned by the plaintiffs, who were remaindermen subject to a life estate. A witness was asked, What, in your opinion, is the difference in value of the farm by the removal of the timber? and also, Would the farm be worth more or less with the timber cut off? Davies, J., held the questions were objectionable, as calling for a speculative opinion, and not for facts, and referred to *McGregor v. Brown*, 10 N. Y. 114; and Mullin, J., said: 'It was unquestionably competent for the witness to give his opinion as to the value of the farm with the timber on, and its value after it was taken off. The difference between the two may be the damages, and in cases where the damages are arrived at by merely subtracting one sum from another, it may seem to be refining overmuch to refuse the witness the right to make the subtraction himself and declare the result; for this is what he is called on to do when asked to give his opinion as to the amount of damages.' The learned judge was speaking of a case where the witness knew the farm in question, — knew it when the timber was on it, and knew what its value then was, and the timber having been cut off, he knew what the value of the land was with the timber thus cut off. And yet in a case where the difference between the two would be the legal damages, it does not even then follow that a witness may be asked the bald question, 'What amount of damages has the plaintiff sustained?' The reason is, that the rule of damages is a question of law, and the witness, upon such a question, might adopt a rule of his own, and hold the defendant responsible beyond the legal measure. In *Marcy v. Shultz*, 39 N. Y. 346, the court, per Denio, J., held that a witness could not be allowed to state his opinion of the amount of damages. That was in an action for damages for raising a dam so as to overflow the plaintiff's house. The learned judge said the witness could describe the character of the overflow and its effect, and then it would be for the jury to estimate the damages; that what was offered was in substance an opinion as to the amount of the damages which the plaintiff had sustained by the wrongful act of the defendant.

"This court, in *Green v. Plank*, 48 N. Y. 669, in an action of replevin for a canal-boat, reversed the judgment for the plaintiff, where the witness had been asked to state the damages for taking and withholding the boat during the time the defendant had it. In *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544, which was an action for damages for a fire, claimed to have been negligently set, from which the plaintiff sustained damage to his land, a farmer was called as a witness for defendant and asked the question, 'What do you say as to whether it was a proper time or not to burn a fallow?' The testimony was said to have been erroneously admitted.

"In *Van Wycklen v. City of Brooklyn*, 118 N. Y. 424, the question of the admissibility of expert evidence is discussed, and held to be allowable only when, from the nature of the case, the facts cannot be stated or described to the jury in such a manner as to enable them to form a correct judgment thereon, and no better evidence than such opinions is attainable.

"In *Avery v. New York Central etc. Co.*, 121 N. Y. 31, which was an action for damages on account of the violation of a covenant to keep a proper opening from the defendant's depot-yard, opposite the plaintiff's hotel, the plaintiff was asked this question: 'Do you know what the rental value of your Continental property, real and personal, would have been between the tenth day of September, 1881, and the twenty-eighth day of January, 1884, if there had been a sufficient opening kept and maintained by the defendant opposite your hotel for the convenient access of passengers and their baggage to and

from the twenty-foot strip of land lying south of the hotel?' This evidence was held to be improper. Judge Gray, in delivering the opinion of this court, said: 'The witness should not have been permitted to give his opinion upon that head. His testimony should have been confined to stating facts. He might have described the condition of his property. He could have given evidence of what the defendant did to or upon the land over which he claimed to possess rights. He could have stated what his business was, and what it amounted to at times prior and subsequent to any change in the situation and circumstances surrounding its conduct; and it would then be for the jury to draw the conclusions from the facts stated as to whether plaintiff had been injured by the defendant, and what amount of damages he should recover.'

In *Norman v. Wells*, 17 Wend. 136, it was held by the old supreme court that the amount of indemnity, when it is not capable of being reached by computation, is always a question for the jury. It was stated that if there be any rule without exception, it is this, and the court was unable to find any instance where the opinion of a witness had been received upon that particular question. The action was on covenant for damages to the plaintiff by the erection of another mill on the same stream with plaintiff's mill, and a witness was asked the damages which, in his opinion, the plaintiff had sustained by reason of the erection of such mill. The question was allowed at circuit, and a new trial was granted for the error in allowing it. The learned counsel for the plaintiff has cited a number of cases on his side, which he claims are authorities for the question put to the witness herein. The briefs of both counsel exhibit untiring industry and research, and all the cases that have been decided involving questions of this nature, both in this and other states, would seem to have been found and cited on the one brief or the other. It is impossible to notice them all, and I shall not make the attempt. Special reliance seems to have been placed by the learned counsel for the plaintiff upon the cases I now refer to. In *Clark v. Baird*, 9 N. Y. 183, the point decided was, that the opinions of a witness acquainted with real estate, the value of which was in dispute, were competent upon the question of such value. It was an action on the case by the purchaser of a tavern-stand against his vendor, for fraudulently misrepresenting the boundaries of the land. A witness for the plaintiff testified that he had examined the tavern-stand with a view of buying it, and that 'it was worth one thousand dollars if it extended to the race and trees. The strip taken off would reduce it one fourth.' This testimony was objected to, on the ground that the amount of damage could not be ascertained by the opinion of the witness. The objection was overruled, and the defendant excepted. Part of the alleged fraud consisted in the statement that the tavern-stand extended to the race and trees. The plaintiff claimed, as matter of fact, it did not extend so far. The learned judge, in the course of his opinion, said that the witness had in substance stated the value of the stand, including all the land it was represented to include, and also in contrast with that statement, and as bearing upon the question of damages, had further stated the value of the stand, excluding that part which, as the plaintiff contended, did not pass by the defendant's conveyance to the plaintiff by reason of his want of title. I do not see that the case affords any countenance for the claim of the plaintiff herein. The witness simply stated the value of the tavern as it stood, estimating that a certain amount of ground in plain view was attached to the stand, and then stated what in his opinion was the value of the land with that particu-

lar piece of land not included. Within any rule regarding the opinions of experts we think this evidence admissible.

"In *Rochester etc. R. R. Co. v. Budlong*, 10 How. Pr. 289, which was a proceeding by plaintiff to take defendant's property by the right of eminent domain, the opinion of the general term of the supreme court was delivered by Judge Selden in 1854. It contains expressions which favor the views contended for here by plaintiff's counsel, and it includes all that can be said in favor of the admission of this kind of evidence. The opinion has not been followed by the courts of this state, and many subsequent decisions of this court, some of which have already been cited, are at war with the doctrine announced by Mr. Justice Selden. The case cannot be regarded as authority in this state at the present time: See *Harpending v. Shoemaker*, 37 Barb. 270; *Simons v. Monier*, 29 Barb. 419.

"In *Hine v. N. Y. Elevated R. R. Co.*, 36 Hun, 293, which was an action brought to recover damages for the obstruction of light, air, and access to the plaintiff's premises, by reason of the construction of the defendant's road, a real estate broker was called on the part of the defendant, who, after stating that he was familiar with the premises in question, was asked this question: 'What has been the effect, in your opinion, of the elevated railroad upon the value of the property, so far as the items of light, air, and access are concerned?' Upon the plaintiff's objection, the question was excluded, and the court held that this was error. The court, in the course of the opinion, which was delivered by Davis, P. J., said that 'the answer to the question should have been received. The witness was an expert, and that fact was sufficiently shown to entitle him to express an opinion on the subject. The opinion called for related to the precise question of damages, which, as will be seen, the court submitted to the jury, and there is no reason why the opinions of experts are not admissible upon those questions.' No case is cited in the opinion, and what I have quoted is all the learned judge said in regard to the admissibility of evidence of this kind. The case is not in harmony with the cases in this court, and should not be followed. The evidence is open to all the objections spoken of, in that it puts the witness in the place of the court and jury, and is only his opinion upon the very point to be decided by them.

"In *Kenkele v. Manhattan Railway Co.*, 55 Hun, 398, an action similar to the one at bar, and where, as here, the defendant had neglected to take proceedings to condemn the property of the plaintiff, the general term of New York held that the measure of damages was the difference at the time of the trial between the value of the property to which the easements were appurtenant with the easements, and its value without them. The manner of proving such difference was not discussed. Mr. Justice Van Brunt, in the course of his opinion in that case, after stating what he regarded as the true rule of damages, said: 'We do not think that the court of appeals has as yet condemned the rule. Until they do, justice seems to require that it should be followed.' It is stated as one of the grounds for the motion for a new trial in that case that incompetent evidence upon the subject of damages had been given, but it does not appear what that incompetent evidence was. The learned judge said: 'The evidence as to the value of these easements is necessarily, from the very nature of the case, somewhat conjectural, and stringent and strict rules are not to be applied where they would deprive the owner of all proof of damage, as we are dealing with the damage done by a trespasser; and while damages should be proven with reasonable certainty,

the rights and interests of the owner of these easements should not be sacrificed.'

"That is undoubtedly true. Continuing, the learned judge said: 'What more certain evidence of the value of these easements can be given than by proof of what the property to which they are appurtenant would now be worth with the easements, and what it is worth without these easements?'

"Evidence as to what the value of the property would be with the easements alluded to, unaffected by defendant's acts, is proper. No dispute arises on that point. The controversy arises when the fact of that value is to be sworn to as an opinion by a so-called expert, and which opinion, speculative and uncertain as it must be, is directed to the very point which the jury is to determine. Evidence upon the subject of this speculative value, — a value which in fact does not and cannot exist, — should be confined to those facts which the court shall hold to be material for a fair and intelligent judgment, and then the inferences to be deduced from them may be drawn just as well by the jury as by the expert, and in all probability much more fairly.

"This case is one where the facts which form the basis of opinion can be specified and should be stated, and the inference to be drawn from those facts should be drawn by the court or by the jury.

"A sufficient number of cases has been cited on both sides, I think, to place fairly before us the different reasons for the different views which would exclude or permit evidence of this nature to be laid before a jury. There can be no doubt, as I have already observed, that the great weight of authority, both in the supreme court and in this court, is against the introduction of this evidence. And indeed, there is no reason why it should be introduced. Expert evidence of the actual value of real estate is proper and in many cases essential. The present value of the property of the plaintiff can be proved by expert evidence, both the value of the fee and the rental value. Both classes of value could also be proved by expert evidence, as of a time immediately prior to the building of this road. They are opinions based on facts which now exist or which once existed, and if the expert have knowledge of them, he should be permitted to state it. As to what the value would have been under circumstances which never existed, he knows and can know nothing, but must form an opinion wholly speculative in its nature, which opinion must be based upon data perfectly easy for him to state, and from which, when once stated, an ordinarily intelligent jury can draw as just and fair an inference of a possible yet conjectural value as could the expert. And that very inference must in some way be drawn by the jury, for it is the question it is called upon to decide. The opinion of the expert, if of the least value, would have to be based upon an intelligent consideration and knowledge of the value of other property as nearly as may be similarly situated, in about the same quarter of the town and under nearly the same circumstances, but without the presence of a railroad of the nature of the defendant's in front of the property. All this information he could easily impart to the jury.

"Proof might be made of the filling up of the side streets along the lines of this railroad, and of the incoming of a large population, the erection of buildings somewhat similar to plaintiff's, and their rental and fee value, and finally a general statement of the condition and value of property in the neighborhood of that in question could be proved. All these facts would be of service in determining the question to be submitted to the jury. When they are all stated, and past and present values proved, the jury or the court will then be as fully competent to draw the inference which it is its peculiar

province and duty to draw as the expert. This special question is one which all admit is, to some extent and in all cases, a matter of conjecture and speculation. How much the appreciation of property is itself due to the erection of the road and the consequent filling up of the neighborhood opened by it, and whether the property without the construction of the road would ever have become as valuable as it is, are questions which, when these various data have been given, can be speculated upon as well by the judicial tribunal as by the hired expert. It is none the less conjecture and speculation because the expert is willing to swear to his opinion. He comes on the stand to swear in favor of the party calling him, and it may be said he always justifies by his works the faith that has placed in him.

"This case is a good illustration of what may be almost termed the wholly worthless character for any judicial purpose of the testimony on both sides upon this one point, as to what would be the value of this property if this railroad had not been built. The experts on the part of the plaintiff guessed that it would have been thirty thousand dollars more valuable, while those on the part of the appellant, equally intelligent it would seem, and equally honest, thought that the value of the property would have been less than at present if the railroad had not been built. The court is not in the least aided by the various guesses of these hired experts. If the facts upon which these gentlemen based their guesses are placed before the court, more exact justice will, in my judgment, be the result if their speculations be excluded, and all speculation as to the damage sustained by a plaintiff be confined to the court, and drawn entirely from the evidence in the case."

From this opinion Judge Gray and Chief Justice Ruger dissented. It was followed by the court in *Doyle v. Manhattan E'y Co.*, 128 N. Y. 488, where the question held to have been erroneously allowed was, "What, in your judgment, would the property be worth without the elevated railroad?" Also in *Gray v. Manhattan E'y Co.*, 128 N. Y. 499, where a witness was permitted to state what would have been the value of the property had it not been interfered with by the railroad, and what would be the best uses to which it could have been put in the absence of the railroad, and what were the best uses to which it could be put with the railroad.

While *Roberts v. New York etc. R. R. Co.*, 128 N. Y. 462, has taken away such opinion as we had derived from the principal case respecting the mode of ascertaining damages in cases of like character, it has given us a yearning, which is nowhere sufficiently satisfied, to have the vacuum thus created occupied by something more permanent and reliable. For in the many pages required by Judge Peckham to disclose his aversion to expert evidence in general, and his reasons why the particular expert evidence under consideration should not have been received, he omits to specify any other evidence which could be more reliable, and from which, after the jury had returned a verdict, it would be possible to ascertain whether it was in harmony with the evidence or not. From the peculiar nature of cases of this character, the testimony must, to some extent, be speculative. For as the road had been built and operated for some years before any attempt had been made to fix the compensation due lot-owners injured thereby, and as one of the inquiries to be made in fixing such compensation was, What would be the market value of the land without the railroad in existence? and as the plaintiff did not have the right to have the road stopped and its structures removed, so that the value of his lot without them could be determined by actual experiment, there seemed to be an absolute necessity for taking the opinion of the best qualified persons, even though such opinion should be

speculative, as to what would be the market value of the land without the road. "Evidence as to what the value of property would be if the easements alluded to were unaffected by defendant's acts is proper," says the learned judge, in one part of his opinion. In the same paragraph he objects to taking any one's opinion of that value. But as the property does not exist with these elements unaffected by defendant's acts, and as the whole proceeding was one to ascertain what damages should be awarded, because it is never expected to exist unaffected by such acts, either some one's judgment must be accepted or no exact evidence can be presented of the value of the property with its original easements unimpaired. If we could be excused the temerity of again venturing to entertain an opinion of what the judge means upon this subject, we should say it is that expert evidence may be given of the value of the property before the railroad was built, and like evidence of its value at the time the witness testifies, or at the commencement of the proceeding, and that expert or other witnesses may describe the road and its structures, the mode of its operation, and its effect upon the property in excluding light and air, and making ingress and egress more difficult and less convenient or agreeable, and in producing loud noises, and thereby interfering with the rest of tenants and others occupying the property, and in all other respects which may properly be considered by the jury in determining whether its value had been enhanced or diminished, and that from all these facts, together with the expert's opinion of the value of the property before the railroad was built, and of the value as it is with the railroad built, the jury, instead of the expert, must draw the conclusion, what would the value be if the railroad were still non-existent. But unless the jurors are themselves experts, to tell them how much light and air are obstructed, to what extent ingress and egress is made difficult or disagreeable, and to describe the other incidents following the construction and operation of the road, would give them but a vague idea of how much the market value of the property had been affected, and what compensation to the plaintiff would place him financially in as good a condition as if the railroad did not exist. We think the more reasonable opinion upon the subject is that expressed in the dissenting opinion written by Judge Gray, a part of which is as follows: "The point which is mainly made against the competency of such evidence is, that it calls for the conclusions of the witness upon a matter which the court or jury should alone determine, and hence invades their province. It is also suggested, that to allow such evidence is to permit speculation to supply proof. If the proposition were wholly true, it might be difficult to sustain the right of the plaintiff to submit his case to the jury upon such proof. But it seems to me that the argument against this species of proof is inapplicable to cases of this character, where evidence as to the damage suffered by the abutting land-owner cannot always be furnished by exact data, or in statements of facts, and where, to an intelligent judgment upon the issue, expressions of opinions seem so necessary. Nor is it true that the evidence is forbidden by established rules, whether we consider that question upon its truth, or upon the principles of the law of evidence. These principles cannot be embodied in rigid and lifeless formulas, which deny adaptation to new conditions in human affairs. They admit of expansion and of frequent exception, whenever it is needed, in order to demonstrate the truth. A different view of the law of evidence might be extremely subversive of justice."

In other actions against elevated railroads in New York, commenced after their construction, and also after the owner of property injured by them had leased it to tenants in whose occupation it was when such actions were in-

stituted, these questions have arisen: 1. Has the owner, during the continuance of such lease, any right of action? and 2. If so, what is the measure of his damages? In answering these questions, it has been determined that the maintenance and operation of a railroad are injuries to the inheritance, for which the landlord can maintain an action; and that as every injury suffered from the road necessarily resulted in diminishing the rental value of the property, not only at the moment of execution of the lease, but during all the time it had to run, and as the right which the tenants acquired, or could reasonably expect to acquire, under the lease, was the privilege of occupying and using the property, with the railroad in operation in front of it, they did not have any right of action against the railway company, nor suffer any damage which had not been taken into consideration in fixing the rental value specified in their leases, they had no cause of action against the railway company; and finally, that the only cause of action was in the landlord, and that the measure of his damages was the same as if he had not executed any lease whatever: *Kernochan v. New York etc. R. R. Co.*, 128 N. Y. 559; *Hine v. New York etc. R. R. Co.*, 128 N. Y. 571.

MCQUIGAN v. DELAWARE, LACKAWANNA, AND WESTERN RAILROAD COMPANY.

[129 NEW YORK, 50.]

COURTS — JURISDICTION — SURGICAL EXAMINATION OF PERSON. — In an action for personal injuries, the court has no jurisdiction to require plaintiff to submit to a surgical examination of his person by surgeons appointed by the court, with a view of enabling them to testify on the trial as the existence of his alleged injuries.

ACTION to recover for personal injuries alleged to have been suffered by plaintiff. The defendant applied for an order directing the plaintiff to submit to a physical examination by surgeons, and for the appointment of a receiver, under whose direction the examination should be conducted. The motion was denied and the defendant appealed.

Louis Marshall and Robert T. Turner, for the appellant.

Andrew Hamilton, for the respondent.

ANDREWS, J. The sole question presented by this record is, whether the supreme court has power, in advance of the trial of an action for a personal and physical injury, to compel the plaintiff, on an application made in behalf of the defendant, to submit to a surgical examination of his person by surgeons appointed by the court, with a view of enabling them to testify on the trial as to the existence and extent of the alleged injury. The question is not new in the courts, although, so far as we know, it was first presented in 1868 before a judge of the New

York superior court at special term in the case of *Walsh v. Sayre*, 52 How. Pr. 334, who affirmed the existence of the power. The contrary was held by the general term of the third department in *Roberts v. Ogdensburgh etc. R. R. Co.*, 29 Hun, 154. In 1877 the supreme court of Iowa, in the case of *Schroeder v. Chicago etc. R. R. Co.*, 47 Iowa, 375, sustained the doctrine that the court had an inherent jurisdiction to grant a compulsory order that the plaintiff submit to such examination, and this decision has been followed by the courts of several of the western and southern states, and in others the power has been denied. The same question was considered in the United States supreme court in the recent case of *Union Pacific Ry Co. v. Botsford*, 141 U. S. 250, and the court (two judges dissenting) decided adversely to the claim that the court had power to compel such examination. The opinions of the several courts which have passed upon the question present very fully the considerations bearing upon it. We concur in the view taken by the supreme court of this state and the supreme court of the United States, and we can add very little to the full discussion to be found in the opinions of those courts.

The powers of courts are either statutory or those which appertain to them by force of the common law, or they are partly statutory and partly derived from immemorial usage, which latter constitutes their inherent jurisdiction. They are organized for the protection of public and private rights and the enforcement of remedies. Presumptively, therefore, whatever judicial procedure is essential to enable courts to exercise their function is authorized. The maxim that there is no right without a remedy justified the courts, in the earlier periods of the common law, in inventing writs and modes of procedure adapted to present for adjudication in proper form every question of judicial cognizance. The powers and jurisdiction of the courts of common law and chancery in England are to be found in the English statutes, and in the rules, precedents, decisions, and procedure of the courts. The power which the courts actually exercised, supplemented by statutory powers, constitutes in a general sense their jurisdiction.

Upon the organization of the state government, our courts succeeded to the powers theretofore exercised by the courts of law and chancery in England, so far as they were applicable to our situation. It is a significant fact that not a trace can be found in the decisions of the common-law courts of Eng-

land, either before or since the Revolution, of the exercise of the power to compel a party to a personal action to submit his person to examination at the instance of the other party. If the power existed, it is difficult to suppose that it would not have been frequently invoked. Actions for assault and battery, for injuries arising from negligence, and generally for personal torts, were among the most common known to the law, and yet, so far we can discover, in no case was it supposed or claimed that the court was armed with this jurisdiction. The non-exercise of a power is not conclusive against its existence, but it is strange, if the power in question existed, it should have been unused for centuries, and never have been called into activity. In two cases cited by Justice Gray in his opinion in *Union Pac. Ry Co. v. Botsford*, 141 U. S. 250, the court of common bench, in England, refused an order for the inspection of a building, on the application of the plaintiff in an action for work and labor performed by him thereon, on the ground of want of power: *Newham v. Tate*, 1 Arnold, 244; *Turquand v. Strand Union*, 8 Dowl. Pr. 201. These cases tend to negative the existence of the power in the English courts claimed for our courts in the case at bar. The only authority in the English common-law courts in any degree analogous is found in the power which the courts of England have occasionally, though rarely, exercised, to issue, on the application of apparent heirs, the writ *de ventre inspiciendo*, to compel a widow, claiming to be with child by her deceased husband, to submit her person to examination. The practice in England is *sui generis*, and has never been adopted here. It may have originated in the peculiar favor shown to heirs by the law of England, but whatever its origin, it seems repugnant to common right, and the fact that in this instance only have the courts of England exercised the power to compel the examination of the person in a civil proceeding tends to show that the power is not there regarded as general, but special and peculiar, and limited to the particular case. The doctrine of the cases in chancery (*Briggs v. Morgan*, 2 Hagg. Const. 324; *Devanbagh v. Devanbagh*, 5 Paige, 554; 28 Am. Dec. 443; *Newell v. Newell*, 9 Paige, 25), that in an action to procure a decree of nullity of marriage on the ground of impotence or sexual incapacity, the chancellor may compel the defendant to submit to a surgical examination, is a graft from the civil and common law, and, as has been said, "rests upon the interest which the public, as well as the parties, have in the ques-

tion of upholding or dissolving the marriage state, and upon the necessity of such evidence to enable the court to exercise its jurisdiction": Gray, J., in *Union Pac. R'y Co. v. Botsford*, 141 U. S. 250.

When we examine the history of the power of common-law courts to compel the production and inspection of books and papers in possession of the opposite party in a civil action, we find that originally the courts disclaimed any power in the matter, and the remedy by bill of discovery was the only resource of the party desiring such discovery. Finally, the common-law courts assumed a limited equitable jurisdiction over the subject, and in addition to the rule that a party pleading a deed should make proof of the instrument which enabled the other party to demand oyer, the courts by order compelled a party who in his pleading relied upon a written instrument not a deed to give inspection to the other party, if required, and so in other special cases. The courts in this state, prior to any statute, exercised a limited equitable jurisdiction of the same character: *Lawrence v. Ocean Ins. Co.*, 11 Johns. 245; *Denslow v. Fowler*, 2 Cow. 592, note. But this limited jurisdiction was exercised sparingly, and with hesitation; and it was not until statutes were enacted in England and in this state, conferring upon common-law courts the same power to compel the discovery and inspection of books and papers which was exercised by courts of chancery on bills of discovery, that courts of common law claimed or exercised full power over the subject: Stat. 14 & 15 Vict., c. 99; Stat. 17 & 18 Vict., c. 125; Rev. Stats., p. 199, sec. 21. The limited jurisdiction exercised by these courts before the statute was in the nature of a usurpation, and, so far as we can discover, it was never considered that they possessed an inherent power in aid of justice to grant relief in cases outside of the narrow limit mentioned. The power to compel an inspection of books and papers relevant to the controversy, in possession of either party, is of a similar nature to that invoked in the present case, and if the inherent power of the court did not extend to the one case, it is difficult to suppose that it embraced the other.

The power to compel a party to submit to an examination of his person has never been conferred by any statute. The provisions of the Revised Statutes authorizing the court to compel the production of books or papers have been re-enacted

in the Codes of Procedure. The statutes also contain specific provisions for the examination of a party on oath before trial, at the instance of the other party. The omission in these statutes of any reference to the power now under consideration is quite significant. We cannot say that the exercise of the power claimed might not in some cases promote justice and prevent fraud. On the other hand, unless carefully guarded, it would be subject to grave objections. But we have to deal only with the question of the power of the courts, in the absence of any legislation. It is very clear that the power is not a part of the recognized and customary jurisdiction of courts of law or equity. The doctrine that courts have an inherent jurisdiction to mold the proceedings to meet new conditions and exigencies is true but in a limited sense. They cannot, under cover of procedure, or to accomplish justice in a particular case, invade recognized rights of person or property. No court, we suppose, can abrogate an established rule of evidence, as, for example, the rule that hearsay evidence is inadmissible, or the rule of the common law that parties shall not be witnesses, or that interest disqualifies. They may apply existing rules to new circumstances. Nor is it, we conceive, within the power of the court to create remedies unknown to the common law, or institute a procedure not according to the course of the common law. It is most important that courts should proceed under the sanction of an orderly and regulated jurisdiction, and that as little as possible should be left to the discretion of a judge. The exercise by the court of the power now invoked, as has been shown, is not sanctioned by any usage in the courts of England or of this state. Its existence is not indispensable to the due administration of justice. Its exercise, depending on the discretion of the judge, would be subject to great abuse. We think the assumption by the court of this jurisdiction, in the absence of statute authority, would be an arbitrary extension of its powers. It is a just inference that an alleged power which has lain dormant during the whole period of English jurisprudence, and never attempted to be exercised in America until within a very recent period, never in fact had any existence.

We have purposely omitted to repeat the views and authorities upon this question set forth in the opinions in *Roberts v. Ogdensburgh etc. R. R. Co.*, 29 Hun, 154, and in *Union Pacific Ry Co. v. Botsford*, 141 U. S. 250, and we refer to those

opinions for a fuller discussion of the grounds upon which the denial of the power claimed proceeds.

The order should be affirmed.

SUBROGAL EXAMINATION OF PLAINTIFF — POWER OF COURT TO ORDER. — The defendant has no absolute right to have the person of the plaintiff subjected to an examination. The granting or refusal of such an order is in the discretion of the court: *Siddekm v. Wabash etc. R'y Co.*, 93 Mo. 400; 3 Am. St. Rep. 549, and extended note; *Alabama etc. R. R. Co. v. Hill*, 90 Ala. 71; 24 Am. St. Rep. 784, and note; *Gulf etc. R'y Co. v. Norfolk*, 78 Tex. 321.

O'NEIL v. DRY DOCK, EAST BROADWAY, AND BATTERY RAILROAD COMPANY.

[129 NEW YORK, 123.]

EVIDENCE OF AN EXPERT AS TO THE DISTANCE WITHIN WHICH A LOADED TRUCK could be stopped, under circumstances assumed in the question to him, is competent, though questions of this class should not be encouraged.

STREET-RAILWAYS HAVE NO PARAMOUNT RIGHTS OVER OTHER VEHICLES AT STREET-CROSSINGS. At such crossings, the cars of the street-railways have a right to cross the streets, and other vehicles a right to cross the track of the railway. Neither right is superior to the other. The right of each must be exercised with due regard to the right of the other; and the right of each must be exercised in a reasonable and careful manner, so as not to unreasonably abridge or interfere with the right of the other.

JURY TRIAL — REQUESTS FOR INSTRUCTIONS. — The judge may, in his discretion, refuse to receive further requests for charges or instructions to the jury, when he has already given the complaining litigant an opportunity, and this opportunity has been made available by asking for all the charges which the party then thought proper to ask, and the judge in the charge given has fully and fairly laid down the law applicable to the facts of the case.

ACTION to recover for personal injuries. Verdict and judgment for plaintiff, and the defendants appealed.

John M. Scribner, for the appellant Dry Dock etc. Co.

Jacob F. Miller, for the appellant Westing.

G. Washbourn Smith, for the respondent.

EARL, J. In July, 1889, while the plaintiff was a passenger in one of the cars of the defendant corporation, she was injured in a collision between the car and a truck of the other defendant, and she brought this action to recover damages for her injuries, alleging that they were caused by the concurring negligence of both defendants.

It is not important now to detail the circumstances attending the injury of the plaintiff. A careful scrutiny of the evidence leaves no doubt upon our minds that it fairly tended to show concurring negligence of both defendants, and the verdict of the jury, approved by the general term, therefore concludes us. Hence we have only to consider whether any exceptions taken by the defendants, or either of them, upon the trial point out error.

The collision causing the injury of the plaintiff took place while the car was crossing and the truck was going up Broadway. The claim of the plaintiff and of the railroad company was, that the driver of the truck was negligent, because he did not keep the truck out of the way of the car, and drove the truck with its load against the car. Upon the trial, a witness was called for the railroad company, of large experience as an owner, driver, and manager of trucks, and well acquainted with the locality where the collision occurred, and he was asked this question: "Suppose a truck weighing nineteen hundred pounds, or thereabouts, carrying a load of three thousand six hundred pounds, or thereabouts, and drawn by a horse weighing twelve hundred to thirteen hundred pounds, or thereabouts, and that the horse and truck were being driven up Broadway, and were at the time within one hundred feet south of Walker Street driving north, with the horse on a walk, and the horse being a gentle and tractable animal under full control at the time, within what distance could such a truck, under such circumstances, be stopped, the pavement being wet by sprinkling-carts?" This was objected to on behalf of the defendant Westing as "incompetent, and that it is not a question for an expert," and the objection was overruled, and the witness answered: "Between three and four feet." This belongs to a class of questions not much to be encouraged. The answer to such a question can be of but little service to jurors. They are generally well acquainted with such common things as trucks and horses, and the power, actions, and capacity of horses, which, particularly in the city of New York, are constantly open to observation. Yet we cannot say that the expert witness did not know more about the subject of inquiry than ordinary jurors can generally be supposed to know. The question is barely competent, and probably was not harmful; and the judgment should not, therefore, be reversed because the judge allowed it to be answered.

The counsel for the railroad company, in a variety of forms, requested the judge to charge that the railroad company with its car crossing the street had the right of way, and the paramount and superior right in the street, which the driver of the truck was bound to respect, and he refused so to charge, and this refusal is now complained of as error. The rule invoked by these requests has its application where the tracks of street-railways are laid in the streets. As the cars must run upon the tracks, and cannot turn out for vehicles drawn by horses, they must have the preference, and such vehicles must, as they can, in a reasonable manner, keep off from the railroad tracks so as to permit the free and unobstructed passage of the cars. In no other way can street-railways be operated. As to such vehicles the railways have the paramount right to be exercised in a reasonable and prudent manner. But a railway crossing a street stands upon a different footing. The car has the right to cross and must cross the street, and the vehicle has the right to cross and must cross the railroad track. Neither has a superior right to the other. The right of each must be exercised with due regard to the right of the other, and the right of each must be exercised in a reasonable and careful manner, so as not unreasonably to abridge or interfere with the right of the other.

After the judge had charged the jury, the counsel for the defendant Westing was proceeding to ask the judge to charge some request, and the judge said to him that he declined to receive any more requests from him, and to this the counsel excepted, and he now claims that his client's rights were erroneously abridged. In *Chapman v. McCormick*, 86 N. Y. 479, we held that it is the legal right of counsel on the trial of an action to submit propositions bearing upon the action, and that it is the duty of the court to instruct the jury on each proposition, and that a denial of such right is the subject of exception and of review upon appeal. But the facts of this case do not bring it within the rule there laid down, nor within the reasons which induced the decision in that case. Here, before the judge commenced his charge, the counsel for the respective parties handed up to him requests to charge, and he either charged or refused to charge such requests. After the judge had finished his charge and passed upon the requests to charge, the counsel for defendant Westing made a further request to charge, when the judge asked him if he had "anything else." He replied, "That is all I wish for that." The judge then said,

"Go on"; and then he made another request, and the judge charged as to the request in a manner satisfactory to him, and he then apparently took his seat. The counsel for the railroad company then made a request to charge, which the judge acceded to. Then the counsel for Westing again arose and proceeded to make a further request, which the court declined to hear or receive. Here the judge did not abuse his discretion. His refusal to hear or receive the further request was not arbitrary. He had fully and fairly laid down the law applicable to the facts of the case. The counsel for the defendant Westing had had full opportunity to make his requests, and had made them so far as he deemed important, both before and after the charge was made, and whether after that he should be permitted to prolong the trial and still further vex the judge with requests rested in his discretion. The counsel of a party cannot ask as a right unreasonably to prolong a trial by the examination of witnesses, or by debates to the court or jury, or by innumerable and interminable requests to charge. In these matters, the judge has some discretion, to be exercised in the interest of justice, and with a due regard to the rights and interests of the parties. A party has the right to a reasonable opportunity to present his evidence, objections, and requests; and after he has had that, he cannot complain of reasonable restrictions and limitations put upon the exercise of his right by the judge in the fair use of the discretion which he undoubtedly possesses.

There are various other exceptions in the case, to some of which our attention has also been called. But they point out no error, and need no further attention here.

The judgment should be affirmed, with costs.

WITNESSES — EXPERT TESTIMONY. — An engineer is competent to testify as to the possibility of stopping a train within a certain distance: See note to *Harmon v. Columbia etc. R. R. Co.*, 17 Am. St. Rep. 845. As to the admissibility of expert testimony, and what may be proved thereby, see notes to *Baltimore etc. Turnpike v. Cassell*, 59 Am. Rep. 176-186, and *Hammond v. Woodman*, 66 Am. Dec. 228-246. Expert testimony cannot be resorted to where the facts can be put before the jury, and they are competent to form an opinion thereon: *Van Wyckler v. Brooklyn*, 118 N. Y. 424; *Graham v. Pennsylvania Co.*, 139 Pa. St. 149.

STREET-RAILWAYS — RIGHTS AS RESPECT PERSONS ON STREETS. — A person endeavoring to cross a street on which a street-railroad is operated may choose any point at which to cross, and is bound to exercise only reasonable care: *McClan v. Brooklyn etc. R. R. Co.*, 116 N. Y. 459. Cars of street-railways have a preference in the streets, but they must be operated so as not to injure persons on the streets: *Fenton v. Second Ave. R. R. Co.*, 126 N. Y. 625.

LEWIS v. GOLLNER.

[720 NEW YORK, 27.]

PAROL AGREEMENT NOT TO CONSTRUCT OR ERECT ANY FLATS in the immediate neighborhood, entered into upon adequate consideration, is valid, and its specific performance may be enforced.

SPECIFIC PERFORMANCE OF A PERSONAL COVENANT WILL BE DECREED if it is of such a character and purpose that its performance was what was contemplated by the parties, and not mere damages for its breach. Therefore, an agreement not to erect flats in a designated neighborhood, because its breach cannot be compensated in damages, will be specifically enforced.

PERSONAL COVENANT WHEN BECOMES ATTACHED TO AFTER-ACQUIRED LAND.

—If one who has agreed not to build flats in a designated neighborhood afterwards purchases land in that neighborhood, such land in his hands becomes restricted and limited in its uses by that agreement, and remains subject to such restrictions and limitations in the hands of a purchaser from him with notice of the agreement.

PURCHASER OF A LOT WHICH IS SUBJECT TO A PERSONAL RESTRICTIVE AGREEMENT entered into by its owner is bound by the restriction in a court of equity, unless he was a purchaser in good faith, in ignorance of the restriction.

ACTION to enjoin the erection of flats by the defendants on property designated in the complaint. Judgment entered in favor of defendants at the special term was affirmed by the general term on appeal.

William C. Beecher, for the appellant.

George O. Case, for the respondents.

FINCH, J. All the facts alleged in plaintiff's complaint were found by the court, but were held to be insufficient to entitle him to equitable relief.

The plaintiff's residence was on President Street, between Seventh and Eighth avenues, in the city of Brooklyn. That street and Union Street, which runs parallel with it one block away, are occupied by private residences constructed by citizens of some wealth and social standing, whose homes are more or less creditable to their taste, and in which, as giving character to their neighborhood, they feel a pardonable pride. That part of the city had never been invaded by flats or tenement-houses, which bring together a changing and floating population under one roof, having no ownership of their own, and caring little for anything beyond their personal comfort and immediate needs. Into this locality came the defendant Gollner, a builder of tenement-houses and flats. He bought a lot fronting on Union Street, and immediately in the rear of

plaintiff's premises, and at once announced his intention of erecting there a seven-story flat. Such a building in such a locality was regarded as offensive and injurious by the residents of the vicinity, and the court has found as a fact that its construction in that locality would cause injury and damage to the neighboring premises. Gollner was not without experience, and apparently knew what he was about when he took some pains to let his plans be generally understood. The neighbors at first remonstrated, but found Gollner immovable and standing upon his rights. They then sought to buy him out, for the sole and declared purpose of saving the neighborhood from flats. Gollner had no title, but simply a contract. The price he had agreed to pay was eighteen thousand dollars, which was the full and fair value of the property, and upon that he had paid only the sum of five hundred dollars. He began the negotiations with a very large price, but finally agreed to sell out for twenty-four thousand five hundred dollars, or a net profit of six thousand dollars, and upon the further contract that "he would not construct or erect any flats in plaintiff's immediate neighborhood, or trouble him any more." It is evident, since the lots were worth in the market but eighteen thousand dollars, since the sole motive of the purchasers from Gollner was to prevent his meditated construction, and since his declaration of his purpose was the cause and occasion of the final purchase, that the six thousand dollars was the consideration for the restrictive agreement of Gollner, and was the price paid for his covenant not to build flats in the neighborhood, or trouble its residents with similar injurious and disagreeable enterprises. Neither party at all misunderstood that this was the material point of the contract. It would have been the extreme of folly for the purchasers to pay six thousand dollars to prevent the erection of flats on the one lot alone, leaving Gollner free to repeat the enterprise in the immediate neighborhood, and inflict the very injury to escape which the tribute had been paid. Gollner himself, according to the plaintiff's proof, accurately understood and clearly stated the pith of the agreement when he said, that after making it, if he should build flats in the vicinity, he "should be considered a blackmailer"; and when other lots were suggested by the witness Moody, Gollner said: "What, go for more blood-money after I had taken blood-money out of those people? I would not do it." And yet he did attempt to do it. At the moment when his contract with plaintiff was

closed and the down payment was made, he began negotiations for the purchase of a lot on Union Street, diagonally opposite his first purchase, and, obtaining title, at once commenced the erection of a seven-story flat. When reminded of his agreement, and remonstrated with, he seems, according to one witness, to have regarded it as a good joke upon his vendees, and added that "he guessed he could fight them with their own money, that he had six thousand dollars of it in his clothes [patting his pocket], and he would see that go as far as it would last in that direction." Then came a letter from plaintiff's attorney, threatening an action, and a refusal by one of his material-men to further supply him under the circumstances, and thereupon Gollner sought shelter for his enterprise and his breach of faith under an ownership in his wife. His equity in the lot purchased was two thousand dollars, and that equity, together with his large expenditure upon the foundations, he conveyed to her for her equity in two other lots, which amounted to seven hundred dollars; and then, as her agent and architect nominally and in form, continued the construction. Mrs. Gollner lent herself to this artifice, and took the title with full knowledge of all the facts, and unquestionably for the purpose and with the intent of aiding and protecting her husband in his effort to avoid his own honest obligation.

This state of facts had its natural effect upon the courts below, and the general term, after their recital, added, that if there was any authority, directly or indirectly, in plaintiff's favor they would without hesitation grant him relief; but saying that, felt also bound to say that equity stood helpless before this cool and deliberate wrong. The inquiry which faces us is, therefore, whether in truth equity is thus helpless to enforce such a clear and admitted right.

I think we should first examine the situation as between plaintiff and Gollner, upon the supposition that the latter had remained owner of the land, and was himself engaged in violating his contract, and ask of ourselves the question whether in such event it would have been possible for equity to interfere, or whether the objections and difficulties suggested by the respondents would have proved insuperable.

Two of those objections we may dismiss quite briefly. The agreement was not in the least indefinite or uncertain, as it respects the matter in controversy. The phrase "immediate neighborhood," taken in connection with the subject-matter

of the contract, is not so indefinite as to be incapable of just and natural boundaries, but, in any event, covers and includes the locality of the construction in progress. The court has so found, and there is no reason for doubting its correctness. Nor is there any foundation for saying that, in its restrictive character, the agreement is against public policy. We have too lately discussed that subject to make a recurrence to it necessary. We have perhaps widened and extended the area within which restraints of trade and business may lawfully operate, and certainly should not narrow them till they are less than one neighborhood in a single city.

Nor is there any difficulty in the fact that the agreement is by parol and purely personal. If just grounds of equitable jurisdiction exist, any valid contract, however unsolemn, may be enforced by a decree of specific performance. The cases are very numerous in which agreements purely personal not to engage in a particular trade or business within certain reasonable boundaries have been enforced by injunction, and it certainly does not lessen the duty or imperil the right that the contract proved or established is by parol. In one possible view of this case, we are in fact dealing with just such a contract. The occupation of the defendant Gollner was that of a builder of flats and tenement-houses. He so describes himself, and gives that as his specific business and occupation. He sought to carry it on in plaintiff's neighborhood, and was paid six thousand dollars not to carry it on in that locality, and because his doing so would in fact cause injury to the persons who paid him the money. Of course there is a difference between the present case and those in which the contract purpose is to prevent competition,—a difference which respects the nature and character of the injury resulting from a breach; but that difference does not disturb the doctrine common to both, that in a proper case equity will specifically enforce by affirmative decree or restraining injunction a definite and fully established and valid contract, although a personal one, and irrespective of the fact that it happened to be by parol. The jurisdiction attaches upon the ground that an action at law for damages will not do complete justice, or accomplish the purpose contemplated by the contract. Even though the agreement itself fixes a penalty for its breach, it will not follow that equitable relief must be denied; for if the contract appears to be such in its character and purpose that its performance was contemplated by the parties, and not merely damages for the

breach, the equitable relief will be awarded: *Diamond Match Co. v. Roeder*, 106 N. Y. 474; 60 Am. Rep. 464. When that relief is by injunction to restrain the commission of an injurious act, the complaint of the plaintiff is somewhat in the nature of a bill *quia timet*, in which equity acts to prevent a mischief rather than to redress it. There is, therefore, no reasonable doubt that if Gollner was still the owner of the land and engaged in constructing the flats his enterprise could be restrained by injunction. No other remedy would have the dimensions or proportions of the contract purpose. Money damages could not be an accurate substitute, and would merely palliate and not redress the injury. It would be a continuing one, whose full and actual effects could scarcely be foreseen, and which the plaintiff could only escape by breaking up his home, and retreating to some possible locality in which tenements were not and their builders did not afflict.

But Gollner did not remain the owner of his new purchase, and that brings us to the difficulty which the courts below deemed insurmountable, and which needs to be thoughtfully considered. They reasoned that the new vendee could not be affected, except through or by the purchase of the land, and so only when the land carried with it, as an inseparable attachment, the burden of the contract; that when the contract was made, there was no land to which it did or could attach; and the agreement remained wholly personal to Gollner, and did not affect or bind his wife. I do not see the contract in that way. Gollner might have fulfilled it by omitting to buy or lease any land within the prescribed limits, but his agreement left him at liberty to do so or not, as he pleased, and yet required that if he did so purchase or lease, he should not erect upon the land so owned or possessed the prohibited structures. The moment he bought or leased any such land, he came under an obligation not to use it in a particular way; the land in his hands necessarily became restricted and limited in the use of which it was capable, and as much so, though bought of another, as if it had come from the contractor who imposed the restraint as vendor. I do not see why the equitable rights of the plaintiff did not attach to the land when bought, if it came, as it did, within the scope of the contract. Why should it affect the result that the obligation and the land ownership were not simultaneous, or that the latter came from a vendor who did not restrict when the contractor could and did? In the case of a mortgage, the lien may attach to and bind after-

acquired property, or cover future and later advances, as between the parties themselves, and that is permitted because they have so agreed, and their contract contemplates that precise result. In like manner, I think the agreement under discussion was, in substance and effect, that whatever land the defendant Gollner might thereafter possess in that immediate neighborhood should be restricted in its use by him, and should not be devoted to the construction of tenements or flats. In other words, when he bought the land the plaintiff's equitable rights at once attached to it, became a burden upon it so long as Gollner owned it, so that apparently the contract ceases to be merely and purely personal, because it affects, and was intended to affect, the use and occupation of Gollner's after-acquired land in that neighborhood. But if the contract remains technically a personal one, I think the reasonable and settled doctrine is, that the contract equity is so attached to the use of the land which is the subject-matter as to follow the land itself into the hands of a purchaser with full knowledge of all the facts, who buys with his eyes open to the existing equity, and more especially when he buys for the express purpose of defeating and evading that equity. It has been held that the equity resulting from a valid agreement, although the latter was not a covenant running with the land, or a legal exception or reservation out of it, but stood solely upon the ground of a personal contract dictating the mode of user, would, nevertheless, go with the land into the hands of a purchaser with notice, and who did not buy innocently or in good faith: *Whitney v. Union Railway Co.*, 11 Gray, 363; 71 Am. Dec. 715.

In *Hodge v. Sloan*, 107 N. Y. 250, 1 Am. St. Rep. 816, we substantially affirmed that doctrine, holding that a purchaser without restriction in his deed, but from one who was restricted by a personal covenant, not running with the land or binding his assigns, yet with notice of the facts, is bound by the restriction in a court of equity. Judge Danforth described the character of the agreement thus: "It is restrictive, not collateral to the land, but relates to its use."

It is true, and should be noted, that in these cases the restrictions followed the line of title, and were imposed by the original owners and vendors of the land, while here they were not so imposed, but came from one never an owner of the land, but deriving his right from a contract with one who did become such owner. But why should that difference change the

result? The original owner's right rests upon one consideration, and that of the stranger to the title upon another, but each are equally good, and worthy of equitable regard. In *Parker v. Nightingale*, 6 Allen, 344, 83 Am. Dec. 632, it is declared not to be in the least material that the restrictive stipulations should be binding at law, or that any privity of estate should subsist between parties in order to render them obligatory, and to warrant equitable relief in case of their infraction. I think that doctrine is sound and just. The source of the restriction would seem to be immaterial, if itself binding and founded upon sufficient consideration; and a breach is no greater wrong to a privy in estate than to a stranger validly contracting about its use. Nor can the vendee in bad faith stand upon such a difference. Equity has no compassion for a fraud, and he who buys in aid of one with full knowledge of what is right, but with purpose to defeat it, should not escape the hand of equity by a criticism upon the origin of the restriction violated. If these views are correct, it will follow that plaintiff should have been awarded the relief which he sought.

The judgment should be reversed and a new trial granted, costs to abide the event.

CONTRACT TO CONVEY LAND WITH BUILDING RESTRICTIONS — SPECIFIED PERFORMANCE OF. — A contract for the conveyance of city land, providing that the deed shall be subject to certain building restrictions, will be specifically enforced as made: *Abraham v. Stewart*, 83 Mich. 7; 21 Am. St. Rep. 585. For a full discussion of the subject of covenants restricting the use of land conveyed, see extended note to *Ladd v. Boston*, 21 Am. St. Rep. 484-508. An injunction will be granted to prevent the use of leased premises stipulated against in the lease: *Godfrey v. Black*, 39 Kan. 193.

COVENANT AGAINST CERTAIN USE OF LAND — WHETHER BINDING ON GRANTEE OF COVENANTOR. — A covenant by the owner of land not to use it in such a manner as the other party to the contract specifies is binding in equity against the grantees of the covenantor: *Hodge v. Sloan*, 107 N. Y. 244; 1 Am. St. Rep. 816, and note. Injunction will lie to prevent a vendee of such covenantor from a violation of it: *Sutton v. Head*, 86 Ky. 156.

LYNCH v. METROPOLITAN ELEVATED RAILWAY CO.

[129 NEW YORK, 274.]

PRACTICE — JOINDER OF CAUSES OF ACTION. — When, in a suit to procure an injunction to prevent the continuance of unlawful acts, the complainant sets out the acts from which he has suffered, and the future continuance of which he wishes to prevent, and prays a judgment awarding him compensation for past injuries, as well as relief against their continuance, he states but one cause of action, and that is a claim for relief against the continued trespasses upon his property.

JURISDICTION. — **IF A COURT OF EQUITY ACQUIRES JURISDICTION FOR ONE PURPOSE,** it may retain it generally, and may, when necessary to do complete justice between the parties, ascertain and award damages as incidental to the main relief sought.

EQUITY — JURISDICTION OF, TO AWARD DAMAGES FOR TRESPASSES. — When an injunction is sought against the continuance of trespasses upon complainant's property, a court of equity, in addition to granting the injunction, may close up all matters of legal dispute between the parties, by assessing the loss sustained by the acts which it has restrained.

EQUITY — JURISDICTION OF, TO ENTER PERSONAL JUDGMENT. — The fact that the final relief granted may be or is a personal judgment is not conclusive against the jurisdiction in equity, because, when jurisdiction is once acquired it will be retained to the end, though relief is reached by a mere personal judgment.

JURY TRIAL — CONSTITUTIONAL LAW. — The provision of the constitution declaring that "a trial by jury, in all cases in which it has heretofore been used, shall remain inviolate forever," relates to the trial of issues of fact in civil cases or criminal prosecutions, and not to the trial of issues in equity.

JURY TRIAL — ASSESSMENT OF DAMAGES IN EQUITY. — In a suit to enjoin the continuance of acts of trespass, and to recover for damages already inflicted by those acts, the amount of such damages does not present an issue upon which the parties are entitled to a trial by jury.

Samuel Blythe Rogers and Julien T. Davies, for the appellants.

Charles Gibson Bennett, for the respondents.

GRAY, J. This action was brought to restrain the maintenance and operation of the defendants' roads in front of the plaintiff's premises, and the prayer for such a judgment included also a demand for the amount of loss and damage which might be ascertained to have been already sustained by the plaintiff. The complaint sets out the title and ownership of the plaintiff, and his rights in and to the street in front of his premises; the construction of the elevated railroad, and the operation of trains over it, and the annoying results therefrom; the illegal and unauthorized nature of the trespass upon the plaintiff's premises and easements, and the failure of the defendants to acquire or to make compensation for them; the

injuries sustained, and that they will be constant and continuous; and finally, that to prevent a multiplicity of suits, to protect against irreparable damages, and to afford complete relief, the plaintiff is compelled to seek the equitable interference of the court. When the action came on for trial, the defendants' counsel moved for a trial of the plaintiff's claim for past damages by jury, and the exception to the denial of that motion raises the main question presented upon this appeal.

The clause of the constitution upon which the demand for a jury trial was based reads: "The trial by jury, in all cases in which it has heretofore been used, shall remain inviolate forever." The argument for the appellants is, in substance, that there were two independent causes of action stated in the complaint, of which one was for past damages, which, prior to the constitution of 1846, was cognizable solely in a court of law, and that under the code it comes within the equity jurisdiction of the court only by reason of the permission to join in one complaint legal and equitable causes of action. By section 970 of the Code of Civil Procedure, which was a new enactment, it is provided that "where a party is entitled by the constitution, or by express provision of law, to a trial by a jury of one or more issues of fact, . . . he may apply upon notice to the court for an order directing all the questions arising upon that issue to be distinctly and plainly stated for trial accordingly," whereupon the court must so order, etc. If the defendants believed that they had a constitutional right to a jury trial of some issue of fact in this action, it would have been the natural and orderly way for them to make an application to the court under this section. The complaint appears to be but one consecutive narrative of the grounds upon which the equitable interference of the court is alleged to be necessary. The pretense that there is a separate cause of action rests only upon the demand of the complainant that, if he is entitled to the equitable relief of an injunction, the court shall adjudge to him such an amount for the loss sustained by the defendants' acts as shall be ascertained.

Undoubtedly, the claim for past damages, sustained by plaintiff in his property rights from the defendants' acts, could have been made the subject of an action at law; but that was not the cause of action which the plaintiff elected to assert in his complaint and to bring to trial. What he attempted by instituting his action was to restrain the continuance of acts

which were constantly injuring, and would to all appearances constantly in the future continue to injure, him, in ways and in a manner which he described in his complaint. That was a form of relief demandable and cognizable only on the equity side of the court. Hence, as upon the face of the complaint the plaintiff alleged a cause of action for equitable relief, if the defendants conceived that they were entitled to a trial by jury of any issue of fact involved in the statements of the complaint, they might have moved the court under section 970, and then the question could have been opportunely and properly met. Appellants cite upon this point the decision in *Colman v. Dixon*, 50 N. Y. 572, but that was made in 1872, and section 970 was a new provision, and was enacted in 1877.

But whatever the effect of the omission to take this course of procedure, we need not determine it now; inasmuch as the conclusion we have reached holds the right to a separate trial by jury, as to the amount of past damages, in such an action not to be within the purview of the constitutional guaranty. The action was one purely for a court of equity; for the main relief sought was an injunction against the defendants, restraining them from maintaining and operating their elevated railroad. To the assertion of this ground for the equitable interference of the court the facts in the complaint were marshaled, and to the necessity for granting that species of relief every allegation of the complaint was framed and calculated to lead. There was but one cause of action stated in this complaint, and that was the claim for relief against the continued trespass upon the complainant's properties. The demand for past damages included in the prayer for judgment does not have the effect to set up an independent cause of action. It is nothing more than a demand that the court, having adjudged the plaintiff entitled to the equitable relief prayed for, and having acquired entire jurisdiction of the action, will assess the damages which appear to have been sustained down to the trial.

It has always been a well-settled and familiar rule, that when a court of equity gains jurisdiction of a cause before it for one purpose, it may retain it generally. To do complete justice between the parties, a court of equity will further retain the cause, for the purpose of ascertaining and awarding the apparent damages, as something which is incidental to the main relief sought. While this is done on the ground that the remedy for the damage done is deemed to be incidental to

the relief of injunction, the principle is in perfect harmony with the theory of the jurisdiction of a court of equity. Its power is invoked, and it interferes to restrain a trespass which is continuous in its nature, in order to prevent a multiplicity of suits, and, taking jurisdiction of the cause for such a purpose, it may retain it to the end, and close up all matters for legal dispute between the parties, by assessing the loss sustained from the acts which it has restrained.

The power and practice of courts of equity were, as it was forcibly remarked by Judge Earl in the case of *Madison Avenue Baptist Church v. Oliver Street Baptist Church*, 73 N. Y. 82, 95, "when they have once obtained jurisdiction of a case, to administer all the relief which the nature of the case and the facts demand, and to bring such relief down to the close of the litigation between the parties."

The fact that a money judgment is ordered against the defendant for the plaintiff's loss affords no peculiar ground for attacking equity's jurisdiction. That is frequently the case in actions of an unquestioned equitable nature. Quite recently Judge Finch, in *Van Rensselaer v. Van Rensselaer*, 113 N. Y. 207, observed with respect to an objection to the jurisdiction of a court of equity that the final relief would be a personal judgment, that it would not in that manner lose its jurisdiction of an action of an equitable character. The jurisdiction "once acquired," he said, "it retains to the end, even though it may turn out that adequate relief is reached by a merely personal judgment. That is not an uncommon occurrence."

Instances are frequent in which a court of equity decrees the payment of money as an incident of the grant of equitable relief, and that feature does not suffice to qualify the jurisdiction. But I think we should consider the question to have been settled, upon the authority of several decisions of this court. In the case of *Williams v. New York Central R. R. Co.*, 16 N. Y. 97, 69 Am. Dec. 651, the opinion was delivered by Judge Samuel Selden. That was a suit in equity, brought to restrain the defendants from using the street with their railway, and to recover damages for past use. The conclusion arrived at, as expressed in the opinion, was, that "it follows that the defendants, in constructing their road, . . . were guilty of an unwarrantable intrusion and trespass upon the plaintiff's property, and that he is entitled to relief. Although he had a remedy at law for the trespass, yet, as the trespass was of a continuous nature, he had a right to come into a

court of equity, and to invoke its restraining power to prevent a multiplicity of suits, and can, of course, recover his damages as incidental to this equitable relief. There may be doubt as to his right to recover in this suit the damages upon the lots which have been sold; because as to those lots there was no occasion to ask any equitable relief, and to permit the damages to be assessed in this suit in effect deprives the defendants of the right to have them assessed by a jury. But as this question has not been raised, it is unnecessary to consider it."

There are two things to be noted in that opinion. In the first place, the damages already sustained were deemed within the power of a court of equity to award, as an incident of its jurisdiction over the action. This idea is, in fact, emphasized by the suggestion as to the lots which had been sold, because it is clear that the court regarded its right to award the damages as a matter connected with or dependent upon the ground for granting any equitable relief,—that is to say, as to the property to be protected by the decree of the court against the defendants' acts, the damages caused to it could be assessed by the court; but as to that portion withdrawn by the sale it might be doubtful, because not the subject of or entitled to the equitable relief. It is very obvious that the court had in mind the question as to the right of trial by jury. In the second place, it may be noted that the opinion speaks of the assessment of the damages. This definition of an assessment of the damages seems to me to put the action of the court in line with just what courts of equity have always done in cases over which they have gained jurisdiction,—that is to say, they proceed to inquire directly, or by reference or otherwise, as to the damages sustained, and assess them accordingly. When, later, the same case, entitled as *Henderson v. New York Cent. R. R. Co.*, 78 N. Y. 423, after a new trial, came up again, the opinion of the court was delivered by Judge Danforth, who again upheld the plaintiff's right to invoke the equitable power of the court, and held that he could, "of course, recover his damages as incidental to this equitable relief"; and he stated it to be "an elementary principle," that "when a court assumes jurisdiction in order to prevent a multiplicity of suits, it will proceed to give full relief, both for the tortious act and the resulting damages." The opinion was carefully written, and based upon the authority of many cases.

Recently, again, in the case of *Shepard v. Manhattan R'y*

Co., 117 N. Y. 442, it was said of these actions that they were necessarily "on the equity side of the court, as the main relief sought was the injunction against the defendants," and that in them the complainants could "recover the damages they have sustained as incidental to the granting of the equitable relief." This view, as stated in that opinion, was expressly based upon the Williams and Henderson cases, and upon the supposed equitable principles governing such actions.

The Shepard case somewhat conspicuously illustrates the powers a court of equity may arrogate to itself with the object of completely determining and quieting the questions before it, when it has once acquired jurisdiction of the action. It follows, in that respect, a rule long established by authority. It is true that in these cases the right to demand a jury trial as to past damages was not precisely, or in terms, stated as the proposition advanced; but that, as it seems to me, would be a very narrow evasion of the effect of the opinions delivered. They did consider the nature of such actions, and deliberately declared the power of the court in equity, as an incident of the main relief of injunction, to assess the damages sustained.

In *Carpenter v. Osborn*, 102 N. Y. 552, the court, in an action to set aside certain conveyances as fraudulent, granted the equitable relief prayed for, and in addition decreed the judgment a lien upon the land for some unpaid installments of interest, to the payment of which the defendant had obligated himself in a certain agreement. Chief Judge Ruger delivered the opinion of this court in affirmance of the judgment, and said: "This principle has been applied in many cases, in awarding judgment for pecuniary damages, even when the party had an adequate remedy at law, if the damages were connected with a transaction over which the courts had jurisdiction for any purpose; although for the purpose of collecting damages merely they would not have had jurisdiction." In support of the principle declared by him, the learned judge cited Pomeroy's Eq. Jur., sec. 181, and various cases.

I think some confusion of thought concerning the constitutional guaranty of a trial by jury may arise in a misapprehension as to its proper application. That provision relates to the trial of issues of fact in civil and criminal proceedings in the courts, as it was held by the chancellor in the case of *Beckman v. Saratoga etc. R. R. Co.*, 3 Paige, 45; 22 Am. Dec. 679. Where the trial of a civil proceeding presents for determina-

tion a question of fact, the right of trial by jury is proper, and can be invoked. But an action brought to restrain the commission of trespasses which are continuous in their nature is necessarily in equity, and the court interferes to prevent multiplicity of suits, and grants equitable relief by way of an injunction. The question presented for determination in such an action is one of law, whether, upon the facts to be established upon the trial, the plaintiff is entitled to such relief. Upon the proofs showing the nature of the trespasses, and the consequent injury to the complainant's property, the court decides the question of plaintiff's right to an injunction. It does not seem to me that it can be said that any issue of fact as to damage remains. That was necessarily decided in the action, and all that remains is to fix its amount; and I do not think the constitutional provision was aimed at such a proceeding. As defined by the chancellor in the case above referred to, it seems difficult to rationally give it an application to what is simply an assessment of the damages.

I may extract, and may appositely quote here, a remark of Judge Andrews, in his opinion in *Cogswell v. New York etc. R. R. Co.*, 105 N. Y. 319. "We think," he says, "it is a reasonable rule, and one in consonance with the authorities, that where a plaintiff brings an action for both legal and equitable relief in respect to the same cause of action, the case presented is not one of right, triable by jury, under the constitution." The case was one wherein the plaintiff's complaint demanded judgment for damages and an abatement of a nuisance, and also for an injunction against its continuance. The learned judge's opinion is upon the question of whether such an action was one for a nuisance, under section 968 of the code, which must be tried by jury, unless waived or referred, and he held that it differed from *Hudson v. Caryl*, 44 N. Y. 553, which was a common-law action, in that equitable relief by way of injunction was asked, and not simply the relief obtainable by writ of nuisance for damages and an abatement. His remark upon the right to a jury trial in equitable actions is not out of place, however, here.

To carry this discussion backwards, and to a time anterior to decisions of this court, we find warrant in the opinions then held by our own and the English chancery courts for holding that a trial by jury was not usual in cases where equity had acquired jurisdiction, and that the court would administer all the relief which the facts warranted, including the assessment

and awarding of compensation for injury sustained. In *Watson v. Hunter*, 5 Johns. Ch. 169, 9 Am. Dec. 295, the bill was filed to enjoin the cutting of timber, and to restrain the removal of that which had already been cut. Chancellor Kent confined the relief of injunction to the timber standing, and refused it as to the removal of the cut timber, on the ground that it would be an application to an "incidental remedy." He said that "the practice of granting injunctions in cases of waste is to prevent or stay the future commission of waste; and the remedy for waste already committed is merely incidental to the jurisdiction in the other case, assumed to prevent multiplicity of suits, and to save the party the necessity of resorting to trover at law."

The chancellor's exposition of the principle upon which equity acts in cases of waste, obviously, is as applicable to cases of trespass. If the action at law in trover was deemed unnecessary for the personal property already converted in that case, it seems unnecessary in such an action as this, in order to recover the loss sustained from the trespass. The chancellor in the *Watson* case relied upon the practice followed by the English chancellors. Lord Hardwicke, in *Garth v. Cotton*, 1 Ves. Sen. 528, had held that the decree for the waste already committed was an incident to the injunction to stay waste. Before that, in *Jesus College v. Bloom*, 3 Atk. 262, where the bill was filed for an account and satisfaction for waste in cutting trees, and no injunction was prayed for, Lord Hardwicke said that the bill was improper, and that an action of trover was the remedy. He asserted the rule, however, that where the bill was for an injunction to prevent waste, and for waste already committed, the court, to prevent a double suit, would award an injunction to prevent future waste, and decree an account and satisfaction for what was past. He held that to prevent multiplicity of suits, the court will, on bills for injunction, make a complete decree, and give the injured party a satisfaction for what had been done, and not oblige him to bring another action at law. In the subsequent case of *Smith v. Cooke*, 3 Atk. 381, the same lord chancellor declared the same doctrine, as did also Lord Thurlow in *Lee v. Alston*, 1 Ves. 78. I quote a remark of Lord Nottingham, in *Parker v. Doe*, 2 Ch. Cas. 201, that when a court of chancery has once gained possession of the cause, if it can determine the whole matter, it will not be the handmaid of other courts, "nor beget a suit to be ended elsewhere."

In our former court of errors, Chancellor (then Judge) Kent held, in *Armstrong v. Gilchrist*, 2 Johns. Cas. 424, 431, decided in 1800, that "the court of chancery having acquired cognizance of a suit for the purpose of discovery or injunction will, in most cases of account, whenever it is in full possession of the merits and has sufficient materials before it, retain the suit in order to do complete justice between the parties, and to prevent useless litigation and expense." That case was upon a bill for specific relief, and to restrain an action at law brought to recover the value of certain bank stock, and it set up certain equitable considerations as against the justice of a recovery in the other action. The chancellor below decided against the whole relief sought by the bill, and decreed in favor of the defendants that the complainants should pay them the value of the stock, and ordered a reference to state the account. This procedure the court of errors upheld as being right, and the duty of the chancellor to follow.

I do not consider the cases cited by the appellants to be at all controlling upon the question. In *Murray v. Hay*, 1 Barb. Ch. 59, 43 Am. Dec. 773, the bill was filed by two persons, who were owners of different dwelling-houses in severalty, having no joint interest in either of them, to restrain a nuisance which was a common, but not a joint, injury to both complainants. The objection to the prayer for an account and compensation for their respective damages was upon the ground of multifariousness, and so considered. Another case of *Hudson v. Caryl*, 44 N. Y. 553, was an action to recover damages for the overflowing of plaintiff's lands, and to compel the removal of the dam; and the decision turned upon the ancient right to a jury trial, in such an action of nuisance, which the code had not affected. It was not an action in equity to restrain a nuisance, which, according to Judge Andrews's opinion in *Cogswell v. New York etc. R. R. Co.*, 105 N. Y. 319, would not be an action for a nuisance directed by the code to be tried by jury.

But the judge who delivered the opinion of the majority of the commission of appeals, in *Hudson v. Caryl*, 44 N. Y. 553, spoke *obiter* in his remarks upon the general right of trial by jury, as his opinion indicates, for he says (p. 555): "But whatever may be said or decided in regard to the trial of other actions, in which two causes of action, one exclusively of legal and another exclusively of equitable cognizance arising out of the same transaction, are united, this action should, for an

independent reason, have been tried by jury, and that is, that the action, when brought for the double object of removing the nuisance and recovering the damages occasioned by it, was always tried by jury"; and he proceeds to refer to Blackstone and to the old Revised Statutes. As, therefore, "a case is presented in which a trial by jury has been heretofore used," the commissioner concluded it was error to refuse it.

It does not seem to me necessary to pursue further the consideration of authorities. The respondent's counsel has cited others in this and the lower courts. In a note to *Armstrong v. Gilchrist*, 2 Johns. Cas. 424, will be found reference to other early cases in this state, and in the United States supreme court, in support of the "settled rule, that when the court of chancery has gained jurisdiction of a cause for one purpose, it may retain it generally for relief." Underlying the system upon which courts of equity have exercised their power, as I understand it, is the principle that when they have gained jurisdiction of a cause by reason of the infirmity of the courts of law to entertain it, or to give full relief, they will retain their control of the cause generally, and settle up the whole matter between the parties.

I have discussed the question here at considerable length, in order that a rule, long settled by careful judicial utterances, and in itself reasonable and commendable as promoting the public convenience in the disposition of litigated causes, might not, at this day, be shaken by doubts. The conclusion which, I think, we must reach is, that in this complaint the cause of action is single and constitutes a claim for equitable relief, and there is not mixed up with it a cause of action for legal relief.

The facts alleged as a basis for an appeal to the court to exert its equitable power may well have constituted a claim for legal relief, and might have been set up in an action at law; but that consideration cannot affect nor change the equitable nature of the action itself.

It was not error, therefore, to deny the motion for a trial by jury as to past damages, and the court could competently proceed with the trial of the cause in equity.

The only other point presented to us upon this appeal is, that it was error to award damages for portions of the property which were in the possession of tenants. As to this question, the case is controlled by the decision of the *Kernochan* case, at this term.

The judgment should be affirmed, with costs.

EQUITY — JURISDICTION. — Equity having acquired jurisdiction for any purpose will, in suitable cases, retain it, and make a final adjudication between the parties; *Griffin v. Fries*, 23 Fla. 173; 11 Am. St. Rep. 351, and note; *Lancy v. Randlett*, 80 Ma. 169; 6 Am. St. Rep. 169, and note; *McGowan v. Remington*, 12 Pa. St. 56; 51 Am. Dec. 584, and note; *Bolling v. Vandiver*, 91 Ala. 375; *Sanders v. Soutter*, 126 N. Y. 193; *Killmer v. Wuchner*, 79 Iowa, 722; *Haynes v. Whitsett*, 18 Or. 454.

EQUITY — JURISDICTION IN ACTIONS FOR TRESPASS. — Equity will interfere where a trespass is a continuing one, and grant relief therefrom: *Whetlock v. Noonan*, 108 N. Y. 179; 2 Am. St. Rep. 405. The imposition of an additional burden upon his land entitles the owner to damages as well as to an injunction: *Williams v. New York Cent. R. Co.*, 16 N. Y. 97; 69 Am. Dec. 651, and note 664. Equity may ascertain and compel the payment of damages sustained from a wrong: *Whipple v. Fair Haven*, 63 Vt. 221. Equity will restrain a continuing trespass, and also award damages therefor: *Shepherd v. Manhattan R'y Co.*, 117 N. Y. 442. The fact that a bill in equity may show grounds for a personal judgment will not oust the court of jurisdiction: *Van Benschoten v. Van Benschoten*, 113 N. Y. 207.

EQUITY — TRIAL BY JURY IN. — A statute providing for a final decision of questions of fact in equity proceedings by a jury is unconstitutional: *Brown v. Buck*, 75 Mich. 274; 13 Am. St. Rep. 238, and note. Calling a jury in equity cases is discretionary with the court, and not a matter of right in the parties: *Van Fleet v. Olin*, 4 Nev. 95; 97 Am. Dec. 513, and note. A jury in a chancery court cannot be demanded as a constitutional right: *Bank of the State v. Cooper*, 2 Yerg. 599; 24 Am. Dec. 517.

DYETT v. HYMAN.

[129 NEW YORK, 351.]

INDEMNITORS OF AN OFFICER who has levied upon property not subject to his writ are jointly and severally liable as principals for the original unlawful taking.

INDEMNITORS, LIABILITY OF, NOT LIMITED BY THEIR BOND. — Though the code of New York gives indemnitors of the sheriff, in the event of suit being brought against him, the right to apply to the court to be substituted as defendants in his place, it does not limit their liability to the amount of their bond, nor otherwise impair the right of the person injured by the act of the officer for which he has been indemnified, to recover from him or his indemnitors, either jointly or severally, full compensation for the injuries suffered from his wrongful act.

INDEMNITORS. — LIABILITY OF THE INDEMNITORS OF A SHERIFF IS NOT LIMITED to the amount of their bond, when the party injured by the unlawful act, against the consequences of which they agreed to indemnify the officer, elects to treat them as having adopted and become parties to his wrongful acts. The remedy is not upon the bond, and recovery may therefore be had for the full amount of damages suffered, whether it is more or less than the penalty of the bond.

JUDGMENT — PARTIES. — A judgment against defendants who are parties to an action as judgment creditors is admissible and conclusive against them

in a subsequent action to enforce a liability arising from their having indemnified a sheriff against the consequences of certain wrongful acts. In neither action did they appear in any representative capacity, and therefore the judgment in one is evidence against them in the other.

PRACTICE — RIGHT TO DISCONTINUE ACTION. — If several joint wrong-doers are jointly sued to recover damages resulting from their wrong-doing, the plaintiff may, at any time, by leave of the court, discontinue the action as to such of the defendants as he may elect. The remaining defendants have no power to prevent such discontinuance, and their objection to it may be disregarded.

Alex. Blumensteil, for the appellants.

B. F. Einstein, for the respondent.

RUGER, C. J. The plaintiff brought trover, as assignee in a general assignment by Kapp for the benefit of his creditors, against the defendants Hyman, Morris, Stroock, and Ballin, to recover damages for the taking and conversion of certain personal property. The defendants admitted the execution of the assignment, but justified the taking by a sheriff under certain attachments issued against the property of said Kapp, by a justice of the supreme court, and an averment that the property taken belonged to said Kapp. The allegations of the answer were probably insufficient to raise the question of fraud in the assignment, under the authorities: *Weaver v. Barden*, 49 N. Y. 287; but inasmuch as the parties proceeded to try that issue without objection, we regard it as legitimately in the case.

The claim that the assignment was void for fraud, and conferred no title upon the plaintiff, constituted the only affirmative defense stated in the answer. The execution of the assignment and the taking of the property by the sheriff were specifically alleged in the complaint and admitted by the answer.

Upon the trial, the plaintiff proved the execution and delivery of the assignment; the taking of the property from plaintiff's possession on September 1, 1884, by the sheriff on attachments in favor of the defendant Hyman and others, and its subsequent sale by him and the execution and delivery of a bond to the sheriff, dated September 2, 1884, signed by Hyman as principal, and Morris and Stroock as sureties, indemnifying him against all loss or damage in consequence of the levy, seizure, and sale on Hyman's attachment of the property referred to in the complaint. The plaintiff also proved a judgment dated December 13, 1887, rendered in a

creditor's action in the supreme court, brought by the defendants Hyman and Morris against Kapp and Dyett, the assignor and assignee, in favor of the defendants therein, wherein it was adjudged that the assignment of Kapp and Dyett was not made with intent to hinder, delay, or defraud creditors, and was in all respects valid as against said Hyman and Morris, and all other creditors of said Kapp. This judgment operated as conclusive evidence of the validity of the assignment, and estopped the defendants from showing anything to the contrary in this action. It does not, therefore, admit of any doubt but that the plaintiff made out an unexceptional case to recover against the defendants Hyman and Morris. Their liability for the original trespass committed by the sheriff was presumptively established by their approval and satisfaction of his act, manifested by the execution of a bond of indemnity to him. The sale of the property was secured by this bond, and the defendants were thereby shown to have exercised a controlling authority over the action of the sheriff in procuring the consummation of the wrong complained of, and thereby made themselves liable as principals for the original unlawful taking: *Herring v. Hoppock*, 15 N. Y. 411; *Ball v. Loomis*, 29 N. Y. 412; *Ford v. Williams*, 13 N. Y. 584; 67 Am. Dec. 83.

The defendants who thus participated in the original wrong were jointly and severally liable with the sheriff for the damages occasioned by the trespass. The plaintiff could have elected to sue one or more of the defendants, and it did not operate as a defense to the action brought by him to show that there were other persons liable for the same trespass, who were not joined as defendants in the action: *Wehle v. Butler*, 61 N. Y. 245; *Rose v. Oliver*, 2 Johns. 365.

It is urged by the appellants that no cause of action was made out against the defendants, for the reason, as is claimed, that they had the right, as indemnitors, to be substituted as defendants in the place of the sheriff: Code Civ. Proc., secs. 1421-1423; and they argue that in case such substitution had been permitted by the court, the indemnitors would have been liable for such damages only as they would have been subjected to in an action by the sheriff upon their bonds of indemnity, and that the same rule of liability should be applied to them in this action.

This claim is founded in a misapprehension of the meaning and effect of the provisions of the code referred to, and of the extent of the liabilities incurred by joint wrong-doers. Par-

ties who are jointly and severally liable to the owner for damages arising out of an unlawful taking of property cannot, by any arrangement between themselves, prejudice the rights of an injured party in the prosecution of those who committed the trespasses upon his property: *Hanmer v. Wilsey*, 17 Wend. 92; *Williams v. Sheldon*, 10 Wend. 654. Such arrangements are *res inter alios*, to which the owner has never consented, and by which he cannot be bound.

The sections of the code referred to simply authorize the indemnitors to apply to the court for permission to defend an action in place of the sheriff, and do not, in any respect, vary the rights of the plaintiff in the prosecution of his action. If the owner on the trial proves a good cause of action against the sheriff, the indemnitors, by virtue of such substitution, become liable in his place for the damages occasioned by his unlawful taking. If the act of permitting the substitution impaired in any material respect the right of the owner to recover in the action, it would furnish a conclusive reason why the substitution should not have been permitted.

The plaintiff's cause of action against a wrong-doer is a right of property, and can be taken from him only by due process of law.

If these provisions authorize the court to deprive him of a lawful remedy against one, and compel him to prosecute others, against whom he has no cause of action, they are open to the objection that they authorize the taking of property in violation of the provisions of the constitution. It is only upon the theory that by a substitution of parties the owner is afforded an equivalent remedy for the wrong done him, against other responsible parties, that the legislation in question can find any justification: *Hayes v. Davidson*, 98 N. Y. 23.

The theory presented by the appellants in this case, that the defendants are liable as indemnitors only, and are governed by the provisions of their bond, is wholly unfounded. The liability of the defendants rests wholly upon their participation in the original wrong, and their liability for its consequences incurred by reason of their complicity in the trespass. This, it is true, is evidenced by the bond of indemnity, which authorized the sheriff to consummate the original wrong by an unlawful sale and conversion of the plaintiff's property, but in no sense is the action upon the bond. We are, therefore, of the opinion that the plaintiff made out a good cause

of action against the defendants, and that the court committed no error in directing a verdict for the plaintiff.

The defendants, however, made some objections to the admission of evidence against them, and among others, to the introduction of the judgment roll in the action of Hyman and Morris against Kapp and Dyatt, and took an exception to the ruling of the court thereon, and now urge this exception as a reason why the recovery in this case should not stand. The first point made to its admission was, that it was immaterial and incompetent. The only ground now suggested why the ruling was incorrect is the claim that the defendants Hyman and Morris do not appear in the two actions in the same character, and that what was adjudged against them in one action should not be used against them in the other.

The argument is, that they appeared in the first action as judgment creditors, and in this as indemnitors. The answer to this argument is, that it has no foundation in fact, as they appear in both actions in their individual character, and not in any representative capacity. The fact that in the first action it was essential that they should show a judgment and a return of execution thereon unsatisfied, in order to sustain an action to reach equitable assets, did not affect the character of the action; neither did the fact that the plaintiff has resorted to a bond of indemnity to prove their participation in the tort. In either case they represent individual interests, and are liable as individuals only in such actions. The second objection was, that it was inadmissible against the defendants Stroock and Ballin, because they were not parties to it. This objection furnished no reason why the evidence was not competent against Hyman and Morris, but was, undoubtedly, a good reason why Stroock and Ballin should not be prejudiced by it. The court admitted the evidence as against Hyman and Morris alone, and as against them it was, undoubtedly, competent. If, for any reason, Stroock and Ballin could have been prejudiced by its admission, it is enough to say that they are not now parties to the suit, the plaintiff having on the trial discontinued the action as to them, and they cannot now avail themselves of any errors which have not operated to their prejudice. It was also claimed that the evidence was not admissible as against Morris, and the ground of this objection was the claim that he represented different characters in the two actions, and was not bound in one for any adjudication

made in the other. We have already seen that this claim is not tenable.

After the close of the evidence, the plaintiff asked leave to discontinue the action as to Stroock and Ballin, upon payment of costs. The defendants' counsel, Mr. Blumensteil, objected to the motion, but it was granted by the court, and the action was thereupon discontinued. No ground of objection to the motion was stated by Mr. Blumensteil; neither does it appear in whose behalf he interposed the objection. It can hardly be supposed that Stroock and Ballin objected to be relieved from their liability in the action, and Hyman and Morris had no reason for objecting to such discontinuance, as they had no legal right to require that Stroock and Ballin should be continued as defendants in the action. The plaintiff had the right originally to sue one or more of the joint wrong-doers and hold them, at his option, either severally or jointly; and it necessarily follows from such right that he could, at any time, by leave of the court, discontinue the action as to any or all of such defendants as he should elect: *Williams v. Sheldon*, 10 Wend. 654; *Lord v. Tiffany*, 98 N. Y. 412; 50 Am. Rep. 689.

It is also claimed by the appellants that even though the original taking by the sheriff was wrongful, if the property was afterwards seized upon valid process against the owner, and its proceeds applied to his benefit, such facts could have been proved by the defendants in mitigation of damages. No such questions, however, are presented by any exception or request made in the case. This defense was not set up in the answer, or attempted to be proved by evidence. The facts in evidence in the case are not only very far from establishing any such defense, but they positively overthrow it. Such a defense in any action can arise only when the general property in the goods still remains in the debtor, and the application of the proceeds is made for his benefit: See *Hanmer v. Wilsey*, 17 Wend. 92; *Roberts v. Stuyvesant Safe Dep. Co.*, 123 N. Y. 57; 20 Am. St. Rep. 718.

Here, however, so far as the assets are concerned, it is conclusively proved that the assignee was the owner of the property, and it is uncontradicted that the proceeds of the property were never appropriated to his use or benefit. It is, however, quite unnecessary to discuss this aspect of the case, as it is not in any way presented by the record.

The defendants' counsel requested the court to be permitted

to go to the jury on the facts, but he omitted to state what facts he supposed they had a right to consider. We are now unable to see any evidence upon which he was entitled to ask for a verdict.

The judgment should therefore be affirmed.

SHERIFFS — LIABILITY OF INDEMNITORS OF. — This question is discussed in a note to *Ives v. Jones*, 40 Am. Dec. 425-427.

JUDGMENT AGAINST PRINCIPALS AS EVIDENCE AGAINST SURETIES: See extended note to *Charles v. Hoskins*, 83 Am. Dec. 380-390; extended note to *Robinson v. Baskins*, 22 Am. St. Rep. 205-207.

MULLIGAN v. NEW YORK AND ROCKAWAY BEACH RAILWAY COMPANY.

[129 NEW YORK, 506.]

RAILWAY CORPORATION IS NOT LIABLE FOR THE ACT OF A TICKET AGENT in directing the arrest of a person from whom such agent had received for tickets a bill believed by him to be counterfeit, where he acted at the suggestion of a police-officer, and for the purpose of apprehending the person whom he believed to be engaged in the commission of a crime. It was not within the line of his duty to receive money which he believed to be counterfeit and worthless; and in what he did he acted in his personal capacity, and not as the agent or servant of the railway corporation.

CARRIER'S DUTY TO PROTECT PASSENGERS. — A common carrier, by his contract of transportation, undertakes to protect the passenger against any injury arising from negligence or willful misconduct of his servants while engaged in performing a duty which the carrier owes to him.

CARRIER OF PASSENGERS IS NOT LIABLE FOR UNLAWFUL ARREST OF A PASSENGER while in its depot, at the instance of a ticket agent, on a charge of passing counterfeit money, when it does not appear that the passenger was in the custody or under the protection of the ticket agent, or that the latter was intrusted with any powers with respect to the execution of the contract for the transportation of passengers.

ACTION to recover for unlawful imprisonment. Judgment in favor of the plaintiff in the trial court was affirmed at the general term, and the motion for a new trial denied.

E. B. Hinsdale, for the appellant.

Charles J. Patterson, for the respondent.

O'BRIEN, J. The plaintiff recovered damages in this case upon an allegation that he was unlawfully arrested and imprisoned by the defendant. The legal question involved

relates to the responsibility of the defendant for the conduct of a ticket agent under the following circumstances: On the 10th of July, 1888, the plaintiff and a companion went to the defendant's station at the corner of Atlantic Avenue and Westa Street, Brooklyn, and procured from the ticket agent there two excursion tickets to Rockaway Beach. The plaintiff handed to the agent a new five-dollar bill in payment for the tickets, and received from him the tickets and the change. A very short time before the plaintiff and his friend appeared at the station and purchased the ticket, a detective connected with the Brooklyn police force came to the station and left with the agent the following paper:—

"Look out for three men passing five-dollar counterfeit bills, Garfield picture. One thirty-five years, blue coat, black slouch hat, small dark mustache; one forty years, dark alpaca coat, black pants, slouch hat; the other thirty-five years, blue suit, black slouch hat, full red whiskers, looks like Italian."

When the plaintiff and his companion came to the station, the ticket agent supposed they were two of the parties described in the notice left with him by the detective. The agent's statement as to what took place between himself and the detective before the plaintiff appeared at the station, and his action in consequence down to the time of the arrest, is not contradicted. The agent was told by the detective that if any of these men referred to in the paper put in an appearance to have the officers arrest them. He says that the two men walked up to the window of the ticket-office, and the plaintiff took a brand-new five-dollar bill from his pocket, and asked for two tickets for Rockaway Beach and return. What the agent then did is perhaps best expressed in his own language.

He says: "I took the money from him and gave him the two tickets; did n't let on anything at the time; took the bill and left it one side, because it looked 'queer.' After the two went outside, a messenger boy came in; I took the bill up before the messenger came; took a pin and pulled to find the two parallel silk threads that run through the bill; it appears, in all these kind of bills that are made with the distributor fibre through; it is like a pencil mark, red and blue; and when I picked at it I could not see anything in it, and as I have no instructions to arrest anybody, I took the bill, and when the messenger boy came in, I told him to take the bill, go up to the Howard House, and see if he could find Detective McNeany. If he did, to give him the bill and tell him that the

men who had the bill were here at the station. I told him that if he did n't find him to give it to the ticket agent at the Howard House, the detective said something about giving him the bill, and to ask him if that was the bill. I sent the bill away by this boy, the same bill that I received. Afterwards Officer Kenney and the messenger boy came in. The bill was not returned to me. I never had the bill after I gave it to the messenger boy."

It seems that in consequence of the action of the agent that the police arrived in a short time after the ticket had been purchased, and while the plaintiff and his companion were sitting on a bench outside, and, as the plaintiff claims, the agent pointed him out to the police and directed them to arrest him.

He was arrested and brought to the police court, when, it appearing that the bill was good, he was discharged. The transaction immediately preceding the arrest is thus described by the plaintiff:—

"I went in and handed him in a five-dollar bill to the ticket agent; asked him for two return tickets for Rockaway; he took the bill and looked at me; I thought that it was some young man that might have known me, he was going so slow, going to make the change and give me the tickets, and walked back in the rear of the office; there was an operator, a lady sitting there; he had some conversation with her, and in another corner was a boy,—in another corner of the room; he came back to me and looked at me again; I says, 'You ought to be in a little more hurry than that'; he did n't say a word, but handed me out the change and my return tickets,—the change of the five-dollar bill, which I think was four thirty, or whatever it was. Then we walked out on the platform, down on the Atlantic Avenue side, and sat on the bench of the station platform for ten or fifteen minutes, waiting for the train to come up. It is a regular platform; I think there is a porch over it. I did not have to pass through a gate to go to it."

After the plaintiff was pointed out to the police by the agent, he was brought into the ticket-office, and the agent then charged him with having passed to him a five-dollar counterfeit bill, which the plaintiff denied, but gave to the agent another bill in its place. The agent denied that he gave any direction to the police to make the arrest, and there was some question on the trial as to whether the bill that was actually passed by the plaintiff was the bill produced before the police magistrate, and found by him to be good; but these questions must be re-

garded as settled in the plaintiff's favor by the verdict of the jury.

Assuming, as we must, that the agent directed the arrest, and that the plaintiff had committed no offense that justified it, the question still remains, whether the agent was acting in the line of his duty, so as to make the defendant responsible for his acts. It is quite clear from the evidence that the agent was first put upon his guard, and in fact set in motion, not by any direction from the defendant, but by the police. When he took the bill, he knew, or at least believed, it to be a counterfeit, but notwithstanding this, he gave the plaintiff defendant's property for it, whereas it was his duty, considering him merely as the agent of the defendant, to refuse it. He did not take the bill in the course of his business as agent, but for the purpose of entrapping persons that he believed to be engaged in the commission of crime. This may have been laudable enough on his part as a citizen, or as a person aiding the police, but he was not acting in the line of his duty as defendant's agent. If he had been cheated or imposed upon by the plaintiff, or if he honestly believed he had been, and then attempted to recover what he had or supposed he had lost by the arrest of the plaintiff, it might then be said that he was engaged in the protection of the property and interest of the defendant, and therefore acting within the line of his duty. But here a ticket-agent of a railroad deliberately takes from a person applying to purchase a ticket what he believes to be a counterfeit five-dollar bill, not, of course, in good faith, or in the regular and ordinary course of his business, but for the purpose of aiding the police in the detection of criminals, and then immediately directs the arrest of the person from whom he took the bill; such an act on his part is not binding on his principal. If he was in fact acting within the scope and in the line of his duty, he would have refused to receive what he believed to be counterfeit money for the property of his principal, and would have refused to part with such property, except upon receipt of what, at least, he believed to be good money. The defendant, as a citizen, might, with perfect propriety, render to the police such services as he could in procuring the detection and arrest of persons engaged in passing counterfeit money, but it does not follow that all his acts in that respect are binding on the defendant. The charge, therefore, that the defendant procured the plaintiff to be arrested

without cause was not made out, as the act of the ticket agent in this respect cannot be attributed to them.

The remaining question is, whether it was shown that the defendant is liable for a breach of its contract with the plaintiff as a passenger, or for neglect of any duty it owed to him, growing out of the relation of passenger and carrier. The law is settled that a common carrier, by its contract of transportation, undertakes to protect the passenger against any injury arising from the negligence or willful misconduct of its servants while engaged in performing a duty which the carrier owes to him: *Stewart v. Brooklyn & C. R. R. Co.*, 90 N. Y. 588; 43 Am. Rep. 185.

Upon the facts disclosed by the record, it is very difficult to bring this case within that principle. All we know with respect to the duties of the agent is, that he sold tickets at the station from a place behind a window in the waiting-room. It does not appear that he had any charge of the place where the plaintiff was when arrested, or that the plaintiff was, within the meaning of the decisions, in his custody or under his protection, or that the ticket agent was intrusted by the defendant with any powers or duties with respect to the execution of contracts for the transportation of passengers. Upon the facts disclosed at the trial, it would be quite difficult, if not impossible, to classify the act of the agent, in pointing out the plaintiff to the police and directing his arrest, as negligence or willful misconduct. There can be no doubt that a conductor, or like agent of a carrier of passengers, who has them in his charge and under his care, may violate the duty which he owes to them by directing an arrest without cause, for which his principal may be held liable, but sufficient was not shown in this case to bring it within that rule.

The judgment should be reversed and a new trial granted, costs to abide the event.

JUSTICES EARL and FINCH joined in a dissenting opinion, written by the former, in which it was argued that while the plaintiff was waiting for his train he was entitled to a safe place in which to sit, and the carrier was under obligation to protect him from injury from the careless or willful misconduct of its agents or servants: *Carpenter v. Boston etc. R. R. Co.*, 97 N. Y. 494; 49 Am. Rep. 540; *Hamel v. N. Y. & B. F. Co.*, 125 N. Y. 707; *Stewart v. Brooklyn etc. R. R.*, 90 N. Y. 588; 43 Am. Rep. 185; *Doinelle v. N. Y. C. & H. R. R.*, 120 N. Y. 117; *Hamilton v. T. A. R. R.*, 53 N. Y. 25; that it was not material what the ticket agent's motives were, and that no question was made at the trial as to the extent of his authority; that he was, in all the evidence

and proceedings in the trial court, spoken of and treated as the agent in charge of the train where the arrest was made.

RAILROAD COMPANIES — LIABILITY TO PASSENGERS FOR ACTS OF SERVANTS. — One of the obligations that a carrier assumes is that of protecting its passengers against insult or injury caused by the misconduct of its servants: *Duvalle v. New York etc. R. R. Co.*, 120 N. Y. 117; 17 Am. St. Rep. 611, and note; *Louisville etc. R. R. Co. v. Ballard*, 85 Ky. 307; 7 Am. St. Rep. 606, and note. A railway company is liable for the false imprisonment of a passenger, caused by one of its gate-keepers: *Lynch v. Metropolitan etc. R'y Co.*, 90 N. Y. 77; 43 Am. Rep. 141. As to the liability of a railroad company for the act of its ticket agent in causing the arrest of a person for passing counterfeit money, see note to *Chicago etc. R. R. Co. v. Flannan*, 42 Am. Rep. 38. A street-railway company is liable for the unlawful arrest of a passenger on a charge made by one of its drivers that the passenger had passed counterfeit coin: *Lafitte v. New Orleans etc. R. R. Co.*, 43 La. Ann. 34.

ROMAINE v. CHAUNCEY.

[120 NEW YORK, 566.]

ALIMONY IS AN ALLOWANCE for support and maintenance, having no other purpose and providing for no other object. Like the *alimentum* of the civil law; from which the word was evidently derived, it respects a provision for food, clothing, and habitation; or the necessary support of a wife, after the marriage bond has been severed, and when sued for, it is not so much in the nature of the payment of a debt as in that of the performance of a duty.

ALIMONY IS NOT STRICTLY A DEBT due to a wife, but rather a general duty of support, made specific and measured by the court.

CREDITOR'S BILL TO REACH ALIMONY AWARDED TO A DIVORCED WIFE, and to apply it in payment to a debt existing before such award was made, cannot be sustained.

ACTION by the plaintiff in his capacity of receiver, appointed in supplemental proceedings under a judgment and execution against Maria L. Chauncey, to reach funds alleged to be in the hands of her former husband, Michael Chauncey. He did not have any money or property belonging to her, except that, by a decree of divorce against him and in her favor, he had been directed to pay her \$350 monthly, as alimony. The judgment under which the supplementary proceedings were prosecuted was recovered more than four years before the decree of divorce awarding alimony was rendered. A demurrer to the plaintiff's complaint was overruled by the trial court, but on appeal to the general term, the action of the trial court was reversed, and an order made sustaining the demurrer, and directing final judgment in favor of the defendants, unless an

appeal should be taken within sixty days. The plaintiff thereupon appealed.

George V. N. Baldwin, for the appellant.

Noel Gale, for the respondents.

FINCH, J. This case presents an interesting question which we are called upon for the first time to decide. There are no direct and conclusive precedents to be followed, no explicit and specific statutes coming with an appropriate direction, but only a broad general rule on the one side, and a just and strong necessity for an exception to it on the other. The question is, whether alimony, awarded to an innocent wife by a court of equity as incidental to a decree of divorce in her favor, can be appropriated by her creditor to the discharge of a debt contracted by her, and actually subsisting prior to the date of the decree. The question was different in *Stevenson v. Stevenson*, 84 Hun, 157, cited as a pertinent authority, for in that case the decree of divorce was granted in 1855, and the creditor's judgments obtained in 1880. A debt contracted by the wife after the decree, presumably for her support, and with natural reliance upon the alimony by the creditor as the means of payment, stands upon a very different footing from a debt of the wife contracted prior to or during the marriage and before its judicial dissolution. In the latter case, two new elements enter into the question: one, the imposition of an unfounded duty on the husband; and the other, a perversion of the decree from its definite and intended purpose, and from that authorized by the law.

Alimony, as we all understand, is an allowance for support and maintenance, having no other purpose and provided for no other object. Like the *alimentum* of the civil law, from which the word was evidently derived, it respects a provision for food, clothing, and a habitation, or the necessary support of the wife, after the marriage bond has been severed; and since what is thus necessary has more or less of relation to the condition, habit of life, and social position of the individual, it is graded in the judgment of a court of equity somewhat by regard for these circumstances, but never loses its distinctive character. If sometimes, as the appellant claims, regard is had to the brutal and inhuman conduct of the husband (*Burr v. Burr*, 10 Paige, 20), it serves only to make the court less considerate of his situation, and more liberal in its view of

the necessities of the wife. Thus the prevailing rule in this country is said to be, that where the wife has sufficient means to support herself in the rank of life to which she belongs, no alimony will be allowed: 1 Am. & Eng. Ency. of Law, 485; and where the parties are living apart, under an agreement of separation, by the terms of which the husband has provided adequate means of support, no temporary alimony will be given: *Collins v. Collins*, 80 N. Y. 1. And when awarded, it is not so much in the nature of a payment of a debt as in that of the performance of a duty. During the marriage, the husband owes to the wife the duty of support and maintenance, although owing her no debt in the legal sense of the word; but under the modern statutes, he does not owe to her the duty of paying her debts contracted before the marriage or thereafter, if they are solely hers, and not at all his. The divorce, with its incidental allowance of alimony, simply continues his duty beyond the decree, and compels him to perform it, but does not change its nature. The divorce and consequent separation are wholly his own fault, and do not relieve him from the continued performance of the marital obligation of support. The form and measure of the duty are indeed changed, but its substance remains unchanged. The allowance becomes a debt only in the sense that the general duty over which the husband had a discretionary control has been changed into a specific duty, over which, not he, but the court, presides. The authorities, therefore, cited to the effect that alimony is not strictly a debt due to the wife, but rather a general duty of support, made specific and measured by the court, seem to me to be well founded: *Wallingsford v. Wallingsford*, 6 Har. & J. 485; *Daniels v. Lindley*, 44 Iowa, 567; *Burr v. Burr*, 7 Hill, 207; *Guenther v. Jacobs*, 44 Wis. 354; *Crain v. Cavana*, 62 Barb. 109; *Jordan v. Westerman*, 62 Mich. 170. And so it follows that, as during the marriage, the husband, while bound to support the wife, was not bound to pay her pre-existing or separate debts, so, after the divorce, he must continue the support, but is not required to pay out of his means furnished for that purpose the wife's antecedent debt. The decree cannot logically work the miracle of transforming the duty which he does owe into one which he does not and never did owe; and yet that result is inevitable if the antecedent creditor is at liberty to swoop down upon the provision and carry it away for his own use.

That result accomplishes another thing. It perverts and

nullifies the decree of the court, and leaves the judgment specifically made for one purpose to operate wholly for another, and so obstruct and destroy the humane intent of the law. There is no doubt, of course, that the wife's right to alimony comes from the statute and not from the common law. If that proposition needed the aid of a full and historical argument in its support, such has already been furnished by this court: *Erkenbrach v. Erkenbrach*, 96 N. Y. 456. We must look then to the provisions of the Code of Civil Procedure, which has recast and reproduced the terms of the previous statutes, to see when and for what purpose alimony may be allowed. Section 1769 regulates the temporary alimony which may be awarded *pendente lite*. The terms of the provision are, that in an action for an absolute divorce or for a separation, the court may, in its discretion, make orders requiring the husband to pay any sum or sums of money necessary to enable the wife to defend the action, or to provide suitably for the education and maintenance of the children of the marriage, or for the support of the wife, having regard to the circumstances of the respective parties. It seems to me impossible to misunderstand the force or meaning of that provision. Its palpable purpose is to enable the wife to prosecute her suit, and save her from starvation or beggary during the process. Is it conceivable that the court making such order is bound to stand silent and submissive while the whole scope and purpose of its provision is perverted and nullified? If that be so, the law of divorce has no help or remedy for the injured wife who happens to be in debt. She cannot hire counsel or feed herself and her children pending the litigation, because her pre-existing creditor seizes the humane provision at the moment it is made. The court might as well not make it at all, and simply say there is no divorce or defense for an indebted wife. Undoubtedly, in such a known state of the law, the court would find some way of making its order effective, as perhaps by interposing a trustee in behalf of the wife, but no one has ever yet supposed that such a safeguard was needed. And why should it be? The antecedent creditor has no equity against the fund; the husband is not bound to furnish it for such creditor's benefit, nor the wife to accept it under a rule which gives her a stone when she asks for bread. And of such character has the allowance of temporary alimony been considered that an assignment of it by the wife to her solicitor as compensation for his services has been disregarded and set aside, as being a misappropriation of

a fund awarded for a special purpose: *Jordan v. Westerman*, 62 Mich. 170.

Similar considerations pertain to section 1759 of the code, which regulates permanent alimony. The second subdivision is this: "The court may, in the final judgment dissolving the marriage, require the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of the plaintiff as justice requires, having regard to the circumstances of the respective parties." Thus the court may require the husband to provide for the support of the wife, but may not require him to furnish a fund for the payment of her debts. He never stood under that obligation, and the decree of divorce cannot impose it. He has a right to insist that his allowance shall not be diverted to a use for which he did not in fact supply it, and was under no obligation to supply it, and to resist, as he stands here resisting, a claim upon it which, as against him, is wholly unauthorized, and a complete perversion both of the decree and of his duty. The plaintiff, in his character of receiver for the judgment creditor, comes into a court of equity in pursuit of equitable relief, into the same court which devoted the fund to the support of the wife, and should decently respect its own authority, and asks the aid of that tribunal to practically nullify its decree, to abandon its humane purpose, to join in an indirect robbery of the husband, to pervert his allowance to an end which he never sanctioned and was not bound to sanction, and to disregard the public policy which seeks to protect wife and children from the pauper's necessity and fate; and he asks this without a pretense of special equity against the fund, and solely on the basis of a hard legal right. I have only to say that I think equity ought not to give him that aid, but that, having both the power and the opportunity to prevent the perversion of its purpose and to make effective and protect its own decree, it should avail itself of that opportunity and exercise that power by the simple process of refusing its assistance. Under some circumstances, the court might be troubled to compel respect for its purpose and prevent a perversion of its order; but there is no such difficulty where the wrong cannot be done except by the consent and with the active participation of the court. We have a right to refuse our assistance, not merely because the equities are balanced, but because those of the defendants are superior and ought to prevail.

I can see the possibility and realize the plausible force of

one criticism upon this view of the subject; and that is, that there is a legal judgment which cannot be satisfied by execution, and the creditor has a right to pursue in equity the debtor's equitable assets, and the court has no right, upon some sentimental view of the subject, to withhold its aid. Exactly all that is true; but it assumes the precise point of the dispute, that the wife's alimony is an equitable asset, liable generally as property to the payment of her debts. It is property in one sense, but not in the broad general sense of the term. It is a specific fund provided for a specific purpose, with restraint and limitation written all over its face by the very law and decree which brought it into existence. And here I think we may wisely avail ourselves of one of the analogies which the general term opinion has furnished for our use. Policies of life insurance in favor of the wife on the life of the husband we have persistently held to be non-assignable: *Eadie v. Slimmon*, 26 N. Y. 9; 82 Am. Dec. 395. We determined that their peculiar character and purpose necessarily took from them the chief and most important characteristic of property in general. As I read the later case of *Baron v. Brummer*, 100 N. Y. 372, we distinctly held "that such policies should not be subjected to the lien of creditors, either of husband or wife; as to the former, by the express words of the statute, and as to the latter, by the determination of the courts." We took from them the transferable characteristic of property as such, and tied them closely to their lawful object and purpose. The argument made now would convict us of error then. Alimony allowed by an order is, in one sense, a debt due and to become due to the wife, and her property. In the same sense, a life policy is a debt to become due, or due as to its dividends, and is property in the hands of the assured. The whole force of the argument lies in steadily ignoring the quality and character of the property, and treating it as ordinary and general assets. The appellant's criticism upon this analogy is, that the doctrine as to life insurance policies was dictated by the act of 1840, and rested specially upon the provisions of that act. So much is undoubtedly true, but does not at all disturb the analogy, for in the present case the similar construction is dictated by the statutes of divorce, and is derived from the character of their provisions. In both cases, a thing which might have had the general and ordinary characteristics of property, transferable by sale and liable to creditors, is taken out of that broad category by the terms of the statutes, whose obvious purpose

and aim require a restriction and limitation to which property in general is not subjected. This class of cases indicates that the question is not one of exemptions, but of the right of creditors to a particular fund, which fund, created by equity, should have the protection of equity. It does not, therefore, answer the view we have taken of the duty of the court in this case to appeal to the general law of property, and the general duty of the court in respect thereto. The question concerns a species of property of a peculiar and specific character, created and existing for one purpose only, and whose express limitations take it out of the general rule.

The doctrine which I have here invoked, that a court of equity, when applied to for its active assistance in the enforcement of a claim founded upon a bare legal right, will refuse its aid where granting it would work injustice, or would impose conditions calculated to mitigate or remove the injustice, has been repeatedly asserted under the old law, which permitted the husband to reduce to his possession and become the owner of the wife's personal property. In such cases, equity, not denying the legal right, has yet invariably limited and qualified it by recognizing and protecting the wife's equity, not only against the husband, but against his assignee or judgment creditor. In *Smith v. Kane*, 2 Paige, 303, the chancellor did not hesitate, where the wife's property was less than was needed for her support, to refuse relief entirely, and dissolve the injunction. This class of cases is pertinent only upon the right of the court to withhold its aid where the legal claim, however valid, is wielded to effect a wrong. The equity of the husband in the present case to prevent a perversion of his allowance to an unlawful purpose is entirely clear; that of the wife, to receive it under the decree for the specific purpose which led to its award, I think also should prevail over the creditor's claim. During the marriage, he had no right, legal or equitable, against her support furnished by the husband, and after its dissolution, without her fault, she ought not to be put in a worse condition. When to these equities are added the duty of the court to control and make effectual its own decree, and the public policy in which its provision is founded, it seems to me that no doubt is left as to the right of the court to dismiss the creditor, and refuse him the relief he asks.

The judgment of the general term should be affirmed, with costs.

MARRIAGE AND DIVORCE — ALIMONY — WHAT IS. — Alimony is an allowance made to a woman on a decree of divorce for her support out of the estate of her husband: *Adams v. Storey*, 135 Ill. 448; 25 Am. St. Rep. 392, and note; note to *Buckminster v. Buckminster*, 88 Am. Dec. 659; extended note to *Methvin v. Methvin*, 60 Am. Dec. 665-682.

MARRIAGE AND DIVORCE — ALIMONY. — A wife cannot contract a debt with respect to an allowance for alimony in advance of the decree of divorce: *Jordan v. Westerman*, 62 Mich. 170; 4 Am. St. Rep. 836.

CROSDALE v. LANIGAN.

[129 NEW YORK, 604.]

STATUTE OF FRAUDS. — PAROL LICENSE TO BUILD AND MAINTAIN A WALL ON the land of another, though fully executed, is revocable, and therefore equity will not enjoin the removal of such wall by the land-owner.

SPECIFIC PERFORMANCE cannot be enforced in equity of a parol contract for an interest in land, unless such contract is definite and certain in all its parts.

ACTION to enjoin the tearing down of a stone wall. Judgment in favor of the plaintiff in the trial court was affirmed at the general term.

Lawrence T. Jones, for the appellant.

M. M. Waters, for the respondent.

ANDREWS, J. This case presents a question of importance from the principle involved, although the particular interest affected by the decision is not large.

The action was brought to obtain equitable relief by injunction to restrain the defendant from tearing down a stone wall erected on the defendant's land by the plaintiff, under an alleged parol license from the defendant, and in the erection of which the plaintiff expended, in labor and materials, a sum exceeding one hundred dollars. The parties are the owners of adjoining lots fronting upon a public street. The plaintiff's lot is west of the lot of the defendant. The land, in its natural state, descended toward the east. In 1886, the plaintiff graded his lot, and in so doing raised an embankment several feet high along his eastern line, adjacent to the lot of the defendant, and erected a house on his lot. In 1887, the defendant graded his lot, and excavated the earth up to his west line, adjacent to the embankment on the plaintiff's lot, to the depth of four or more feet, thereby removing the natural support to the lot of the plaintiff as it was in its original state.

Before the defendant had completed his excavation, the parties had an interview, and the question of the support of the plaintiff's embankment arose. The plaintiff claimed that the defendant was bound to build a wall where his excavation was. The defendant denied his obligation to do so, and referred to the fact that the plaintiff had raised his land several feet higher than it was in its natural state. The plaintiff wanted the defendant to sell him two feet of his land to build a wall upon, which the defendant declined to do.

Both parties agree that the wall was spoken of. The plaintiff testified that nothing was said between them as to what kind of a wall the plaintiff would build, nor as to its height, dimensions, or quality. The defendant, on the other hand, testified that the plaintiff stated he would build a wall laid up in mortar, pointed on the side facing the defendant's (proposed) house, and cement it on the top with Portland cement. Some days after the interview, and on the thirteenth day of April, 1887, the defendant addressed a letter to the plaintiff, in which, after referring to their previous interview, he said: "While perfectly satisfied that I am justified in grading my lot as far as I have done, and that if, at any time, your embankment should topple over on my land, that I could claim damages, yet, perhaps, I was a little hasty and somewhat unreasonable with you the other night, and although I came away fully determined to stand on my rights and keep every inch of ground that belonged to me, since then I have thought the matter over seriously, put myself in your place, so to speak, and decided to give you two feet asked for to build your wall on." The plaintiff, on the same day, replied in writing, saying: "I will be glad to accept your offer in the spirit in which it was given, and thus end a disagreement, etc. I expect to go to work immediately to build the wall, and will go as far into my bank as is consistent with its safety. I will also modify as much as I can the grade of the bank along the side and the front." The plaintiff thereupon proceeded to build a wall on the defendant's land, the building of which occupied four or five days. He first made a contract with a mason to build a mortared wall, and lime and sand were drawn upon the place to be used therefor. But for some reason he changed his mind, and he built the wall of "flat, ordinary building-stone, not hewn into shape, and not packed into regular courses, nor dressed at all," and without mortar or cement. The wall was ninety feet in length, two feet or less in width, and four

to six feet high. It does not appear that the defendant saw the wall during the course of its construction, except that he was upon the lot on one occasion when the foundation was being laid, nor does it appear that he knew that the wall was to be laid up loose, or at any time consented to the erection of such a wall as was constructed. Within two weeks after the wall was completed, he notified the attorney for the plaintiff, who, at the request of his client, had written him demanding a deed of the two feet, that he had not agreed to give a deed, and that the wall was not built according to the understanding, and that he intended to tear it down.

This case was tried and decided upon the theory that the plaintiff had a license from the defendant to build the wall on his land, which, when executed, became in equity irrevocable. It was not claimed on the trial, nor is it now claimed, that there was any contract on the part of the defendant to sell the land occupied by the wall to the plaintiff, which, by reason of part performance, equity will enforce. The claim and the finding is, that the license to enter upon the defendant's land, when acted upon by the plaintiff, conferred upon him a right in equity, in the nature of an easement, to maintain the wall on the defendant's lot. If this claim is well founded, there has been created, without deed and in violation of the statute of frauds, an interest in the plaintiff and his assigns in the land of the defendant, impairing the absolute title which he theretofore enjoyed, and subjecting his land to a servitude in favor of the adjacent property. It is quite immaterial in result that this interest claimed, if it exists, is equitable, and not legal. An encumbrance has been created upon the defendant's lot, and his ownership, to the extent of such interest, has been divested.

We are of opinion that this judgment is opposed to the rule of law established in this state. There has been much contrariety of decision in the courts of different states and jurisdictions. But the courts in this state have upheld with great steadiness the general rule that a parol license to do an act on the land of the licensor, while it justifies anything done by the licensee before revocation, is, nevertheless, revocable at the option of the licensor, and this, although the intention was to confer a continuing right, and money had been expended by the licensee upon the faith of the license. This is plainly the rule of the statute. It is also, we believe, the rule required by public policy. It prevents the burdening of lands

with restrictions founded upon oral agreements easily misunderstood. It gives security and certainty to titles, which are most important to be preserved against defects and qualifications not founded upon solemn instruments. The jurisdiction of courts to enforce oral contracts for the sale of land is clearly defined and well understood, and is indisputable; but to change what commenced in a license into an irrevocable right, on the ground of equitable estoppel, is another and quite different matter. It is far better, we think, that the law requiring interests in land to be evidenced by deed should be observed, than to leave it to the chancellor to construe an executed license as a grant, depending upon what, in his view, may be equity in the special case. There are several circumstances in the present case which render the enforcement of such a jurisdiction a dangerous precedent. The only license claimed is contained in the letter of April 13th. The language is: "I have decided to give you the two feet you asked for to build your wall on." How far the wall was to extend, its character, or how it was to be built, is not stated. Referring to the previous interview to which the letter alludes, the evidence of the plaintiff of what was said at the interview leaves the whole matter indefinite and uncertain. He testifies that neither the description, dimensions, and character of the proposed wall were spoken of. The testimony of the defendant is to the contrary, but perhaps it is to be assumed that the trial judge adopted the testimony of the plaintiff.

Upon the case made by the plaintiff upon the letter and the prior conversations, if it was a case of contract, it is difficult to see how it could be enforced in equity. The cases are decisive that equity will only enforce a parol contract for an interest in land when the contract is definite and certain in all its parts. The extent of the injury which will be suffered unless equity intervenes is also an element to be considered when its extraordinary jurisdiction is invoked. Here the amount expended by the plaintiff in reliance upon the license was comparatively small. The most reasonable inference is, that the plaintiff confided in the good faith of the defendant as his security that the wall would be permitted to remain. It does not appear that anything was said as to the time it should be maintained. It is claimed that the wall was built for the benefit of both parties. This is founded on the assumption that the defendant's excavation removed the natural support

of the plaintiff's land, and subjected him to liability. But this would not take the case out of the statute, nor authorize the interference of equity to enforce the license as a grant in equity. The same element of common benefit is found in the case of *Cronkhite v. Cronkhite*, 94 N. Y. 323.

The trial judge refused to find the facts as to the effect which would have followed from the defendant's excavation in case the plaintiff's land had continued in its natural state. He tried and decided the case on the theory that the license when executed became irrevocable. In this we think he erred. The cases of *Mumford v. Whitney*, 15 Wend. 380, 30 Am. Dec. 60, *Wiseman v. Lucksinger*, 84 N. Y. 31, 38 Am. Rep. 479, and *Cronkhite v. Cronkhite*, 94 N. Y. 323, are, we think, decisive of this action.

The judgment should be reversed.

LICENSE — PAROL — REVOCATION. — A parol license, granted without consideration, is revocable at pleasure: *Wheelock v. Noonan*, 108 N. Y. 179; 2 Am. St. Rep. 405, and note. A license by the owner of land to an adjoining proprietor to join fences with him is revocable: *Houx v. Seat*, 26 Mo. 178; 72 Am. Dec. 202. A parol license to build a house on the land of another, though executed, is revocable, because it is within the statute of frauds: *Prince v. Case*, 10 Conn. 375; 27 Am. Dec. 675, and note; *Johnson v. Skillman*, 29 Minn. 95; 43 Am. Rep. 192, and note; note to *Hamelton v. Putnam*, 54 Am. Dec. 166; extended note to *Rerick v. Kern*, 16 Am. Dec. 501-506; extended note to *Ricker v. Kelly*, 10 Am. Dec. 40-45. A parol license to enter the lands of another is revocable, though the licensee has entered and expended money under the license: *Richmond etc. R. R. Co. v. Durham etc. R'y Co.*, 104 N. C. 658; *Hodgkins v. Farrington*, 150 Mass. 19; *Bucher v. Bowden*, 83 Me. 67.

A license given by a land-owner to build a levee on his lands for the purpose of protecting the land from overflow is not revocable after the levee has been built: *Grimshaw v. Belcher*, 88 Cal. 217; 22 Am. St. Rep. 298. Where money has been expended by a licensee on the strength of his license it becomes irrevocable: *Ferguson v. Spencer*, 127 Ind. 66; *Curtis v. La Grande Water Co.*, 20 Or. 34; *Pierce v. Cleland*, 133 Pa. St. 189; *Olmstead v. Abbott*, 61 Vt. 281.

SPECIFIC PERFORMANCE — CERTAINTY REQUISITE FOR. — A bill in equity for specific performance is demurrable where it is not certain in all its parts: *Iron Age Pub. Co. v. Western U. Tel. Co.*, 83 Ala. 498; 3 Am. St. Rep. 758, and note. Specific performance of a parol contract will not be enforced unless it is established by competent proof to be clear, definite, and certain in all its parts: *Hamelton v. Putnam*, 2 Pinney, 107; 54 Am. Dec. 158. As to the certainty in contracts requisite for specific performance, see extended note to *Atwood v. Cobb*, 28 Am. Dec. 661-671. Where the terms of a contract are indefinite it cannot be specifically enforced: *Holliday v. Hubbard*, 45 Minn. 233; *Preston Nat. Bank v. Purifier Co.*, 84 Mich. 364; *Gallagher v. Gallagher*, 31 W. Va. 9; *Smith v. Taylor*, 82 Cal. 533; *Potter v. Hollister*, 45 N. J. Eq. 508; *Nelson v. Kelly*, 91 Ala. 569.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

HORNTHAL v. BURWELL.

[108 NORTH CAROLINA, 10.]

CONFLICT OF LAWS — CHATTEL MORTGAGE — ATTACHMENT. — If a mortgagor of personal property situated in one state, in which the mortgage is duly recorded, retains possession and carries the property into another state, where he is a non-resident, and where the property is attached and sold under judgments obtained against him by his creditors in that state, the mortgagee is entitled to recover the value of the mortgaged property sold from such judgment creditors, in the state where the mortgage was executed and recorded, although the mortgage was void as to them in the other state, because not recorded there.

ATTACHMENT, STRICTLY SPEAKING, IS NOT A PROCEEDING IN REM, and the judgment obtained therein is conclusive only upon the actual parties and their privies.

ACTION to recover the value of certain horses, mules, oxen, log-wagons, and other property. The property in question was owned by one Moore in North Carolina, who, being indebted to the plaintiffs there, gave them a chattel mortgage on the property, which was recorded in the proper county. Moore, being engaged in the lumber business, retained possession of the property, and took it with him, in the prosecution of his business, into Virginia, where the mortgage was not recorded, and where the creditors of the mortgagor seized the mortgaged property under attachments, and obtaining judgments, sold it in satisfaction of their debts. By the law of Virginia, chattel mortgages are void against creditors except from the date when recorded. This action was brought against the judgment creditors of the mortgagor, to recover the value of the mortgaged property sold by them. Defendants claimed by

demurrer that, upon the facts stated, plaintiffs were not entitled to recover. The demurrer was overruled, and defendants refusing to answer, judgment was rendered for plaintiffs, and defendants appealed.

B. B. Winborne, for the appellants.

C. L. Pettigrew, for the respondents.

SHEPHERD, J. The principle embodied in the maxim, *Mobilia sequuntur personam*, is generally recognized in all civilized countries, and it follows, as a natural consequence, says Story (Conflict of Laws, 383), that "the laws of the owner's domicile (or the *lex loci contractus*) should in all cases determine the validity of every transfer, alienation, or disposition made by the owner, whether it be *inter vivos* or be *post mortem*." The authority of such laws, however, is admitted in other states, not *ex proprio vigore*, but *ex comitate*, and hence it is now very generally held that when they "clash with and interfere with the rights of the citizens of the countries where the parties to the contract seek to enforce it, as one or the other of them must give way, those prevailing where the relief is sought must have the preference": *Oliver v. Townes*, 14 Mart. (La.) 93; 2 Kent's Com. 458; *Moye v. May*, 8 Ired. Eq. 131. This is illustrated by the leading case first cited, where a ship was sold in Virginia, and was, before delivery, attached by creditors at New Orleans. The court held the sale void as to the attaching creditors, because the law of the *situs* required an actual delivery to pass the title.

So in the case of *Green v. Van Buskirk*, 7 Wall. 139, an attachment in Illinois was sustained as against a mortgage executed by the owner in New York, but not registered in Illinois, where the property was situated. The laws of that state provided that the mortgage should be "void as against third persons unless acknowledged and registered, and unless the property be delivered to and remain with the mortgagee. This principle, however, has no application to a case like ours, where the mortgage was executed and duly registered according to both the law of the domicile and the law of the *situs*. The property was situated in this state, and the title of the mortgagees perfected here. This being so, we think it quite clear that the removal of the property to another state could not deprive the mortgagees of their rights.

In support of this position, there seems to be a consensus of judicial opinion. Even in Louisiana (whose courts were, per-

haps, among the most prominent in giving effect to the law of the *situs* as above explained), there has never been any doubt upon this question. On the contrary, in *Thurst v. Jenkins*, 7 Mart. (La.) 318, 12 Am. Dec. 508, it was held that where the title had passed, "the circumstance of the chattel being afterwards brought into a country, according to the law of which the sale would be invalid, would not affect it." The doctrine of this case has since been affirmed in *Southern Bank v. Wood*, 14 La. Ann. 554; 74 Am. Dec. 446.

To the same effect is *Langworthy v. Little*, 12 Cush. 109, where Shaw, C. J., says that "a party who obtains a good title to property, absolute or qualified, by the laws of a sister state is entitled to maintain and enforce those rights in this state." The property was attached in Massachusetts as the property of the mortgagor, and the sheriff was held liable for its conversion.

So in *Jones on Chattel Mortgages*, 301, it is said that "although the mortgage be not executed in conformity with the laws of the state to which the property is afterwards removed, if executed and recorded according to the laws of the state or country of its execution, it is effectual to hold the property in the state to which it is removed."

So in *Ballard v. Winter*, 39 Conn. 179, the supreme court of Connecticut sustained an action of trover against one of its own citizens for suing out attachment proceedings against property which had been mortgaged according to the law of Massachusetts, but which had been subsequently removed to the former state. The court said: "By the general rules of law, title thus perfected in one state is respected in all other states and countries into which the property may come. . . . It would certainly be very inconvenient if such mortgages fairly made in Massachusetts should be held invalid in Connecticut in respect to movable property which may be daily passing to and fro along the dividing lines between the states." This case is reported in 12 American Law Register, 759, and is highly approved by the annotator, who cites several authorities in its support.

The same point was decided by the supreme court of the United States in *United States Bank v. Lee*, 13 Pet. 107. There, certain property, being in Virginia, was conveyed in trust to Richard Bland Lee for the benefit of Mrs. Lee. The title passed according to the Virginia law, but the property being subsequently removed to the District of Columbia, where, un-

der a prevailing Maryland statute, such a transfer would not be good, except upon certain conditions which had not been complied with, the court (Catron, J.) said that "the statute had no reference to a case where the title has been vested by the laws of another state, but operates only on sales, mortgages, and gifts made in Maryland." The following authorities are also directly in point: *Hilliard on Mortgages*, 412; *Keenan v. Stimson*, 32 Minn. 377; *Ferguson v. Clifford*, 37 N. H. 86; *Jones v. Taylor*, 30 Vt. 42; *Rhode Island Central Bank v. Danforth*, 14 Gray, 123; *Martin v. Hill*, 12 Barb. 631; *Kanaga v. Taylor*, 7 Ohio St. 134; 70 Am. Dec. 62; *Wilson v. Carson*, 12 Md. 54; *Smith v. McLean*, 24 Iowa, 322; *Hicks v. Skinner*, 71 N. C. 539; 17 Am. Rep. 16; *Barker v. Stacy*, 25 Miss. 477; *Feurt v. Rowell*, 62 Mo. 524.

The defendants, however, contend that they are protected by the sale under the attachment proceedings in the Virginia court. They rely upon the case of *Green v. Van Buskirk*, 7 Wall. 139, and insist that, under the act of Congress, full faith and credit must be given to the judgments of the courts of a sister state. It is true that the decision referred to was chiefly based upon that statute; but it must be observed that the record of such an adjudication has only (we quote from the opinion) "the same faith and credit as it has in the state court from which it is taken"; and that, "in order to give due force and effect to a judicial proceeding, it is often necessary to show by evidence outside of the record the predicament of the property on which it operated." Such was the course pursued by the court in that case, and as we have seen that the title to the property had not passed according to the law of the *situs*, the attachment proceedings were sustained. If, however, it had appeared that at the time of the execution of the mortgage in New York, the property was also there, but had been afterwards removed to Illinois, it cannot be doubted that the decision would have been otherwise. Happily, we have a case directly in point from the supreme court of Illinois: *Mumford v. Canty*, 50 Ill. 370; 99 Am. Dec. 525. It is there distinctly held that "where personal property was mortgaged in the state of Missouri, and permitted to remain with the mortgagor (contrary to the law of Illinois) after the maturity of the debt to secure which the mortgage was given, and upon being subsequently brought into Illinois was seized under an attachment in favor of a *bona fide* creditor of the mortgagor, the rights of the mortgagee (would) be determined

by the law of Missouri," and the mortgagee was permitted to recover the property of the purchaser. Here, then, we have an express decision as to the effect which is to be given to such a judgment in the state in which it is rendered, and it is only to this extent, and no further, that the judgment is conclusive in a sister state. To hold otherwise would go beyond what the statute requires, and give the same effect to an attachment proceeding, which generally follows a proceeding which is strictly and technically *in rem*. Such is not the law. An attachment proceeding, though often spoken of as a proceeding *in rem*, "cannot be admitted to come within the strict meaning of that term. . . . The judgment is conclusive only upon the actual parties to the litigation and those in privity with them, . . . and they use the hold obtained by the seizure of specific property merely as a means of reaching and giving effect to the rights of parties, and neither claim nor exercise any controlling authority over the title of strangers. The same remark applies to replevin": 2 Black on Judgments, 801; Drake on Attachment, sec. 245; *Duchess of Kingston's Case*, 1 Leach C. C. 146; 1 East P. C. 468; 3 Smith's Lead. Cas. 2011. In his notes to the latter case, Judge Hare cites, with entire approval, the opinion of Hale, J., in *Woodruff v. Taylor*, 20 Vt. 65, in which it is said that the operation of such a proceeding "must be limited to the parties to it, and cannot in any manner affect the right or interest of any other person having an independent and adverse claim to the goods," etc.

Having shown, we think, that the title perfected here was not lost by the removal of the property to Virginia, and that the record of the judgment in the attachment proceeding is only to be respected in so far as effect is given to it in that state, we cannot but assume, in the absence of any decision to the contrary, that the same principle of comity, so universally recognized and acted upon, likewise prevails in Virginia, and that even if these plaintiffs were suing in that jurisdiction they would be permitted to recover. This would seem all the more reasonable, as we have extended this very comity to a citizen of our sister state in a case precisely similar to the one under consideration: *Anderson v. Doak*, 10 Ired. 295. There, a slave, being in Virginia, was mortgaged by its owner, and the mortgage duly registered in Carroll County. It was never registered in this state, nor was it executed according to its laws. The slave came to this state and was attached by a

creditor of the mortgagor. In an action of trover, brought by the mortgagee against the sheriff, the plaintiff was permitted to recover.

It will be noted that we have discussed this question as if the plaintiffs were seeking redress in the courts of Virginia. If we have shown that, according to what appears to be the entire course of judicial opinion, they would be entitled to recover there, *a fortiori* can they recover in the courts of this state when they have acquired jurisdiction over the parties.

To the foregoing authorities we will add a recent decision of the court of appeals of New York. In that case (*Edgerly v. Bush*, 81 N. Y. 190), B. executed to plaintiff a chattel mortgage upon a span of horses, both parties then residents of New York. B. subsequently took them to Canada, where they were sold by a regular trader dealing in horses, the purchaser buying in good faith. Under the laws of Canada, property cannot be reclaimed from one so purchasing without refunding the price paid. Defendant, a resident of this state, bought the horses in Canada from such purchaser, and they were left in Canada. Upon refusal of defendant to deliver them, the plaintiff sued for their conversion. The court held (Folger, C. J., delivering an elaborate opinion) that the plaintiff was entitled to recover.

We are of the opinion that his honor very properly overruled the demurrer; but he should have given the defendants an opportunity to answer: Code, sec. 272; *Moore v. Hobbs*, 77 N. C. 65; *Brunson v. Wilmington etc. Ins. Co.*, 85 N. C. 411.

Modified and affirmed.

CHATTEL MORTGAGE—CONFLICT OF LAWS.—Removal to another state of mortgaged chattels by the mortgagor subjects them to attachment by his creditors in the state to which they were removed: *Corbett v. Littlefield*, 84 Mich. 30; 22 Am. St. Rep. 681, and note. The doctrine of the leading case is sustained by *Kanaga v. Taylor*, 7 Ohio St. 134; 70 Am. Dec. 62, and extended note.

AM. ST. REP., VOL. XXVI.—26

BRUCE v. NICHOLSON.

[100 NORTH CAROLINA, 202.]

HUSBAND AND WIFE — ESTATE BY ENTIRETIES NOT SUBJECT TO CONVEYANCE, ENCUMBRANCE, OR JUDGMENT LIEN. — A conveyance of land in fee to husband and wife vests the title in them by entireties with the right of survivorship; and neither can convey or encumber the estate without the assent of the other, nor can the interest of either be sold, under judgment and execution against the other, so as to pass title during their joint lives, or as against the survivor after the death of one of them.

JUDGMENT LIEN — EXTENT OF. — The lien of a judgment does not vest in the judgment creditor any estate or interest in the real property subject to it. It extends to and embraces only such estate, legal and equitable, in the real property of the judgment debtor, as he could sell or dispose of at the time it attached, and creates, and during its continuance secures, the right of the judgment creditor to have his debt paid out of the proceeds of the sale of the property.

ENTIRETIES. — **JUDGMENT LIEN AGAINST HUSBAND DOES NOT EXTEND** to his contingent interest in an estate held by himself and his wife by entireties.

PRACTICE — PARTIES. — A junior judgment creditor is not entitled to become a party to an action to foreclose a prior mortgage, in order that he may attack it for fraud. His remedy is by separate action against the parties.

ACTION to foreclose a mortgage. The plaintiff, Bruce, was the holder of two mortgages executed by one Sugg and wife. All of the land covered by the mortgages was owned by Mrs. Sugg, except one tract which was owned by Sugg and wife under a joint deed to them. The defendants Nicholson and Sons were the judgment creditors of Sugg, and moved for leave to be made parties defendant, that their rights as judgment creditors might be protected. The motion was denied, and judgment given for plaintiff by consent of defendants Sugg and wife. Nicholson excepted and appealed.

O. M. Barnard, for the appellant.

T. F. Davidson, and Jarvis and Blow, for the respondent.

MERRIMON, C. J. The appellant's judgment is not against the *feme* defendant, who is the wife of her co-defendant, I. A. Sugg, nor do they seek to have her property — land — devoted to its satisfaction; it is against the defendant husband.

The land, except a small tract of four acres embraced by the mortgages of the plaintiffs, which they seek by this action to foreclose, is that of the *feme* defendant wife. The court so expressly finds and declares. The husband has no such interest in her land as is subject to levy and sale to satisfy the appellant's judgment. It does not appear that he is tenant

by the curtesy initiate, and if it did so appear, such interest could not be sold to satisfy the judgment. The statute (Code, sec. 1840) so expressly provides: Code, sec. 1838. As to this land, the appellant has no judgment lien to be enforced in or by this action.

The defendants, husband and wife, held the small tract of land conveyed to them, not as joint tenants or tenants in common, but by entireties. In contemplation of law, they were, for such purpose, but one person, and each had the whole estate as one person, and when one of them should die, the whole estate would continue in the survivor. They, by reason of their relations to each other, could not take the fee-simple estate conveyed to them by moieties, but both were seised of the entirety *per tout, et non per my*. This is so by the common law, and is the settled law of this state: *Motley v. Whitmore*, 2 Dev. & B. 537; *Long v. Barnes*, 87 N. C. 329; *Todd v. Zachary*, Busb. Eq. 286; *Simonton v. Cornelius*, 98 N. C. 433; *Harrison v. Ray*, 108 N. C. 215; 23 Am. St. Rep. 57; 2 Black, 182.

The nature of this estate forbids and prevents the sale or disposal of it, or any part of it, by the husband or wife without the assent of both; the whole must remain to the survivor. The husband cannot convey, encumber, or at all prejudice such estate to any greater extent than if it rested in the wife exclusively in her own right; he has no such estate as he can dispose of to the prejudice of the wife's estate. The unity of the husband and wife as one person, and the ownership of the estate by that person, prevents the disposition of it otherwise than jointly.

As a consequence, neither the interest of the husband nor that of the wife can be sold under execution so as to pass away title during their joint lives or as against the survivor after the death of one of them. It is said in Rorer on Judicial Sales, that "no proceeding against one of them, during their joint lives, will, by sale, affect the title to the property as against the other one as survivor, or as against the two during their joint lives. Neither party to such tenancy can sell or convey their (his) interest, for it is incapable of being separated." He cites many authorities to support what he thus says. Indeed, it seems that the estate is not that of the husband or the wife, it belongs to that third person recognized by the law, the husband and the wife. It requires the co-operation of both to dispose of it effectually: Rorer on Judicial Sales, sec. 549; Freeman on Cotenancy, secs. 73, 74; 4 Kent's Com. 362; *Simonton v. Cornelius*, 98 N. C. 433.

The statute (Code, sec. 435) prescribes that a docketed judgment, directing the payment of money, "shall be a lien on the real property in the county where the same is docketed of every person against whom any such judgment shall be rendered, and which he may have at the time of the docketing thereof in the county in which such real property is situated, or which he shall acquire at any time thereafter for ten years from the date of the rendition of the judgment."

The lien thus intended and created does not vest in the judgment creditor any estate or interest in the real property subject to it; it only creates and secures the right of the creditor to have the judgment debt paid out of the proceeds of the sale of the property, made under the ordinary process of execution, or other proper process or order of the court. The lien extends to and embraces only such estate, legal and equitable, in the real property of the judgment debtor as may be sold or disposed of at the time it attached. In *Bristol v. Hallyburton*, 93 N. C. 384, Justice Ashe, for the court, said: "A sale under an execution, upon a judgment which is a general lien on all the property of the debtor, vests only the interest of the debtor at the time the judgment lien attaches, or such as the debtor might have conveyed by suitable instrument for a valuable consideration. It is limited to and can rise no higher than that [the interest] of [the] debtor; a stream cannot rise higher than its fountain. A purchaser under an execution takes all that belongs to the debtor, and nothing more." It was hence said in that case, that a vested remainder in land might be sold under execution, but a contingent remainder could not: *McKeithan v. Walker*, 68 N. C. 95; *Hoppock v. Shober*, 69 N. C. 153; *Dixon v. Dixon*, 81 N. C. 323; *Dail v. Freeman*, 92 N. C. 351. The statute contemplates and intends a lien upon some present subsisting estate, legal or equitable, in the real property of the judgment debtor that may be enforced in some proper way. It would be idle and absurd to intend a lien that could not be made effectual: *Freeman on Judgments*, sec. 357; *Rorer on Judicial Sales*, sec. 557, and note.

As we have seen, the husband, who is the judgment debtor in this case, had no interest in the land that he could dispose of, nor that was subject to sale under execution or any legal process. A sale would be ineffectual. The possibility that the husband might survive his wife, and thus become the sole owner of the property, was not the subject of sale or lien. This did not constitute or create any personal estate, legal or equi-

table, any more than a contingent remainder, or any other mere prospective possibility: *Bristol v. Hallyburton*, 93 N. C. 384.

It seems that, at the common law, the husband, by virtue of his marital rights, could dispose of the possession of real estate held by entireties. But however this may be, the statute (Code, sec. 1840) expressly provides that he shall not have power to dispose of his wife's land for his own life or any less term of years without her assent, nor can the same be subject to sale to satisfy any execution obtained against him.

The appellants, therefore, had no lien upon the land, or any part of or interest in it, so far as appears, and the court properly denied their motion to be made a party defendant.

It appears from the affidavit upon which the appellants based their motion, and from the brief of their counsel, that they did not ask to be made a party defendant in the action for the purpose of enforcing their supposed lien and sharing in the funds, the proceeds of the sale of the land, according to their alleged right, but for the purpose of alleging collusion between the plaintiffs and defendants to the prejudice of themselves and other creditors, and to contest the validity of the plaintiff's mortgages and debts secured by them.

The court might properly have denied the motion upon the ground that a party would not be allowed to come into the action for such purpose. The effect of such suggested procedure and practice would be, not to completely determine the action and administer the rights of divers persons who had mortgages of and liens upon the property to be sold, etc., but to allow a party to come into the action and allege a distinct and different cause of action against the plaintiffs and defendants and litigate the same. Such practice is unwarranted, and cannot be tolerated. In such case, the remedy of the complaining party is by an independent action, brought for the purpose, against the plaintiffs and defendants.

Judgment affirmed.

HUSBAND AND WIFE — ESTATE BY ENTIRETIES — POWER OF ONE PARTY TO ENCUMBER OR DISPOSE OF. — Where real estate is held by a husband and wife in entirety, it cannot be subjected to the payment of the sole debts of the husband: *Town of Corinth v. Emery*, 53 Vt. 525; 25 Am. St. Rep. 780, and note; nor can either convey any interest therein without the consent of the other: *Emery v. Kepler*, 118 Ind. 34; 10 Am. St. Rep. 94, and note.

An estate in entirety cannot be sold under execution to satisfy a judgment against the husband: *Davis v. Clark*, 26 Ind. 424; 39 Am. Dec. 471, and note; *Ketchum v. Walsworth*, 5 Wis. 95; 68 Am. Dec. 48, and note; see note to *Den v. Hardenbergh*, 18 Am. Dec. 386-388.

JUDGMENT LIEN — EXTENT AND SCOPE OF. — A judgment lien on realty extends no further than that the debtor has power voluntarily to transfer or alienate it: *Coombe v. Jordan*, 3 Bland, 284; 22 Am. Dec. 236, and note; and does not constitute property or right in the land itself: *Walton v. Hargreaves*, 42 Miss. 18; 97 Am. Dec. 429; extended note to *Filley v. Duncan*, 93 Am. Dec. 345. Where the real estate of a judgment debtor is not subject to levy and sale to satisfy the judgment, the judgment lien does not attach: *Grimes v. Portman*, 99 Mo. 229.

BLAKE v. BLACKLEY.

[109 NORTH CAROLINA, 257.]

SALES — RECOVERY OF PROPERTY OBTAINED BY FRAUD. — Where one induces another to part with his property by a promise to pay cash for it on the same day, showing a check to inspire confidence in his promise, when he does not intend, at the time of making such representation, to pay for the property in money at any time, but intends, after thus getting possession, to credit its value on a claim held by him against the owner or one of the owners, the sale is fraudulent and voidable at the election of such owner, who may maintain detinue, and recover the specific property, or if it cannot be found, he may maintain trover for its wrongful conversion, consummated by a refusal to surrender it on demand.

FRAUD IN SATISFACTION OF DEBT. — A creditor cannot, by practicing a fraud, acquire title to the property of his debtor, even with the purpose of crediting its value on a just debt.

MARRIED WOMEN'S SEPARATE PROPERTY, AND ACTIONS IN RELATION THERETO.

— In North Carolina, no limit is imposed upon the wife's power to acquire property by contracting with her husband or a third person, and she may maintain an action in relation to property so acquired, either alone or jointly with her husband.

ACTION to recover two horses and one set of harness. The plaintiffs, Blake and wife, and one Wynne entered into an agreement to buy and sell horses, Mrs. Blake to furnish the money, and Wynne to devote his time and attention to the business for one half the profits. Defendant Blackley bought and obtained the possession of two horses and harness belonging to the plaintiffs, by representing to Wynne that he intended to pay cash for them, and by showing him a check on a bank in Raleigh, which he said would be cashed the next morning. Blackley sent the horses and harness away early that morning, and upon being called upon by Wynne for payment, he presented a note executed by Wynne in his favor for \$250, and the difference in cash between such note and the purchase

price. Wynne refused to accept the payment offered. Blackley had no money in bank. Other facts appear in the opinion. Judgment for plaintiffs, and defendant excepted and appealed.

N. J. Gulley, for the appellant.

John Devereux, Jr., and S. G. Ryan, for the respondents.

AVERY, J. The main question raised by the appeal is, whether, upon the whole of the evidence, in any phase of it, and in the particular aspects presented by the judge below to the jury, the plaintiffs were entitled to recover.

The mere fact, if admitted, that the defendant told a falsehood, or made a promise to pay at a time when he knew he would not, in all reasonable probability, be able to pay, would not invalidate the sale. But if one induces another to part with his goods by a promise to pay cash for them on the same day, showing a check to inspire confidence in his engagement, when, in fact, he does not intend, at the moment of making the representation, to pay for the property in money at any time, but purposes, after getting possession of it by holding out the hope of the immediate receipt of ready cash, to credit its value on a claim held by him against the owner or one of the owners of it, the contract is fraudulent and voidable at the instance of the original owner, and where the owner has been induced to surrender the possession, he may maintain an action in the nature of detinue, and recover the specific property, if to be found, or in the nature of trover for the wrongful conversion consummated by the refusal to surrender it on demand: Bishop on Contracts, sec. 667; Benjamin on Sales, sec. 656, and note 18; *Smith v. Young*, 109 N. C. 224; 8 Am. & Eng. Ency. of Law, 650; *Donaldson v. Farwell*, 93 U. S. 631.

The representation of the defendant, if the testimony was believed, that he wished to start the horses in the early morning while it was cool, and transferring them from the road ordinarily traveled to his home from the place of purchase to another way not so well known, in connection with the declaration made to a witness before he had acquired possession of them, that he intended to play a trick on Wynne, were sufficient to warrant the verdict. It was the duty of the judge to submit this testimony, with all of the circumstances, and let the jury pass upon the intent of the defendant, and the defendant has no just ground to complain that the language in which his honor couched the proposition was such as might have misled the jury to his prejudice.

Whether the declaration of the defendant was drawn out by a direct question, or whether made gratuitously, the object in telling Wynne that he had money in the bank, and exhibiting a check, was to induce Wynne to surrender the property before it was paid for, and ultimately to avoid paying for it, and therefore the false representation, which the jury find misled Wynne and caused him to part with the horses before receiving the purchase-money, vitiated the contract *ab initio* at the option of the injured party, to be exercised within a reasonable time: *Wilson v. White*, 80 N. C. 280; *Donaldson v. Farnell*, 93 U. S. 631. In this view of the case, it is immaterial whether the property belonged to the *feras* plaintiff, or to her and Wynne as partners, or to Wynne individually. A creditor is not allowed, by practicing a fraud, to acquire title to the property of his debtor, even with the purpose of crediting its value on a just debt: *Smith v. Young*, 109 N. C. 224. If the law should give its sanction to the wrongful conversion of property, whether by force or fraud, for the purpose of collecting even undisputed debts, the end would not justify the means, either legally or morally.

There was evidence tending to show that the defendant exhibited a check, for which he declared that he could not get the cash in the afternoon or evening before, because the banks of the city of Raleigh were closed, and that he would get the cash for it on the morning following so soon as the banks should be opened. It was not material whether his language was such as to convey the idea that his money was on deposit in a Raleigh bank or elsewhere. The *gravamen* of the fraud was in falsely and willfully creating the impression on the mind of Wynne that he had money which could be procured by means of a check, and which he would apply in payment for the horses, when, in fact, the defendant's purpose was to acquire possession of the horses, and to credit the value, with or without the assent of Wynne, on a debt which Wynne owed him.

Another exception made by the defendant seems to be founded upon the theory that because a married woman is not a free trader, and has no power to bind her separate property by a contract, she has no right to acquire property by purchase, or to maintain (even when her husband is joined) an action for the wrongful withholding of it after she has acquired it. "It is settled law in North Carolina, that our statutes (Code, c. 47) impose no limit upon the wife's power to

acquire property by contracting with her husband or any other person, but only operate to restrain her from or protect her in disposing of property already acquired by her": *Osborne v. Wilkes*, 108 N. C. 667; *Battle v. Mayo*, 102 N. C. 439; *George v. High*, 95 N. C. 99; *Kirkman v. Bank of Greensboro*, 77 N. C. 394; *Dula v. Yoway*, 79 N. C. 459; *Stephenson v. Felton*, 106 N. C. 121.

For the reasons given, we think there was no error in the rulings of the court below, which constitute the grounds of exception, and the judgment must be affirmed.

SALES — RECOVERY OF PROPERTY OBTAINED BY FRAUD. — A purchase of goods by one who promises but who does not intend to pay for them is such a fraud as will enable the seller to recover the property: *People v. Healy*, 128 Ill. 2; 15 Am. St. Rep. 90, and note. In such a case, the vendor may either recover the goods in an action of replevin or maintain trover for their value: *Sleeper v. Davis*, 64 N. H. 39; 70 Am. St. Rep. 377, and note. A seller who is induced to part with his goods on the strength of misstatements of the buyer may rescind the sale and recover back the goods: *Morrison v. Adams*, 76 Tex. 255; *Said v. Goodenoway*, 79 Iowa, 169; *New Haven Wire Co. Cases*, 57 Conn. 352.

MARRIED WOMEN — SEPARATE PROPERTY OF — POWER WITH RESPECT TO. — A wife, in Kansas, has equal rights with the husband in regard to contracts with respect to her separate property: *Munger v. Baldridge*, 41 Kan. 236; 13 Am. St. Rep. 223, and note; extended note to *Kastrowitz v. Prather*, 99 Am. Dec. 598; note to *Johnson v. Owens*, 84 Am. Dec. 147; extended note to *Yale v. Delester*, 78 Am. Dec. 225. A wife can bind her separate property by contract: *Geiger v. Bradley*, 68 Va. 328; *Sin v. Agans*, 28 S. C. 624.

BAGG v. WILMINGTON, COLUMBIA, AND AUGUSTA RAILROAD COMPANY.

[189 NORTH CAROLINA, 279.]

INTERSTATE COMMERCE — POWER OF STATE TO REGULATE. — When state legislation is not in conflict with any law passed by the federal Congress in pursuance of its powers, and is merely intended and operates to aid commerce, and to expedite instead of hindering the safe transportation of persons or property from one state to another, it is not repugnant to the federal constitution, and will be enforced, either as supplementary to federal statutes relating to the same subject, or in lieu of such statutes, when they do not exist.

INTERSTATE COMMERCE — POWER OF CONGRESS TO REGULATE. — The power of the federal Congress over commerce between the states is, as a general rule, exclusive, and its inaction is equivalent to a declaration that it shall be free of any restraint which it has a right to impose, except by such state statutes as are passed for the purpose of facilitating the

safe carriage of goods and passengers, and are not in conflict with valid federal statutes.

INTERSTATE COMMERCE — POWER OF STATE TO REGULATE. — A state statute which, without discriminating, operates uniformly in aid of domestic and interstate trade alike, is valid, and should be enforced, when the federal Congress has not acted, or has no power to afford so complete a remedy for the existing evil as the state legislature.

INTERSTATE COMMERCE — POWER OF STATE TO REGULATE. — A state statute imposing a penalty upon railroad companies for a failure to ship freight within five days, and which operates alike upon freight to be shipped outside as well as inside the state, is valid, and not unconstitutional, as an interference with the power of the federal Congress to regulate commerce between the states.

ACTION to recover a statutory penalty for the detention of freight after delivery for shipment. The goods were consigned in North Carolina to a party in South Carolina, and the termini of defendant's road was in each of these states. Judgment for plaintiff, and defendant appealed.

J. Davis, for the appellant.

AVERY, J. The power to regulate commerce among the several states, as well as with foreign nations, was delegated to the federal government, in pursuance of a preconceived purpose on the part of the leading representatives of public opinion, to provide for and promote the free and unrestricted sale and interchange of commodities between the states. It appears from contemporaneous history of the condition of the country, especially from the journals of the general assemblies of the states and of the federal convention, that there was a deep-seated desire in all parts of the Union to establish a uniform system of commercial regulation, such as would prohibit one state from imposing burdens upon the business of citizens of other states, whether by a tax upon their persons or property *in transitu*, on their goods when offered for sale, or by an impost tax: 1 Elliott's Debates, 140; 5 Elliott's Debates, 540.

The earlier cases that gave rise to the construction of this clause of the constitution were chiefly controversies as to the right of a state to levy a tax upon passengers or products passing through and along its highways to a market beyond its borders. The test of constitutionality, to which every doubtful state statute was subjected, was involved in the inquiry whether its enforcement would tend to trammel the trade between citizens of different states, or embarrass them in passing from one to another.

The idea was crystalized by Justice Strong in the definition of regulating commerce, given by him in *Railroad Co. v. Husen*, 95 U. S. 470, to wit: "Transportation is essential to commerce, or rather it is commerce itself; and every obstacle to it, or burden laid upon it by legislative authority, is regulation": *Ward v. Maryland*, 12 Wall. 418; *Case of State Freight Tax*, 15 Wall. 232; *Welton v. State of Missouri*, 91 U. S. 275; *Henderson v. Mayor of New York*, 92 U. S. 259; *Chy Lung v. Freeman*, 92 U. S. 275.

"Commerce," said Chief Justice Marshall, "undoubtedly is traffic, but it is something more: it is intercourse."

The police power is the authority to establish such rules and regulations for the conduct of all persons as may be conducive to the public interest, and under our system of government is vested in the legislatures of the several states of the Union, the only limit to its exercise being that the statute shall not conflict with any provision of the state constitution, or with the federal constitution, or laws made under its delegated powers: *Martin v. Hunter's Lessees*, 1 Wheat. 326; *State v. Moore*, 104 N. C. 714; 17 Am. St. Rep. 697; *State Tax on Railroad Gross Receipts*, 15 Wall. 284. So long as the state legislation is not in conflict with any law passed by Congress in pursuance of its powers, and is merely intended and operates in fact to aid commerce and to expedite instead of hindering the safe transportation of persons or property from one commonwealth to another, it is not repugnant to the constitution of the United States, and will be enforced, either as supplementary to partial federal statutes relating to the same subject, or in lieu of such legislation, where Congress has not exercised its powers at all: *Morgan S. S. Co. v. Louisiana Board of Health*, 118 U. S. 455; *Train v. Boston Disinfecting Co.*, 144 Mass. 523; 59 Am. Rep. 113; *Smith v. Alabama*, 124 U. S. 465; *Nashville etc. Ry Co. v. Alabama*, 128 U. S. 96; *Welton v. Missouri*, 91 U. S. 275; *Railroad Co. v. Fuller*, 17 Wall. 560.

The power of Congress over commerce between the states is, as a general rule, exclusive, and its inaction is equivalent to a declaration that it shall be free from any restraint which it has the right to impose, except by such statutes as are passed by the states for the purpose of facilitating the safe transmission of goods and carriage of passengers, and are not in conflict with any valid federal legislation: *Cooley's Constitutional Limitations*, 595; *County of Mobile v. Kimball*, 102 U. S. 697;

Wilson v. McNamara, 102 U. S. 572; *Wilson v. Blackbird Creek M. Co.*, 2 Pet. 245; *Pound v. Turk*, 95 U. S. 459; *Turner v. Maryland*, 107 U. S. 28; *Morgan S. S. Co. v. Louisiana Board of Health*, 116 U. S. 455.

Familiar instances of statutes falling within the foregoing exception are found in those relating to harbor pilotage, beacons, buoys, the improvement of navigable waters, the examination as to fitness of engineers and other railroad employees, and which are discussed by the courts in the cases cited above.

The validity of these and other state laws, which relate directly to or indirectly affect commerce between the states, has been sustained upon the ground either that the particular statute upon its face appeared to have been passed for the purpose of expediting the safe transportation of persons and property, or in the exercise of police powers which it is more convenient to leave subject to local legislation, such as the building of bridges over inland navigable streams.

Where the manifest tendency of enforcing such laws has been, as far as could be foreseen from their terms, to impede the free and expeditious conduct of commerce over interstate lines by land or water, they have been declared repugnant to the organic laws, and void, even where Congress had failed to legislate on the branch of the subject to which they relate. The futile attempts by state legislatures, either to give exclusive privileges to a particular telegraph company, or to subject telegraph companies generally to such license tax or tax on messages as would imply the right to destroy their business by burdening them with such imposts, illustrate the view which we have submitted, that where Congress has not exercised a police power, comprehended under the general authority to regulate commerce, the states may exercise the power to aid, but not to impede or obstruct, it: *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Western Union Tel. Co. v. Texas*, 105 U. S. 460; *Leboup v. Port of Mobile*, 127 U. S. 640.

The supreme court of the United States has also, in a long line of cases, passed upon the power assumed by some of the states to impose a tax on persons or goods *in transitu* to another state, a license tax upon traveling salesmen, who might offer to sell within their borders merchandise manufactured in or commodities shipped from another state, before such articles of commerce should become intermingled with its own products. These adjudications, within the last decade, have marked much more clearly the line to which Congress

may rightfully claim exclusive authority to legislate, and have also indicated more definitely the limit to which the states may still cross that boundary in the exercise of permissive police power. The controlling principle which pervades all of them is, that such legislation by the states is inhibited as impedes, obstructs, or controls commerce, or comes in conflict with some statute passed by Congress to regulate it: *Robbins v. Shelby Co. Taxing District*, 120 U. S. 489; *McCall v. California*, 136 U. S. 104; *Asher v. Texas*, 128 U. S. 129; *Lyng v. Michigan*, 185 U. S. 166; *Walling v. Michigan*, 116 U. S. 446; *Isman S. Co. v. Finkler*, 94 U. S. 238; *In re Rahrer*, 140 U. S. 545; *Bowman v. Chicago etc. Ry Co.*, 125 U. S. 465; *Philadelphia etc. S. Co. v. Pennsylvania*, 122 U. S. 326.

In *Railroad v. Husen*, 95 U. S. 470, Justice Strong, delivering the opinion, said: "Many acts of a state may, indeed, affect commerce without amounting to a regulation of it in the constitutional sense of the term. And it is sometimes difficult to distinguish between that which merely affects or influences and that which regulates or furnishes a rule of conduct. . . . While we unhesitatingly admit that a state may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent animals suffering from contagious or infectious diseases, or convicts, from entering the state; while, for the purpose of self-protection, it may establish quarantine and reasonable inspection laws, — it may not interfere with transportation into or through the state, beyond what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police power, substantially prohibit or burden either foreign or interstate commerce."

In *Welton v. State of Missouri*, 91 U. S. 282, it is said: "The fact that Congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question. Its inaction on this subject, when considered in reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammelled."

In *Western Union Tel. Co. v. Pendleton*, 122 U. S. 358, Justice Field says: "In these cases, the supreme authority of Congress over the subject of commerce by the telegraph with foreign countries or among the states is affirmed, whenever that body chooses to exert its power, and it is also held that

the state can impose no impediments to the freedom of that commerce."

In *Walling v. Michigan*, 116 U. S. 446, Justice Bradley, speaking for the court, says: "We have repeatedly held, that so long as Congress does not pass any law to regulate commerce among the several states, it thereby indicates that such commerce shall be free and untrammelled": *Brown v. Houston*, 114 U. S. 631.

When we come, therefore, to the application of the authorities to the case at bar, the question arises at the threshold of the inquiry, whether the statute which is drawn in question would, in its enforcement, tend to trammel or obstruct the trade carried on between the states, and not whether it might remotely influence it.

The statute (Code, sec. 1967), which was declared to be repugnant to the constitution of the United States in the court below, is as follows: "It shall be unlawful for any railroad company operating in this state to allow any freight they may receive for shipment to remain unshipped for more than five days, unless otherwise agreed between the railroad company and the shipper, and any company violating this section shall forfeit and pay the sum of twenty-five dollars for each day said freight remains unshipped, to any person suing for the same."

Neither the act of Congress passed in 1887 to regulate commerce, nor the amendatory act of 1889, prescribes the time or the manner in which freight received for shipment to another state shall be forwarded; nor do these statutes clothe the commission with power to regulate the time of shipment. Therefore, if the defendant company, whose line extends into the section of our state where many farmers are engaged in raising vegetables for sale in northern cities, should, for the purpose of stimulating production in a state further south and more remote from the markets, fail to furnish transportation to this class of persons, known as "truckers," for more than five days, and thereby give to the planters of South Carolina the exclusive benefits of the markets till vegetables of the same kind, then mature here, should ripen in Virginia, the producers would suffer loss without adequate remedy, because no provision is made in any national law for preventing such secret preference. It would be almost impossible, in the very nature of things, to prove the existence of such a purpose, though in fact entertained and acted upon by some agent in control of the through line, or in any way to show that, in a sys-

tem so extensive and complicated, the injury was due to any cause other than undesigned and unavoidable accident. In the same way, in the absence of a state statute imposing a penalty, or any other local legislation on the subject, facilities for shipment may be furnished more promptly to one town or station than to another neighboring one, and thereby its business may be injured and its improvements retarded. No other compulsory law could be conceived of that is calculated to operate so uniformly in insuring the shipment of both local and interstate products without preference to one class of shippers over another, or to one station over a neighboring one. If the evil to be remedied were the habit of giving the preference to through freight consigned to another state over local shipments to points within the state, where is the power to compel fairness lodged? The power delegated to Congress to control through shipments would not warrant the enactment of a law going further than to prohibit unfairness and insure promptness in transporting goods shipped to another state. If, then, the authority of the state is confined to such legislation as will apply to and insure uniformity and dispatch in forwarding freight to points within its own territory, how could the evil of giving advantage either to the through or local shipper be corrected? Surely, as between the federal legislature acting under well-defined and delegated powers and the states that have retained and may exercise all the residuary authority to provide by statute for the protection of its citizens, subject only to the restraints of their own organic law, the right should be conceded to the latter without question.

It is settled that the statute under consideration is valid as to the transportation of freight to points within the state, and so far may be enforced in the state courts, just as the license taxes could be collected from persons selling the products of the state that imposed them, and within its limits.

If we concede, then, that each power, state and national, is sovereign and exclusive within its own domain in dealing with the problem of expediting shipments, we have located the authority to regulate the conduct of each class of consignments *inter sese*, and it might be exercised, if the statutes so provided, by two railroad commissions supplementing each other. But when the interests of state and interstate traders conflict, and such regulation is needed as will prevent corporations from giving undue preference to either over the other, under

this theory it would seem that the states have neither delegated nor reserved the right to afford such relief by appropriate legislation, but that in the transfer of delegated authority to the federal Union, this power, so conducive if not essential to the public weal, has been lodged in *nudibus* beyond the reach of either. There is nothing upon the face of the statute, as in that discussed in *Robbins v. Shelby Taxing District*, 120 U. S. 489, to show that it was intended to operate, or does operate, as a restriction upon the interstate commerce. On the contrary, the enforcement of the penalty is at once a stimulus and a compensation, placed within the reach of every one who consigns his freight to another state, and he may avail himself of its aid as an incentive to promptness to the same extent as the local shipper may do. In fact, the controversy before us has its origin in a failure to ship goods to another state, and we are asked to declare the law invalid when its aid has been invoked to expedite interstate commerce, and to thereby leave the defendant at liberty to embarrass such traffic, not by legislation, but by inaction or unfair conduct.

It was contended, on the argument, that a state could not compel railroad companies doing business between states to provide cars for removing freight within a given period without risk of impairing the facilities for shipment from the adjacent state by withdrawal of the company's cars from it. That is an evil that may be met and provided against by the enactment of a similar statute in the adjacent state, and thus forcing the company to provide an adequate supply of cars to remove its freight without delay. Besides, the same result would as naturally follow, if the statute were limited in its operations to compelling the removal of freights consigned to points within the state, and if the argument were allowed to influence us at all, we would be driven to the conclusion that the penalty cannot be recovered, even where the agreement is to ship the freight to a station in North Carolina. Cars cannot be provided for the shipment of local freight if they are moved to particular points, not to fulfill a duty due to persons who have been induced by the invitation of the carriers to intrust goods to their care, but to avoid the consequences of disregarding a penal statute, without influencing to some extent the business of the whole line.

Where these articles of trade have termini in different states, or where they lie entirely within a single state, but constitute a part of a long through line formed for the purpose of com-

peting for business with other similar lines, it would be as certainly impossible to interfere in any way with any branch of the system, whether located entirely within one or situate in two states, without to some extent affecting the whole line, as it would be to check the flow of blood in a vein of one's arm, or to temporarily open the vein, without influencing the action of the main artery of that arm.

This case illustrates the distinction drawn by Justice Strong in *Railroad v. Husen*, 95 U. S. 470, between a state statute that affects or influences incidentally, even to the slightest extent, the transportation of commodities from one state to another, and one that is palpably intended to embarrass such commerce, and trammel it by restrictions, especially where, in addition, there is a plain discrimination in favor of the local trade or production.

Neither the clause of the constitution which we have considered, nor any other, has been construed to interfere with "the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity": *Barbier v. Connolly*, 113 U. S. 27; *Mugler v. Kansas*, 123 U. S. 623. The palpable purpose of the legislature in enacting our statute was to stimulate trade and develop the resources of its people. It throws the ægis of state protection alike over freight consigned under the care of the state, and that of which the general government has the right of supervision. The requirements of a state law that locomotive engineers be examined as to the condition of their eyes, to determine whether they were color-blind, and as to fitness generally, and required to have a license, have been declared valid under the general authority to protect life, health, and property; yet such statutes interfere with and affect, but do not obstruct, commerce between the states: *Smith v. Alabama*, 124 U. S. 465; *Nashville etc. R'y Co. v. Alabama*, 128 U. S. 96. In *Smith v. Alabama*, 124 U. S. 465, the court said: "If the state has power to secure to passengers conveyed by common carriers in their vehicles of transportation a right of action for the recovery of damages occasioned by the negligence of the carrier in not providing safe and suitable vehicles or employees of sufficient skill and knowledge, or in not properly conducting or managing the act of transportation, why may not the state also impose, on

behalf of the public, as an additional means of prevention, penalties for the non-observance of these precautions?"

Justice Field, in delivering the opinion of the court in *Nashville etc. R'y Co. v. Alabama*, 128 U. S. 96, said: "It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties, and liabilities of employees and others on railway trains engaged in that commerce; that such legislation will supersede any state action on the subject. But until such legislation is had, it is clearly within the competency of the states to provide against accidents on trains whilst within their limits."

If it is not only the right but the duty of state legislatures to provide for the safety of the persons, alike of its own citizens and those of other states, passing across its territory on trains, by such legislation as Congress had plenary power to pass if it had chosen to exercise that power, it would seem doubly due to all persons interested in the traffic conducted along the railway lines which cross it, that their property intrusted to the corporations owning them should be protected by proper legislation, especially if the power of Congress in the premises is not plenary, and there is no authority lodged anywhere except in the states to pass a statute that will operate uniformly and on all classes of freight.

It is true that section 1967 has been modified so as to give persons injured by failure to ship within five days the right to recover double the amount of damage actually sustained. Laws 1891, c. 520. But by its terms, the statute does not apply to actions pending in the courts so as to affect the right to recover the prescribed penalty.

We might add, that though Congress has plenary authority over whisky stored in a government distillery and in the custody of a gauger, it is, nevertheless, larceny to steal such whisky: *State v. Harmon*, 104 N. C. 792; *State v. Cross*, 101 N. C. 770; 9 Am. St. Rep. 53; *State v. Bishop*, 98 N. C. 773.

In like manner, national banks are the creatures of the general government, and subject to such supervision and regulation as Congress may provide for, yet the state may protect the property of such banks by punishing the forger of a note to defraud it: *Cross v. North Carolina*, 132 U. S. 132.

Where, therefore, the state legislature, without discrimination, passes a law which operates uniformly in aid of domestic and interstate trade alike, and Congress has not acted, or has

not the authority to afford so complete a remedy for the evil as the state legislature, there can be no question about the validity of such legislation, or the duty of the state courts to enforce it.

Freight Discrimination Cases, 95 N. C. 432, 59 Am. Repl. 247, presented a question widely different from that raised by this appeal. That case involved a construction of section 1966 of the code, which was an act, by its terms, prohibiting the exaction of a greater charge for hauling freight a shorter distance over a given line than is charged by the same carrier for transporting freight of the same class to a greater distance in the same direction. If the statute had been enforced as to shipments beyond the limits of the state, it would have been clearly an invasion of the exclusive domain of Congress, and would have provided for one of the most flagrant abuses on the part of carriers of goods shipped from one state to another that has been remedied by the more recent act of Congress. The court there conceded that the regulation of charges was operative within, though not beyond, the boundaries of the state. The passage of that statute was, as to its operation beyond our lines, an undisguised attempt to interfere with commerce by regulating charges, and not an effort to aid such traffic by speeding shipments to their appointed destination.

We think that there was error in the ruling of the court below, that the plaintiff could not recover because the goods were consigned to a point beyond the limits of the state, and a new trial must, therefore, be granted.

INTERSTATE COMMERCE — POWER OF STATE TO REGULATE. — States may, in the exercise of their police power, enact laws which, though they affect commerce between the states, are not to be considered regulations of that commerce within the meaning of the federal constitution: *Gulf etc. Ry Co. v. Dwyer*, 75 Tex. 572; 16 Am. St. Rep. 926, and note; *Leisy v. Hardin*, 78 Iowa, 226.

INTERSTATE COMMERCE — JURISDICTION OF CONGRESS OVER. — From the moment that an article of commerce commences to move from one state to another it becomes the subject of interstate commerce, and as such is subject only to national legislation: *Bennett v. American Express Co.*, 83 Mo. 236; 23 Am. St. Rep. 774, and note; *State v. Intoxicating Liquors*, 83 Mo. 158; *Stanley v. Wakefield etc. Ry Co.*, 100 Mo. 436.

JOHNSON v. EDWARDS.

[109 NORTH CAROLINA, 466.]

HUSBAND AND WIFE — ESTATE BY ENTIRETIES — STATUTE OF LIMITATIONS.

— When husband and wife own an estate in fee by entireties, the statute of limitations will not run against them during coverture as to an action by them involving the title or possession of the land, because of the disability of the wife.

ACTION for the possession of land conveyed by one Edwards to Johnson and wife, by deed in fee-simple, on November 8, 1886. This deed was afterwards lost on or about February 5, 1887, without registration. On May 17, 1887, said Edwards conveyed the same land by deed in fee-simple to the defendant, Millie Edwards, who claimed that plaintiff's right of action was barred by the statute of limitation. Judgment for defendant, and plaintiffs appealed.

C. Manly, for the appellants.

C. B. Watson, for the respondent.

MERRIMON, C. J. Whatever may be the nature and merits of the plaintiff's cause of action, it was not barred by any statute of limitation, because the deed under which they claim, and by this action seek to have benefit of, purported to convey to them the fee-simple in the land in question. As they were husband and wife, they were not tenants in common, and did not take by moieties, but by entireties, — they were seised, if seised at all, of the entirety *per tout et non per my*. They owned the land, or whatever interest they acquired in it, as one person. They could not sell or dispose of it, or any interest in it, but by their joint action. The husband could not encumber it, or at all prejudice the wife's estate by his laches or his positive acts: *Bruce v. Nicholson*, 109 N. C. 202; *ante*, p. 562; and *Phillips v. Hodges*, 109 N. C. 248, and the cases there cited at the present term.

The statute of limitations could not bar or affect the rights of the *feme* plaintiff, because, as a married woman, she was under disability. The husband had no interest or estate separable from hers, nor, as we have seen, could his laches affect her rights adversely. The nature of the estate and interest of the husband and wife are so thoroughly identified as one and the same as to each, that the right of the husband cannot be barred without the like bar of the right of the wife. Her right cannot be barred, and no more can that of the husband. Such

causes of action as the subject of this action are not subject to the statute of limitations, because the married woman's rights are not.

The court ought, therefore, to have given judgment, as the parties appeared to be entitled, without regard to the statute of limitations. Error.

HUSBAND AND WIFE — DISABILITY OF COVERTURE AS AFFECTING THE STATUTE OF LIMITATIONS. — The time limited for the commencement of actions does not begin to run against married women during coverture: *Alsup v. Jordan*, 69 Tex. 300; 5 Am. St. Rep. 53, and note. In California, the statute does not run against married women in those actions in which the husband is a necessary party plaintiff: *Wilson v. Wilson*, 36 Cal. 447; 95 Am. Dec. 194, and note; note to *Moore v. Armstrong*, 36 Am. Dec. 69.

HINKLE v. RICHMOND AND DANVILLE R. R. Co.

[209 NORTH CAROLINA, 422.]

RAILROADS — NEGLIGENCE — WARNING AT CROSSINGS. — In the absence of any statute regulating the time and manner of giving signals, the failure of an engineer in charge of a locomotive to ring the bell or sound the whistle, on approaching the crossing of a public highway, or a point where the public have been habitually permitted to cross, and where the approaching train is hidden from the view of the traveler by any obstruction allowed to be placed or placed in any way by the company, is negligence on its part.

RAILROADS — NEGLIGENCE — WARNING AT WHISTLE-POST. — When a railroad company has erected a whistle-post at a proper distance from a crossing, to notify engineers when to give timely warning of the approach of a train to persons using the intersecting highway, and the purpose of the company is known to the public, so that persons generally are led to act on the supposition that a signal will be given at the post, it is negligence on the part of the company if the engineer fails to sound the whistle at such post when passing with a train.

RAILROADS — NEGLIGENCE — WARNING AT CROSSINGS — CONTRIBUTORY NEGLIGENCE. — Where the person injured would not have ventured upon the railroad track at a crossing, and would have incurred no risk of a collision with a passing train, but for the negligence of the engineer in failing to give timely warning of its approach, the company is negligent and liable in damages, although such person may have been careless in exposing himself to danger.

RAILROADS — NEGLIGENCE — CROSSINGS — DUTY TO LOOK AND LISTEN. — A traveler must look and listen before going upon a railroad track, although it is not the hour when a regular train is expected. He is, however, bound to look only when to do so would aid him in determining whether or not a train is approaching. In all other respects, he has a right to rely upon his ears.

RAILROADS — NEGLIGENCE — CROSSINGS — CONTRIBUTORY NEGLIGENCE. — Where a traveler ventures upon a railroad track when proper signals are

given, and miscalculates as to the chances of crossing, the risk is his, unless some negligence can be imputed to the company, which has directly caused the injury.

RAILROADS — NEGLIGENCE, WHEN A QUESTION FOR JURY. — When the evidence is conflicting, it is for the jury to determine whether the party injured looked and listened for the approaching train before attempting to cross the railroad track, and whether the engineer keeping a proper lookout could have avoided the injury or diminished its danger by stopping or slackening the speed of the train.

RAILROADS — NEGLIGENCE. — EVIDENCE that soon after the happening of an accident to a traveler at a railroad crossing the company put it in good repair is admissible as tending to show that the railway company was under obligation to keep it in repair.

D. Schenck and G. F. Bason, for the appellant.

G. B. Watson, for the respondent.

AVERY, J. In the absence of statutes regulating the time and manner of giving signals, the failure of an engineer in charge of a locomotive to ring the bell or sound the whistle on approaching the crossing of a public highway, or a point where the public have been habitually permitted to cross, as at the intersection of a mill road or a farm road frequently used, is evidence of negligence to be submitted to the jury: 2 *Shearman and Redfield on Negligence*, secs. 463, 464; *Warner v. New York Cent. R. R. Co.*, 44 N. Y. 465; *Troy v. Cape Fear etc. R. R. Co.*, 99 N. C. 298; 6 Am. St. Rep. 521; 2 *Wood's Railroad Law*, 1292; *Barry v. New York Cent. etc. R. R. Co.*, 92 N. Y. 289; 44 Am. Rep. 377.

It is negligence *per se*, because of the peril both to passengers on trains and people using highways, to omit to give in reasonable time some signal from a train moving, whether at the rate of twenty or forty miles an hour, when it is hidden from the view of travelers who may be approaching and in danger of coming in collision with it by the cars of the company left standing on its track, or by an embankment, a cut, or a sharp curve in its line, or by any other obstruction allowed to be placed or placed in any way by the company: *Randall v. Richmond etc. R. R. Co.*, 104 N. C. 416; 2 *Wood's Railroad Law*, 1313, and note 3; *Louisville etc. R. R. Co. v. Goetz*, 79 Ky. 442; 42 Am. Rep. 227; *Pennsylvania Co. v. Krick*, 47 Ind. 368; *Strong v. Sacramento etc. R. R. Co.*, 61 Cal. 326; *Kenney Hannibal etc. R'y Co.*, 105 Mo. 270.

Where a railroad company has erected a whistle-post at a proper distance from a crossing, in order to notify engineers when to give timely warning of the approach of a train to

persons using the intersecting highway, and the purpose of the company is known to the public, so that persons generally are led to act on the supposition that a signal will be given at the post, it is negligence on the part of the company if the engineer fail to sound the whistle at the point so indicated in passing with a freight or passenger train in his charge: 2 Wood's Railroad Law, 1313; *Spencer v. Illinois Cent. R. R. Co.*, 29 Iowa, 55; *Sweeny v. Old Colony etc. R. R. Co.*, 10 Allen, 368; 87 Am. Dec. 644; *Newson v. New York Cent. R. R. Co.*, 29 N. Y. 383.

Where a jury find that the injured person would not have ventured upon the track at such a crossing, and would have incurred no risk of a collision with the train, but for the negligence of the engineer in failing to give timely warning of its approach, the corporation is liable to answer in damages, though the plaintiff may have been careless in exposing himself to danger: *Deans v. Wilmington etc. R. R. Co.*, 107 N. C. 686; 22 Am. St. Rep. 902, and cases cited.

In *Randall v. Richmond etc. R. R. Co.*, 104 N. C. 416, the judge who tried the case below charged the jury, in effect, that if the engineer failed, in passing around a sharp curve caused by a projecting cliff or mountain, to give the usual signal of approach to a crossing just beyond the curve, from which his train was not visible, the corporation was liable for injury to a team of oxen that were being driven along a parallel road beside the track and near said crossing, if, as the testimony tended to show, the owner would have driven them to a point more remote from the railroad, and where they would have been free from danger, had he heard the expected warning at the usual place. There was a conflict of testimony in that as in our case. The engineer testified that he blew at the usual point for the crossing, not far from the place where the animals were killed, while other witnesses contradicted this statement. Kinney, the engineer in the case at bar, testified that he blew at a post erected below Linwood Station, which he located 842½ yards south of that depot; that he passed the station going north without stopping, and blew again at the proper point, to warn persons passing over the crossing of the Lexington road, which is 281 yards north of Linwood, but that he gave no other warning after passing that signal-post till he struck the horse attached to the covered wagon in which the plaintiff and his father were riding, at the crossing of the mill road, 652 yards north of the intersec-

tion with the Lexington road. It is admitted that there was a signal-post erected on the west side of the track, or on the left of the engineer, going north, at a distance of 208 yards south of the mill-road crossing, and 444 yards north of the crossing of the Lexington road.

Three witnesses for the plaintiff testified positively that the engineer blew the whistle at a bridge about a half-mile south of Linwood, and far south of the first whistle-post on his right, and did not blow again till the plaintiff was injured. Another witness, who lived in sixty or seventy yards of Linwood, stated that he did not hear any whistle after that given at the bridge.

Conceding, for the sake of the argument, that the signal-post on the left (208 yards from the mill-road crossing) was intended for trains moving south, and that the custom was to blow opposite to it to give notice of the approach of trains moving south to travelers on the Lexington road, we think that the judge below was not in error in telling the jury that a traveler had the right to rely on hearing the usual signal at posts known by the public to have been erected to indicate to engineers the point for blowing the whistle as a warning of the approach of a train. According to the testimony offered for the plaintiff, the engineer failed to blow at the lower post (where he admits he ought to have given a signal, and says that he did), or below the Lexington road crossing, while the engineer testifies to the contrary. In *Randall v. Richmond etc. R. R. Co.*, 104 N. C. 416, it was the station blow that the jury found the engineer had failed to give, and plaintiff was near, not at, a crossing, and about one hundred yards from the station, when his oxen jumped upon the track and were killed; yet if he had heard the usual station blow at the point where he had a right to expect it, he would have moved his cattle out of danger, and thereby avoided the accident. But counsel pressed with much earnestness and ingenuity the more sweeping and general exception, growing out of the tenth paragraph of his prayer for instructions, that there was no evidence of negligence on part of defendant company. Not only was the court justified by the testimony tending to show the failure to sound the whistle at the lower post in refusing to give this instruction, but the jury should have been left to determine (looking at every aspect of the testimony, and the inferences to be drawn from from it) whether the engineer blew the whistle before reaching the Lexington road, and whether his admitted failure, at the proper distance from the mill-road

crossing, to repeat the warning, was the proximate cause of the injury; for if, by giving a signal at either place where defendant had a right to expect it, the accident would have been avoided, then such omission was the immediate cause of the injury, and the plaintiff was entitled to recover, though he may have shown a want of care in going upon the track: *Lay v. Richmond etc. R. R. Co.*, 106 N. C. 404; *Deans v. Wilmington, etc. R. R. Co.*, 107 N. C. 686; 22 Am. St. Rep. 902. In passing upon these questions, the jury could have considered, and doubtless did, the contention, on the one hand, that the train was moving along a deep cut, up-grade, and could not have been seen by the plaintiff, who had been stationed by his father on the shafts of the covered wagon, until the wagon was driven upon the track, and on the other, that the train must have been distinctly visible to one looking out from the front of the wagon for forty yards before they drove upon the crossing.

The jury found, in response to the first issue, that the plaintiff was injured by the negligence of the defendant company, and in answer to the second issue, that the plaintiff did not contribute to cause the injuries by his own negligence.

It was the duty of the plaintiff to look and listen before going upon the track, although it may not have been the hour when a regular train was expected: *Randall v. Richmond etc. R. R. Co.*, 104 N. C. 416. "He is only bound to look, when to do so would aid him in determining whether a train is approaching. In all other respects he has a right to rely upon his ears. But when the proper signals are given, if a traveler ventures upon the track, and miscalculates as to the chances of crossing, the risk is his, unless some negligence can be imputed to the company which has directly caused the injury": 2 Wood's Railroad Law, p. 1310, sec. 843, note 2, p. 1312, note 1; *Kenney v. Hannibal etc. R'y Co.*, 105 Mo. 270.

The court instructed the jury upon this subject as follows: "It was the duty of the plaintiff to keep a proper lookout as well as the engineer, and one time looking and listening at a distance from the track is not a proper lookout. He ought to have used his senses of sight and hearing all the time, and if he failed to do so, and thereby caused his injury, the answer to the second issue should be 'Yes.'" If the court had, in compliance with the defendant's request, told the jury that it was "the duty of the plaintiff to see and hear," and his failure to do so was equivalent to not looking or listening at all, the instruction would unquestionably have been

erroneous, and subject to well-grounded exception on the part of the plaintiff. It is manifest that the court had no right, where there was conflicting testimony, and more than one inference deducible from the evidence, to instruct the jury that they must find, in any aspect of the case, that the plaintiff, by his own negligence, contributed to bringing about the collision, much less that the negligence of the plaintiff was the direct cause of the injury. The plaintiff testified that he and his father (who is his next friend as plaintiff) started from the house of his brother, the witness A. A. Hinkle, near the Lexington road, in a covered wagon, and as they traveled along the road, he looked out of the wagon two or three times to see if a train was coming, and that when they had gone down the hill, within about twenty yards of the crossing, he stopped the wagon and listened. The plaintiff then got out on the cross-pieces of the shaft and held to the wagon with one hand while he rested the other on the horse's rump, and as his father drove on, looked and listened, but neither heard nor saw an approaching train till the horse got upon the track, when he had but time to utter an explanation and fell back into the wagon with his father before they were stricken and carried or thrown about seventy-five feet, and left in an insensible state by the train. It will be observed that the boy, if he is to be believed, looked and listened, and neither saw nor heard anything. The judge had no right to tell the jury that because the engineer, however respectable or intelligent, testified to the height of the banks along the cut, and introduced a map to corroborate his opinion that a train on the track, anywhere north of Linwood and south of the mill-road crossing, was visible to a person passing along the road traveled by plaintiff from his brother's house to the crossing, they must disregard the plaintiff's statement, and answer the second issue, "Yes." It was the province of the jury to determine whether the plaintiff did, in fact, after stopping and listening at the foot of the hill, ride sixty feet, looking and listening still, but in vain, from the shaft all the way, for a train that could not be seen till the horse was upon the track, and to say whether it was possible for him to see the approaching train or hear the noise, in the absence of signals, as it moved up-grade from the station. In such a conflict, the court could not instruct the jury as to the weight of the testimony. Although the engineer may have failed to give the usual signals south of the depot or of either of the crossings, it was the duty of the plaintiff to

look and listen before going upon the track, and he testified that he did. The jury were warranted by the testimony, therefore, in finding that he used ordinary care to guard against accident before attempting to cross. His father, according to the evidence, was deaf, and was compelled to rely upon the hearing of the plaintiff, a boy of fourteen. It was not the duty of the plaintiff, if, after listening at twenty yards distance, and riding on the shaft, he neither heard nor saw an approaching train, to get down and look up and down the track, even though his view of the railroad line was obstructed: *Pennsylvania R. R. Co. v. Ackerman*, 74 Pa. St. 265.

It was not error in the court to give the jury the instruction as to the duty of the engineer to keep a vigilant outlook, which is the subject of exception. It was not contended that the proposition embodied in the instruction given was not a correct statement of the law, but that it was inapplicable to the facts, and calculated to mislead the jury. There was some evidence that counsel had a right to comment upon and to have submitted to the jury, as tending to show that after the engineer saw, or could by keeping a proper lookout have seen, the plaintiff's horse stepping upon the track, he might have stopped his train altogether before reaching the crossing, or have so lowered its speed as to strike with little force, and diminish the chances of serious injury to the inmates of the wagon, who were thrown seventy-feet by the violent concussion.

The expert witness Rutherford, who was introduced for the defendant, testified that the engineer might have seen a man on his left within nine or ten feet of the track, on the mill road, when the engine was three hundred feet from the crossing, and that he could have seen a horse six feet from the track one thousand feet from the crossing, and could have stopped his engine within five hundred feet. If the engineer could have seen, or saw, the horse, and was unable to tell whether he was harnessed, and he seemed to be approaching the track, it was his duty to slacken speed: *Snowden v. Norfolk etc. R. R. Co.*, 95 N. C. 93; *Carlton v. Wilmington etc. R. R. Co.*, 104 N. C. 365. If he saw that the horse was attached to a covered wagon, and could see that the inmates were not on the outlook, but were inside the wagon, it was his duty to stop his engine. If the jury believed that the engineer had failed to give the usual signals, then it was his duty to keep a more vigilant watch along the track. He had no right under such circumstances to keep his seat as he approached the crossing,

and also to direct the fireman to put coal in the engine, so that neither could keep a proper outlook upon the crossing after he had neglected to whistle. We are assuming that the jury believed the whistle was not blown north of the bridge, in order to show that there were phases of the evidence that warranted the judge in giving, if they did not impose upon him the duty of giving, the instruction complained of. Counsel could not expect the court to find as a fact and tell the jury that the fireman could not look out on the left because his fire had gone down while the train was side-tracked at Holtsburg, and the engineer could not get out of his seat long enough to look first on one side and then on the other while his subordinate replenished the supply of coal. Whether he could stand up and keep his hand upon the throttle of the engine under such circumstances, and whether it was necessary to do so in order to provide for the safety of all who might expose themselves to danger of being injured by his train, were questions, not for the court to pass upon, but for the jury to consider in their bearings upon the issues.

The court below permitted the plaintiff to show by a witness that soon after the accident the defendant company repaired the crossing at the mill road so as to make it less difficult to get upon the track. The defendant objected then, and assigns as error now the admission of the testimony. The court assigned as a reason for the ruling, that it was competent to show in this way that the defendant knew of the existence of the crossing, and treated it as a public crossing, or one that the corporation was under obligations to keep in repair. Although the road may have been used as a mill road, it may also, as a plantation road, have come within the requirement of section 1975 of the code, which fact would have made it the duty of the company to keep it repaired. At that stage of the trial, it is not difficult to see that it might become material for the jury to know whether such duty was imposed upon the defendant by law, especially if, in the further progress of the trial, it should appear that the engineer, by keeping a proper outlook, might have had reason to believe that the plaintiff's wagon was impeded by some defect in crossing: *Bullock v. Wilmington etc. R. R. Co.*, 105 N. C. 180. It is evident, at any rate, that the defendant was not prejudiced by the ruling, because it could not have materially influenced the jury in their findings.

The judge below had, unquestionably, the right, in the ex-

ercise of his discretion, to refuse the motion for a new trial on the ground of newly discovered evidence in any case: *Carson v. Dellinger*, 90 N. C. 226.

There is no error, and the motion for a new trial must be refused.

RAILROAD COMPANIES — DUTY TO GIVE WARNING AT CROSSINGS. — Where the failure of an engineer to give warning on the approach of his train to a crossing is the cause of an injury to one who ventured upon the crossing while acting in an ordinarily prudent manner, the railroad company will be liable therefor: *Quigley v. Delaware etc. Canal Co.*, 142 Pa. St. 388; 24 Am. St. Rep. 504, and note, where the cases on this subject are collected; extended note to *Welch v. Hannibal etc. R. R. Co.*, 37 Am. Rep. 443; *Swift v. Staten Island etc. R. R. Co.*, 123 N. Y. 645; *Toledo etc. R. R. Co. v. Cline*, 135 Ill. 41.

RAILROAD COMPANIES — CROSSINGS — DUTY TO LOOK AND LISTEN. — The law requires a traveler to look and listen for the approach of a train before venturing upon the track at a public crossing, and if he neglects so to do, he cannot recover for injuries received thereby: *Tucker v. New York etc. R. R. Co.*, 124 N. Y. 308; 21 Am. St. Rep. 670, and note; *Mynning v. Detroit etc. R. R. Co.*, 64 Mich. 93; 8 Am. St. Rep. 804, and note; extended note to *Ernst v. Hudson River R. R. Co.*, 90 Am. Dec. 780-787; *Louisville etc. R'y Co. v. Stommel*, 126 Ind. 35; *Nash v. New York etc. R. R. Co.*, 125 N. Y. 715.

NEGLIGENCE — CONTRIBUTORY — WHEN QUESTION FOR JURY. — In a case involving contributory negligence, when the facts are in dispute, or if the circumstances are such that sensible men may differ in their conclusions, the question should be left to the jury: *Roddy v. Missouri Pac. R'y Co.*, 104 Mo. 339; 24 Am. St. Rep. 333, and note; *Moon v. Northern Pac. R. R. Co.*, 46 Minn. 106; 24 Am. St. Rep. 194, and note; *Swift v. Staten Island etc. R. R. Co.*, 123 N. Y. 645; *Baltimore etc. R. R. Co. v. Walborn*, 127 Ind. 142.

NEGLIGENCE — EVIDENCE. — Evidence that, after an accident, the railroad company repaired the track at the place where the accident had occurred is admissible in evidence, as tending to show the condition of the track at the time of the accident: *Stewart v. Boertz*, 76 Wis. 35; 20 Am. St. Rep. 17, and note. In an action against a railroad company for personal injuries, evidence that after the accident the engines ran more slowly than before is admissible: *Savannah etc. R'y Co. v. Flannagan*, 82 Ga. 579; 14 Am. St. Rep. 183.

STATE v. FRENCH.

[109 NORTH CAROLINA, 722.]

INTERSTATE COMMERCE — LICENSE TAX. — A tax imposed on merchants and all other dealers, of one tenth of one per cent of their purchases in or out of the state, is a license or occupation tax for the privilege of carrying on business within the state, and is valid, both under the state constitution and that portion of the federal constitution giving power to Congress to regulate interstate commerce.

INTERSTATE COMMERCE — TAXATION — LICENSE TAXES. — When transactions are between parties in different states, or consist of the transportation of freight or passengers from one state to another, a state tax is prohibited, whether it creates discrimination or not; but when the tax is on an occupation carried on in a state, or on property therein, it is valid, unless it discriminates against articles brought from other states, or taxes the sale of such articles in the original package.

George Davis and George Rountree, for the appellants.

Theodore F. Davidson, attorney-general, and *A. M. Waddell*, for the state.

CLARK, J. By the act to raise revenue (Laws of 1891, c. 323, sec. 22), it is enacted as follows: "Every merchant, jeweler, grocer, druggist, or other dealer who shall buy and sell goods, wares, and merchandise, of whatever name or description, not specially taxed elsewhere in this act, shall, in addition to his *ad valorem* tax upon his stock, pay as a license tax one tenth of one per centum on the total amount of his purchases in or out of the state (except purchases of farm products from the producer), for cash or credit, whether such persons herein mentioned shall purchase as principal, or through an agent or commission merchant."

The special verdict brings the defendants completely within the provisions of the act, and finding, among other facts, that the defendants purchased goods in other states, brought them into this state and sold them here, but made no purchases within this state.

The policy or advisability of such taxation rests with the legislative branch of the government alone. The sole question committed to the courts is as to the constitutional power of the legislature to lay the tax.

It is conceded by the learned counsel of the defendants that such tax is not a property tax, but, as truly stated on the face of the act, is a license tax for the privilege of carrying on the business specified. Such license tax is not prohibited by the constitution of North Carolina, but is expressly authorized by

section 3, article 5, thereof: *Albertson v. Wallace*, 81 N. C. 479; *State v. Cohen*, 84 N. C. 771. Nor is this mode of taxation forbidden by the fourteenth amendment to the United States constitution, which guarantees to all persons the equal protection of the law. It has been repeatedly held that the Fourteenth Amendment in no wise affects the right of the state to adjust its system of taxation in accordance with its own constitution, "to classify property for taxation, subjecting one kind of property to one rate of taxation, and another kind to another rate, distinguishing between franchises, licenses, and privileges, and visible and tangible property, and between real and personal property": *Home Ins. Co. v. New York*, 134 U. S. 594, 606; *Bell's Gap R. R. Co. v. Pennsylvania*, 134 U. S. 232, 237. Both of these cases are cited and approved by the same court in a very recent case: *Pacific Exp. Co. v. Seibert*, 142 U. S. 339.

The defense, indeed, rests its case upon the position that the tax, so far as it respects goods purchased in other states and brought into this state, is void, as being in violation of the federal constitution, article 1, section 8, which gives to Congress the power to "regulate commerce with foreign nations and among the several states, and with the Indian tribes."

Under the decisions of the supreme court of the United States, if the "business," the carrying on of which is made liable to the tax, was that of interstate commerce, such as the offering for sale or selling goods in one state to be shipped to the buyer who is in another state, as in *Robbins v. Shelby Taxing District*, 120 U. S. 489 (known commonly as the "Drummers'" case), or if this impost was laid on the transportation of passengers or freight from one state to another (*State Freight Tax Cases*, 15 Wall. 232; *Freight Discrimination Cases*, 95 N. C. 428; 59 Am. Rep. 247; and 94 N. C. 434; 59 Am. Rep. 250), or the transmission of telegrams across state lines (*Leloup v. Mobile*, 127 U. S. 640), such tax would be inhibited. But the business here subjected to the privilege tax is neither by the terms of the law nor in its purport, to be gathered by any reasonable construction, "interstate dealings." The tax is not on any dealings between the parties outside of the state and the defendants within the state, nor on the transportation of goods into the state. The "business" taxed, and intended to be taxed, is that of "buying and selling goods, wares, and merchandise," i. e., carrying on a mercantile business in this state. The fact that such trade or occupation exercised in this

state is carried on in goods, wares, or merchandise which had their origin out of the state cannot make it "interstate commerce." The commerce is "intrastate." It is carried on in this state between the defendants and other parties in the state. It is an occupation or trade exercised here under North Carolina laws, and protected by them from violence and illegal interference, from robbery and thieves. Should the purchaser of "goods, wares, and merchandise" from the defendants subsequently ship the goods to another state, this would not make the dealing between them "interstate," even though the defendants, at the time of such sale, knew of the buyer's intention to so ship the goods: *Brown v. Houston*, 114 U. S. 622. Neither, for like reasons, could the fact that the "occupation" taxed deals in merchandise, some or all of which originated elsewhere than in North Carolina, make it "interstate" traffic: *Woodruff v. Parham*, 8 Wall. 123. The interstate dealings were terminated when the goods were delivered at the store of the defendants. The "business" subsequently carried on of vending and disposing of them is intrastate traffic, upon which the state can levy its license tax. The tax is not laid on the purchases nor on the sales. It is laid as a "license tax" on every "merchant," etc., who shall "buy and sell goods, wares, and merchandise," evidently meaning to tax the occupation of carrying on such business in this state. As a mode merely of graduating the tax by some approximation to the volume of business done (which is just), it is provided that such license tax shall be "one tenth of one per centum on the total amount of purchases in or out of the state." In the late case of *State of Maine v. Grand Trunk R'y Co.*, 142 U. S. 217, this is adverted to, and the court say: "This ruling [of the court below, which is reversed] was founded on the assumption that a reference by the statute to the transportation receipts, and to a certain percentage of the same, in determining the amount of the excise tax, was, in effect, the imposition of the tax upon such receipts, and therefore an interference with interstate and foreign commerce. But a resort to those receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied, and we are unable to perceive in that resort any interference with transportation, domestic or foreign, over the road of the railroad company, or any regulation of commerce which consists in such transportation. If the amount ascertained were spe-

cifically imposed as the tax, no objection to its validity would be pretended. And if the inquiry of the state as to the value of the privilege were limited to the receipts of certain past years, instead of the year in which the tax is collected, it is conceded that the validity of the tax would not be affected, and if not, we do not see how a reference to the results of any other year could affect its character. There is no levy by the statute on the receipts themselves, either in form or in fact. They constitute, as said above, simply the means of ascertaining the value of the privilege conferred. This conclusion is sustained by the decision in *Home Ins. Co. v. New York*, 134 U. S. 594." And the court go on to cite with approval from the latter decision the following: "The validity of the tax can in no way be dependent upon the mode which the state may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privilege it bestows."

The tax in our case is not on the business of buying goods out of the state, but on the business of buying and selling goods in the state, irrespective of the place of origin of the goods, and the extent of the purchases, whether "in or out of the state," is only referred to as a basis by which to measure the tax which shall be levied on the business proportionate with such approximation to its volume. It is admitted that there is no discrimination against goods bought out of the state, and the sole question is, whether the state, in taking as the basis of a license tax the value of the goods dealt in, must exclude the value of goods manufactured or raised out of the state. If this were so, no license tax could be imposed for merchandising in this state when the articles dealt in were manufactured in other countries or other states, or were the products of a soil other than our own, leaving the full weight of the tax to fall upon the privilege of dealing in articles manufactured or the products of the soil in this state. This would require a discrimination against our own citizens, and is not within the letter or spirit of the constitution. The power of the state to exact a license tax from its own citizens doing business in its borders is beyond question, and a discrimination in favor of non-residents is as much forbidden as a discrimination against them by the United States Revised Statutes, sec. 1977: "All persons within the jurisdiction of the

United States shall have the same right in every state and territory to make and enforce contracts, etc., and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

The rule deducible from the authorities seems to be that if the dealings or transactions are between parties in different states, or the transportation of freight or passengers from one state to another, a tax by state law is prohibited, irrespective of whether there is "discrimination" or not; but where the tax is on an "occupation" carried on in a state, or on property therein, the state has power to levy the tax, unless it "discriminates" against the articles brought from other states, with the sole exception that the sale of such articles in the original package cannot be taxed by the state. Even this exception, which is laid down in *Leisy v. Hardin*, 135 U. S. 100, is strongly controverted by the able dissenting opinions of Justices Gray, Harlan, and Brewer, in that case.

DAVIS, J. (concurring). The statute under which the defendants are taxed makes no discrimination in favor of the citizens of the state against the citizens or property of other states; and in my opinion the only purpose of the framers of the federal constitution was to prevent any discriminations which local interest might suggest in favor of resident citizens of a state against non-resident citizens. I do not think it was the purpose of the constitution of the United States to confer upon Congress by enactment, or upon the courts by construction, any authority to give non-resident citizens doing business in another state rights, privileges, or exemptions which may be lawfully denied to resident citizens who are taxed to support the state, and to protect non-resident as well as resident citizens in the discharge of their business. I think a provision of the constitution conferring upon Congress the power to discriminate by exempting non-resident citizens doing business in a state from duties or burdens which may be lawfully imposed on resident citizens engaged in the same business would have shocked the most ultra advocate of federal power; and I do not think that one of the thirteen states would have sanctioned a constitution granting such authority to the federal government directly or by any fair implication; and the federal government has no powers except those delegated by the constitution, expressly or by fair implication.

Affirmed.

INTERSTATE COMMERCE — LICENSE TAX. — A state may impose a license tax on peddlers, and they cannot escape therefrom on the ground that the goods which they peddle were manufactured in another state, and a statute imposing such a tax is not in violation of the interstate commerce provision of the federal constitution: *State v. Emert*, 103 Mo. 241; 23 Am. St. Rep. 874, and note; *Ex parte Butts*, 28 Tex. App. 304; *Alexander v. State*, 86 Ga. 246; *contra, Ex parte Rosenblatt*, 19 Nev. 439; 3 Am. St. Rep. 901, and note, with cases on this subject collected; *Rothermel v. Meyerle*, 136 Pa. St. 250; *McLaughlin v. South Bend*, 126 Ind. 471. Any act which makes a discrimination against articles produced in another state is unconstitutional: *State v. Deschamp*, 53 Ark. 490.

STATE v. STEVENSON.

[109 NORTH CAROLINA, 789.]

INTERSTATE COMMERCE — TAXATION. — LICENSE TAX of one tenth of one per cent on the total amount of purchases in or out of the state, made by merchants or other dealers within the state, "except on purchases of farm products from the producer," is a valid state occupation tax; nor does the exception render it invalid as violating the principle of uniformity of taxation, or denying to such dealers the equal protection of the laws, or as a regulation of interstate commerce, or as a discrimination against the products of other states.

George Davis and George Rountree, for the appellants.

Theodore F. Davidson and A. M. Waddell, for the state.

CLARK, J. The defendants, merchants residing and doing business in this state, have bought out of the state and have brought into the state and sold goods, not being farm products purchased from the producer, and have bought in the state and sold farm products which were not purchased from the producer. They refused to list them under schedule B, section 22, of the revenue act, and they contend the act is void and unconstitutional, because, —

1. "It denies to the defendants the equal protection of the laws: U. S. Const., 14th Amend., sec. 1." It has been repeatedly held that the Fourteenth Amendment was not intended to "compel a state to adopt an iron rule of equal taxation," or "to prevent it from adjusting its system of taxation in all proper and reasonable ways": *Bell's Gap R. R. Co. v. Pennsylvania*, 134 U. S. 232, 237; *Home Ins. Co. v. New York*, 134 U. S. 594, 606. Both these cases are cited and approved in *Pacific Express Co. v. Seibert*, 142 U. S. 339. The Fourteenth Amendment certainly has no application to a case like the present, as we have held in *State v. French*, 109 N. C. 722; *ante*, p. 588.

2. "In so far as it applies to goods purchased outside of the state, it is a 'regulation of commerce among the states': U. S. Const., art. 1, sec. 8, par. 3." This point was also presented and passed upon in the case of *State v. French*, 100 N. C. 722; ante, p. 588. It is sufficient to say that the tax is not on "interstate" dealings, but on the occupation of carrying on a mercantile business in this state; and instead of levying a fixed sum, irrespective of the quantity of business done, the statute graduates the tax according to the amount of purchases, "whether made within or without the state." If the defendants had removed here from another state, while there could be no tax on their transportation here, they would be liable, after their arrival, to a license tax on their "occupation," if there was no discrimination. In the same manner, if they brought goods with them, this would not prevent a property tax on the goods, or a license tax on the trade or occupation in which such goods were used, provided there was no discrimination on account of the place of origin of the goods.

3. "It discriminates against the products of other states, and is repugnant to the United States constitution, article 4, section 2, paragraph 1." The act makes no discrimination against products brought from elsewhere. It is couched in general terms, and exempts purchases of farm products from the producer, wherever raised, from being taken into account in ascertaining the basis upon which the amount of the license tax is graduated. This is neither necessarily nor within reasonable construction a discrimination against farmers in other states. Florida oranges, northern corn, wheat, and apples, and other farm products of other states, are ordinarily largely dealt in, and the amount of the purchases thereof from the producers are omitted, equally with similar purchases of farm products raised in this state, in adjusting the amount of license tax required by the act. It is true that a law professing to be non-discriminating on its face may, from the circumstances and in its application, be held to be really discriminating, and hence unconstitutional, as in the meat and guano inspection cases: *Brimmer v. Rebman*, 138 U. S. 78; *Minnesota v. Barber*, 136 U. S. 313; *American Fertilizer Co. v. Board of Agriculture*, 43 Fed. Rep. 618. But these were cases of taxation or prohibition. The provision before us is only an exemption. It does not tax the non-resident farmer, or put him at any disadvantage as compared with the farmer residing in this state. This point has recently been considered by Seymour, J., in

the United States district court for the eastern district of North Carolina, in a very able opinion construing this very statute (*Ex parte Brown*, 48 Fed. Rep. 435), the reasoning in which case in this aspect of it seems to us satisfactory and conclusive.

4. "That it violates the principle of uniformity in taxation: Const. N. C., art. 5, secs. 5, 6."

This is a privilege tax on a trade or occupation, and is authorized by the constitution of North Carolina (art. 5, sec. 3), in addition to the *ad valorem* tax on property: *Albertson v. Wallace*, 81 N. C. 479; *State v. Cohen*, 84 N. C. 771. It was in the discretion of the legislature to impose either a specific tax or one graduated by the extent of the business done: *State v. Powell*, 100 N. C. 525. Such tax is uniform when it is equal on all persons in the same class: *Gatlin v. Tarboro*, 78 N. C. 119; *State v. Powell*, 100 N. C. 525. Graduating a merchant's license tax by the amount of his purchase of a certain class of goods, and not by the amount of his total purchases, is not imposing unequal taxes on the goods. It is merely a mode of graduating, according to the wisdom and discretion of the legislature, the amount of the license tax for carrying on any specified occupation.

But treating it as a "classification," this law puts all merchants dealing in farm products purchased from the producer in one class, and all merchants not dealing in farm products purchased from the producer in another class, and treats all in each class alike. There is no discrimination in either class. The power to select particular trades or occupations and subject them to a license tax cannot be denied to the legislature, nor the power to tax such trades according to different rules, provided the rule in regard to each business is uniform. "It may be different upon a dealer in whisky by retail from that on a wholesale dealer, or a dealer in whisky from what it is on a dealer in grain," etc., says Judge Rodman in *Gatlin v. Tarboro*, 78 N. C. 119, and so it may of course be different on a dealer in farm products purchased from the producer from that on a dealer in other goods." Indeed, there can be, strictly speaking, no uniform, proportional, and *ad valorem* tax on all trades, professions, franchises, and incomes, taken together, because they are so dissimilar that there is no practicable means of arriving at what should be a uniform tax common to them all. How could a tax be "uniform" or proportional between the profession of law or medicine, livery-

stable keepers, merchants, keepers of ferries, etc. The legislature could lay a franchise tax on some callings, and it would not be illegal because some other occupation was not taxed. It could lay a fixed tax on some occupations and graduate it on others by the volume of business done, or in any other mode it may deem fit: *Home Ins. Co. v. New York*, 134 U. S. 594. It is within the legislative powers to define the different classes and to fix the license tax required of each class. All the licensee can demand is, that he shall not be taxed at a different rate from others in the same occupation as "classified" by legislative enactment.

The act provides: "Every merchant, jeweler, grocer, druggist, or other dealer, etc., shall pay as a license tax one tenth of one per centum on the total amount of purchases in or out of the state (except purchases of farm products from the producer)." This language makes no discrimination in favor of or against any merchant, jeweler, grocer, druggist, or other dealer. On the contrary, it taxes the business of each alike, and exempts each alike from the necessity of listing his purchases of farm products from the producer. The act, in our opinion, is not obnoxious for any of the reasons urged against it, and the judgment of the court below should be affirmed.

INTERSTATE COMMERCE — LICENSE TAX. — A tax imposed on merchants and all other dealers, of one tenth of one per cent of their purchases in or out of the state, is a license or occupation tax, and is valid: *State v. French*, 109 N. C. 722; ante, p. 588, and note. Personally we shall doubt the correctness of the two preceding decisions until they have been approved by the highest of the national courts. They sanction the imposition of a tax on commerce carried on in another state, and in exempting from such tax farm products purchased of the producer, they discriminate in favor of local products. For both of these reasons they are objectionable, as tending to regulate interstate commerce. Upon this subject, see note to *People v. Wemple*, 27 Am. St. Rep.

STATE v. CUTSHALL.

[109 NORTH CAROLINA, 764.]

FORNICATION AND ADULTERY is a joint act, and to convict, it must be shown that two persons, a male and a female, have habitually indulged in unlawful sexual intercourse; but it is not essential to the conviction of one of them to show that both had a guilty intent. The one having such intent may be convicted, although the other, through an ignorance of the facts, had no such intent.

IN FORNICATION AND ADULTERY, CRIMINAL INTENT need not be alleged nor proved. The crime is established when it is proved that a man and woman, not being married to each other, habitually engaged in sexual intercourse.

FORNICATION AND ADULTERY. — Where the accused lived for years with a woman as his wife under a marriage bigamous as to him, he is guilty of fornication and adultery, although during all the time the woman was ignorant of his previous marriage, and consequently innocent of any guilty intent or crime.

EXTRADITION. — A prisoner who voluntarily accompanies an officer into the state without the use of extradition papers issued in his case cannot afterwards object to the regularity of such papers.

J. A. Forney, for the appellant.

Theodore F. Davidson, attorney-general, for the state.

CLARK, J. The special verdict finds that the defendant, not being legally married to his co-defendant (who was not on trial), lived with her for years as man and wife. The interesting question is not now before us, whether he is not also guilty of bigamy when he has gone through the ceremony of marriage with her in another state, having at the time a lawful wife living. The state has chosen to prosecute him for fornication and adultery, the court below adjudged him guilty on the special verdict, and the appeal presents the correctness of that ruling for review.

It is true that fornication and adultery is a joint act. It must be shown that two persons, a male and a female, have habitually indulged in unlawful sexual intercourse. But it is not essential to show that both parties had a guilty intent. It is sufficient if both parties participated in the unlawful sexual intercourse. This is demonstrated frequently in practice, by placing one defendant on trial when nothing need be proven as to the other defendant, who is not on trial, beyond the incidental fact that it is shown as against the party on trial that the unlawful and habitual sexual intercourse existed between them. Nor can it make any difference that here it affirmatively appears that the party not on trial had

no guilty intent; for if the guilty intent of both parties is essential to the conviction of the party on trial, the burden would always be on the state to prove it. But in truth, all that is necessary to be shown (when only one is on trial) is, that there was illicit and habitual sexual intercourse by the party on trial with the person of the opposite sex, charged in the indictment. There is nothing in this which conflicts with the authority of *State v. Mainor*, 6 Ired. 340 (though even that is somewhat questioned in *State v. Rinehart*, 106 N. C. 787), which holds that if one is put on trial and acquitted, the other cannot be convicted. The reason there given for this (if valid) is, that the verdict of acquittal establishes against the state that there was no illicit sexual intercourse between the parties, or, in the words of the decision, "that there has been no joint act." But there may, without countervailing that authority, well be, as in this case, an unlawful sexual intercourse, wherein one party has a guilty intent, and the other, through ignorance of the facts, not have such intent. The intercourse may be illicit as to both, but perhaps criminal as to one only. It would be strange, indeed, if the defendant, who has violated the law flagrantly and intentionally for years by living as man and wife with a woman he knew was not his wife, should not be guilty of the offense of fornication and adultery, because he added to his offense the fraud of making a good woman falsely believe that she was his wife. This case also differs from *State v. Mainor*, 6 Ired. 340, in that here neither were both parties on trial, nor had one been previously tried and acquitted.

In *Alonzo v. State*, 15 Tex. App. 378, 49 Am. Rep. 207, it is said: "While it is true that to constitute adultery there must be a joint physical act, it is certainly not true that there must be a joint criminal intent. The bodies must concur in the act, but the minds may not. While the criminal intent may exist in the mind of one of the parties to the physical act, there may be no such intent in the mind of the other party. One may be guilty, the other innocent, and yet the joint physical act necessary to constitute adultery was complete. Thus if one of the parties was at the time of committing the physical act insane, certainly such party has committed no crime; but it certainly cannot be contended that the other party, who was sane, has committed no crime. So if one of the parties was mistaken as to a matter of fact, after exercising due care to ascertain the truth in relation to such fact, which fact, had it

been true, would have rendered the alleged criminal act legal and innocent, the party so acting under such mistake of fact would be innocent of crime. But suppose the other party was not mistaken as to such fact, but on the contrary, well knew the true fact which rendered the connection illicit, would this party be regarded as guilty of no offense because the mistaken party was innocent? Suppose a father and his daughter are indicted for incestuous intercourse with each other. Upon the trial of the daughter, it is conclusively proved that at the time of committing the physical act she was an idiot, or that she was wholly ignorant of the relationship between herself and her father, without any fault of hers; of course, in either of these cases, she would be acquitted. Would it not be monstrous to hold that, because of her innocence, the beastly father must go unpunished for his unnatural crime? Such cannot be the law, and such, we believe, is not the law as declared by the weight of authority."

In Missouri it has been held, in a case of incest, where one party had knowledge of the relationship and the other was ignorant of it, that the former may be convicted and the latter acquitted: *State v. Ellis*, 74 Mo. 385; 41 Am. Rep. 321. Bishop (Statutory Crimes, sec. 660) says that when the woman is too drunk to give consent, the man may be prosecuted for rape or adultery, at the option of the prosecuting power. In 2 Wharton's Criminal Law, it is also said that the woman may be innocent because irresponsible (for any cause), though the man may be guilty; to same effect, *State v. Sanders*, 80 Iowa 582; *State v. Donovan*, 61 Iowa, 278; *Commonwealth v. Bakesman*, 131 Mass. 577; 41 Am. Rep. 248.

The fact is not to be lost sight of, that in an indictment for fornication and adultery, the state is not called on to prove a criminal intent. The case is made out when it is shown that a man and woman, not being married to each other, habitually engaged in sexual intercourse. That this is "lewd and lascivious" is not required to be shown, but is an inference of law from the facts proved, as with "malice" in indictments for homicide, even though in the latter case an intent must be charged. As to this offense, no intent is required to be charged or proved. Indeed, when the habitual sexual intercourse is shown, the law casts the burden of showing marriage on the defendants (*State v. McDuffie*, 107 N. C. 885; *State v. Peebles*, 108 N. C. 769), both as to this offense and in bastardy proceedings. Either party may avoid such legal conclusion by show-

ing that he or she was insane, idiotic, or without fault ignorant of the facts. But such defense of a want of intent cannot inure to the benefit of the other party, who had the intent. It is otherwise, under *State v. Mainor*, 6 Ired. 340, if the act of unlawful sexual intercourse between the two, which it is incumbent upon the state to show, is found in the negative as to one of the two parties charged.

This distinction must exist: 1. Because in the nature of things the state can show no intent except that of an habitual engaging in unlawful sexual intercourse by the parties charged; 2. If the state must show the guilty intent beyond the intent to do the act, the parties not being married to each other, those who lived in illegal habitual sexual intercourse, believing it to be lawful, as Mormons, free-lovers, and the like, would not be indictable; 3. A party who lived in such habitual adulterous intercourse with an idiot or insane person, or who might induce another person to go through the ceremony of marriage before one who was not authorized to celebrate it, by falsely pretending to the other party that the celebrant was a proper officer, would be guilty of no offense. It would always be easy in indictments for this offense to show a pretended ceremony before some one not an officer, and that the woman believed him to be such, and neither party (if this were law) could be convicted. The man could thus have the benefits of matrimony without its responsibility as to offspring or the public.

In the present case, the male defendant has grossly violated the law, and has sinned against the woman as well as the law, and her simple, unsuspecting "faith" in his honor and truth cannot "be imputed to him for righteousness," though it may be so as to herself, if she was innocent of "contributory negligence," and made reasonable inquiry.

Speaking for the majority of the court, the case of *State v. Mainor*, 6 Ired. 340, cannot be sustained on reason, since one may be put on trial for this offense and acquitted for lack of proof, and when the other is tried the proof may be ample, and there can be no estoppel as to the state in favor of a party not on trial (*State v. Caldwell*, 8 Baxt. 576), as there is none against him when put on trial for this offense after conviction of the other party: *State v. Parham*, 5 Jones, 416. Or when both are on trial together, there may be ample proof as to one by confession, as in *State v. Rinehart*, 106 N. C. 787, which cannot be evidence against the other. *State v. Mainor*, 6 Ired. 340, stands alone. Dr. Wharton (2 Crim. Law, 1788)

expressly refers to it, and says that it cannot be sustained, either by authority or reason. Indeed, however, as we have said, the decision in *State v. Mainor*, 6 Ired. 340, is placed on the ground that "the record affirms that there was no joint act." Here there is no verdict establishing, as to the woman, that she did not have illegal habitual sexual intercourse with the man. On the contrary, it is expressly found that she did. If she is withdrawn from liability by her lack of knowledge of the facts, he can receive no shelter or benefit from an exculpatory matter in which she does not share.

This offense differs from an indictment for conspiracy, in that the latter requires the concurrence of two or more minds. No act whatever need be shown: *State v. Brady*, 107 N. C. 822. Hence, if the indictment charges two persons with a conspiracy, and by a verdict the non-concurrence of one mind is shown, there can be no conviction of the other defendant. The offense is mental, and lies wholly in the intent. But fornication and adultery is a joint physical act. No intent is charged, and of course none need be proven. If the joint act is shown, the non-participation of the mind of one of the parties will not relieve the other. Hence, in a late case under the Virginia statute, of fornication and adultery (which defines the offense *verbatim* in the language of our statute), it is held that either party can be indicted alone in a separate bill: *Scott v. Commonwealth*, 77 Va. 344. This would not be permissible as to conspiracy, or any other offense where the concurrence of two persons in the intent, and not merely in the act, must be alleged and proven. An offense on "all fours" with this is the crime of incest, which is, in every particular, the crime of fornication and adultery, with the sole addition of the relationship of the parties, and as to that offense the authorities all agree that one may be convicted, when the other, from lack of mind or ignorance of the facts, may properly be acquitted. When the habitual sexual intercourse between persons not married to each other is in proof, such intercourse is "lewd and lascivious," nothing else appearing. If by lack of mind, or want of knowledge, it is not so as to either party, it is none the less still "lewd and lascivious" as to the other.

As to the other plea, it is sufficient to say that the defendant came back to the state voluntarily, not upon extradition papers, and the point intended to be raised in that regard is not presented.

Per Curiam. No error.

MERRIMON, C. J., dissented, and after quoting section 1041, North Carolina code, to the effect that "if any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed, and cohabit together, they shall be guilty of a misdemeanor," said: "To constitute the sexual intercourse thus prohibited, the act or acts must have the quality of lewdness and lasciviousness, not simply on the part of one, but both of the parties. The offense complete is their joint act in all material respects, and cannot be otherwise committed. The statute in respect to fornication and adultery does not, as we have seen, make the simple act of sexual intercourse indictable. To create this offense, the male and female, not being married to each other, must 'lewdly and lasciviously associate, bed, and cohabit together.' There must exist the common purpose and knowledge of it to be lewd and lascivious in the association, bedding, and cohabiting forbidden, else the offense is not complete. If the facts are as the jury found them to be, it would seem that the appellant should have been indicted for bigamy, and not for the offense charged in the indictment." In speaking of the facts in the case, Judge Merrimon said: "The facts found as to the male defendant, the appellant, who alone was put upon his trial, tend strongly to show that he was guilty of the much graver crime of bigamy. But as to the female defendant, who was not put upon her trial, the facts found by the verdict show that she was not guilty. She was innocent,—she thought that the male defendant was her lawful husband, and as soon as she became sensible of his perfidy and crime she ceased to live with him. She did not, in a legal sense,—that of the statute,—'lewdly and lasciviously associate, bed, and cohabit together' with him." And he concluded that as she was not guilty of the offense charged, the appellant could not be, and was consequently entitled to his discharge; citing, in support of this view, *State v. Mainor*, 6 Ired. 340; *State v. Parham*, 5 Jones, 416; *State v. Lysterly*, 7 Jones, 158; *State v. Rienthart*, 106 N. C. 787.

ADULTERY AND FORNICATION — WHAT CONSTITUTES THE OFFENSE. — See *Hall v. State*, 88 Ala. 236; 16 Am. St. Rep. 51, and note; *Commonwealth v. Oall*, 21 Pick. 509; 32 Am. Dec. 289, and note. A marriage celebrated under license is unlawful when the man has another wife living, and the cohabitation of the parties under it is adulterous: *Vaughan v. State*, 83 Ala. 55. Fornication by unmarried parties may be committed in two ways: 1. By the living together and carnal intercourse with each other; 2. By habitual carnal intercourse without living together: *Thomas v. State*, 28 Tex. App. 300; *Luster v. State*, 23 Fla. 339.

EXTRADITION. — The mere fact that a prisoner, being a fugitive from justice, was kidnaped in another state and brought into the state from which he had fled, is no reason why he should be released; *Ex parte Barker*, 87 Ala. 4; 13 Am. St. Rep. 17; note to *In re Fetter*, 57 Am. Dec. 399; *State v. Smith*, 1 Bail. 283; 19 Am. Dec. 679. When a person is arrested in a sister state, and, without being extradited, is brought into another to answer to a criminal offense, such person is unlawfully deprived of his liberty, and is entitled to a discharge; *In re Robinson*, 29 Neb. 135; ante, p. 378, and note.

CASES
IN THE
SUPREME COURT
OF
NORTH DAKOTA.

**GOOSE RIVER BANK v. WILLOW LAKE SCHOOL
TOWNSHIP.**

[1 NORTH DAKOTA, 26.]

SCHOOL TOWNSHIP WARRANTS ISSUED to pay for services of teachers who held no lawful certificate of qualification are without consideration and void. Such persons cannot be employed to teach, under the express terms of the statute.

NEGOTIABLE INSTRUMENTS. — **SCHOOL TOWNSHIP' WARRANTS ARE NOT NEGOTIABLE INSTRUMENTS**, in the sense that their negotiation or ownership by innocent purchasers for value will cut off defenses.

ESTOPPEL. — **SCHOOL TOWNSHIP IS NOT ESTOPPED BY THE FALSE REPRESENTATIONS OF ITS OFFICERS** as to the existence of facts authorizing the issuance of a warrant for the payment of school money.

VOID MUNICIPAL CONTRACT — RETENTION OF FRUITS OF. — When a contract entered into by a school township for the payment of school money is void or prohibited by express declaration of statute, the retention by such municipality of the fruits of such contract will not subject it to liability, either under such contract or upon a *quantum meruit*.

UNQUALIFIED SCHOOL-TEACHER OR HIS ASSIGNEE NOT ENTITLED TO COMPENSATION. — One who teaches school without a certificate of qualification, in violation of the express terms of a statute, is not entitled to compensation for his services, even though the school officers have issued a warrant therefor. His assignee is entitled to no greater rights than himself.

A. B. Levises, for the appellant.

E. J. and J. P. McMahon, and J. E. Robinson, for the respondent.

CORLISS, C. J. The judgment in favor of the defendant must be affirmed. The action was upon three school township warrants issued by the officers of the defendant. These

warrants are void. They were issued to pay for the services of a teacher who held no lawful certificate of qualification. No such person can be employed to teach. The statute so declares, and any contract made in violation of this provision is void by the express terms of the same act: Comp. Laws, sec. 1723. There was therefore no consideration for these warrants. The teacher had no claim against the defendant, because the statute declares she should not be employed to teach, and every act in violation of this provision was a nullity, so far as the liability of the defendant is concerned. The plaintiff cannot claim protection as an innocent purchaser for value. That such instruments are not negotiable in the sense that their negotiation will cut off defenses is the voice of all the decisions: *Wall v. Monroe Co.*, 103 U. S. 74; *Mayor v. Ray*, 19 Wall. 468; 1 Dillon on Municipal Corporations, 3d ed., sec. 503; *Miner v. Vedder*, 66 Mich. 101. The purchaser buys at his peril. Nor is the doctrine of estoppel applicable. Could town officers in this manner estop a municipal corporation, void acts — acts void because expressly forbidden by the sovereign — would have validity, and the will of the legislature would be nullified by the conduct or statement of mere municipal agents. The cases cited on this point have no bearing on this question. No decision can be found holding that a void warrant receives life from the false statement of such an agent, under the circumstances existing in this case. Unless we were willing to leave such corporations to the mercy of dishonest agents, we would not follow such a case could one be found. If an agent can estop the township by a false statement that the teacher has received the certificate, he can estop it also by a false statement that the person to whom the warrant was issued has rendered services in teaching, when in fact such person has not rendered any services at all. The question was directly presented in *Mayor v. Ray*, 19 Wall. 468. In view of the earnestness with which this claim of estoppel was urged, we will quote briefly from this opinion, as accurately expressing our views. Speaking of a similar evidence of indebtedness, the court say: "But every holder of a city order or certificate knows that to be valid or genuine at all, it must have been issued as a voucher for city indebtedness. It could not be lawfully issued for any other purpose. He must take it, therefore, subject to the risk that it has been lawfully and properly issued. His claim to be a *bona fide* holder will always be subject to this qualification. The face

of the paper itself is notice to him that its validity depends upon the regularity of its issue. The officers of the city have no authority to issue it for any illegal or improper purpose, and their acts cannot create an estoppel against the city itself, its tax-payers, or people." To the same effect is *Wall v. Monroe Co.*, 103 U. S. 74; *Farmers' etc. Bank v. School Dist.*, 6 Dak. 255; 1 Dillon on Municipal Corporations, 3d ed., sec. 504.

There is no force in the position that the defendant, having received the benefit of the teacher's services, is liable. Such a doctrine would defeat the policy of the law, which is to give the people of the state the benefit of trained and competent teachers. The law recognizes only one evidence that that policy has been regarded, — the certificate of qualification. If the defendant could be made liable by the mere receipt of the benefit of the services rendered, the law prohibiting the employment of teachers without certificates, and declaring void all contracts made in contravention of that provision, would be, in effect, repealed, and the protection of the people against incompetent and unfit teachers, which such statute was enacted to accomplish, would be destroyed. Where a contract is void because of the express declaration of a statute, or because prohibited in terms, the retention by a municipality of the fruits of such a contract will not subject it to liability, either under the contract or upon a *quantum meruit*: *Dickinson v. City of Poughkeepsie*, 75 N. Y. 65; *McBrien v. City of Grand Rapids*, 56 Mich. 95; *Thomas v. Richmond*, 12 Wall. 349; *Argenti v. San Francisco*, 16 Cal. 255; *City of Litchfield v. Ballou*, 114 U. S. 190. See also *National Tube Works Co. v. City of Chamberlain*, 5 Dak. 54. This is particularly true in a case like the one at bar, where no person can teach without the certificate without being actually or legally in collusion with local officers to defeat a wise and salutary statute enacted as a barrier against the employment of unqualified teachers. The person who teaches without the certificate has violated the letter and the spirit of the law. The wrong done is without remedy. The people who have thus had this barrier torn from about them have no redress. Shall the wrong-doer be compensated for aiding the school township officers in breaking down this barrier, thus depriving the people of the protection of this important law? In this connection, the language of the court in *Thomas v. Richmond*, 12 Wall. 349, is very applicable: "The issuing of bills as a currency by such a cor-

poration without authority is not only contrary to positive law, but, being *ultra vires*, is an abuse of the public franchises which have been conferred upon it, and the receiver of the bill, being chargeable with notice of the wrong, is *in pari delicto* with the officers, and should have no remedy, even for money had and received, against the corporation upon which he has aided in inflicting the wrong. The protection of public corporations from such unauthorized acts of their officers and agents is a matter of public policy, in which the whole community is concerned, and those who aid in such transactions must do so at their peril." In *City of Litchfield v. Ballou*, 114 U. S. 190, the same court said: "The money received on the bonds having been expended with other funds raised by taxation in erecting the water works of the city, to impose the amount thereof as a lien upon these public works would be equally a violation of the constitutional prohibition as to raise against the city an implied *assumpsit* for money had and received. The holders of the bonds and agents of the city are *participes criminis* in the act of violating that prohibition, and equity will no more raise a resulting trust in favor of the bond-holders than the law will raise an implied *assumpsit* against a public policy so strongly declared."

The judgment of the district court is affirmed.

SCHOOLS — TEACHERS — NECESSITY FOR CERTIFICATE. — A teacher who does not hold a certificate as required by law cannot maintain an action for services performed while not in possession of such certificate: *Devoe v. School District*, 77 Mich. 610; see *Lee v. School District*, 71 Mich. 361.

SCHOOLS — ORDERS OR WARRANTS, WHETHER NEGOTIABLE. — An order drawn by the trustees of a school district on the county superintendent is not a negotiable instrument: *Shakespear v. Smith*, 77 Cal. 638; 11 Am. St. Rep. 327, and note.

SCHOOLS — ACTS OR REPRESENTATIONS OF OFFICERS — ESTOPPEL. — No estoppel will ordinarily arise from any act of a school district or its officers if done in violation of or without authority of law: *Seeger v. Mueller*, 123 Ill. 87.

MUNICIPAL CORPORATIONS — ULTRA VIRES CONTRACTS. — If the contract sued on is a contract to pay out public money in aid of a purpose prohibited by law, it is void, and no recovery can be had thereon: *County of Cook v. Industrial School*, 125 Ill. 540; 8 Am. St. Rep. 386, and note.

STATE v. NELSON COUNTY.

[1 NORTH DAKOTA, 88.]

CONSTITUTIONAL LAW — SEED-GRAIN STATUTE. — A statute authorizing counties to issue bonds to procure seed-grain for needy farmers resident therein, and providing for the payment of such bonds by the levy of a general county tax, if necessary, is not invalid on the ground that the tax authorized is not for a public purpose, or that such statute authorizes counties to make donations or lend their aid or credit to individuals, otherwise than for the necessary support of the poor, and in direct violation of the express terms of the state constitution.

CONSTITUTIONAL LAW — POLICE POWER. — The legislature, in the exercise of its discretion, and within the limits of the county indebtedness prescribed by the state constitution, may clothe county commissioners with discretionary authority to make small loans, secured by prospective crops or general county taxation, to those whose condition is so impoverished and desperate as to reasonably justify the fear that, unless they receive help to enable them to raise crops, they and their families will become a charge upon the counties in which they live. And it will be presumed that, in passing a statute for their benefit, the legislature acted upon the fullest knowledge of the necessities of the situation, and it will also be presumed, in favor of the validity of such statute, that it was passed after due deliberation, and with the clearest apprehension of the scope and purpose of the language used in the state constitution.

INJUNCTION — JURISDICTION — STATUTE. — An injunction will not issue to restrain the operation of a valid statute.

ORIGINAL JURISDICTION TO ISSUE EXTRAORDINARY WRITS — WHEN EXERCISED. — The writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, and injunction will not be issued by the supreme court, in the exercise of its original jurisdiction, except in a limited class of cases, where the writs, except *habeas corpus*, are sought for on motion of the attorney-general, under information as prerogative writs, as in cases *publici juris*, and those affecting the sovereignty of the state, its franchises and prerogatives, or the liberty of the people. In all other cases, the writs should be issued by the district courts or by the judges thereof.

ORIGINAL JURISDICTION TO ISSUE INJUNCTIONS will not be exercised by the supreme court, when the question presented is one of merely local concern, affecting a county and its tax-payers only.

George F. Goodwin, attorney-general, and Burke Corbett, for the petitioner.

M. N. Johnson, state's attorney, and F. R. Fulton, for the respondent.

WALLIN, J. Upon the return of an order to show cause, application is made to this court for leave to file an information, as a foundation for issuing a writ of injunction out of this court prohibiting the county of Nelson and its officials from issuing seed-grain bonds, under an act of the state legislature, approved February 14, 1890, and entitled: "An act authorizing

counties to issue bonds to procure seed-grain for needy farmers resident therein." The information is based upon the complaint of one John Birkholz, which alleges, — "1. That the above-named complainant, John Birkholz, is a tax-payer of the county of Nelson, the respondent above named. 2. That said respondent is a political or public corporation, duly organized under existing laws. 3. That J. W. Forbes is the duly elected and qualified chairman of the board of county commissioners, and N. F. Webb is the duly elected county auditor of Nelson County, and as such officers are respectively discharging the duties thereof. 4. That the above-named respondent, on the twenty-sixth day of March, 1890, acting through its board of county commissioners and the county auditor of said county, pursuant to a petition signed by one hundred freeholders resident in said county, adopted and passed a resolution at a meeting of said board, and thereby resolved to issue the bonds of the said county in the sum of twenty thousand dollars (\$20,000), payable in ten (10) years, and bearing interest at the rate of seven (7) per cent per annum, payable semi-annually, claiming their right to so do under an act of the legislative assembly entitled 'An act authorizing counties to issue bonds to procure seed-grain for needy farmers resident therein,' approved February 14, 1890, and acts amendatory thereto; that in pursuance to said resolution, said respondent, acting through its auditor and the chairman of its board of county commissioners, have taken such steps as are requisite and necessary in the premises to and are about to issue bonds for said amount, in pursuance of said resolution, claiming their right to do so under the act aforesaid. 5. That if said bonds are issued they will become the obligation of the county. In order to meet the payment of the interest thereon, and the payment of the principal of the same, it will be necessary to levy taxes from year to year against the tax-paying people of said county, and the proceeds of said bonds, when issued and sold by the said county, will be diverted to and used for the purpose of buying said grain, to be distributed to private individuals, indigent and poor farmers resident in said county. 6. That the act of the legislative assembly aforesaid, under which said respondent claims its right to issue said bonds, is in contravention of section 185 of the constitution of the state of North Dakota, which said section reads as follows: 'Sec. 185. Neither the state, nor any county, city, township, town, school district, or any other political subdivision, shall loan or give its credit,

or make donations to or in aid of any individual, association, or corporation, except for necessary support of the poor, nor subscribe to or become the owner of the capital stock of any association or corporation, nor shall the state engage in work of internal improvement, unless authorized by a two-thirds vote of the people.' Wherefore your complainants pray your honorable court that an order in the nature of a rule to show cause be issued to the said respondent, its officers, agents, and servants, to be and appear before your honors, at Fargo, in the county of Cass and state of North Dakota, at the opening of court thereof on Wednesday, the second day of April, A. D. 1890, and then and there show cause, if any reason it has, why an injunction should not be issued restraining respondent from issuing the bonds aforesaid."

It clearly appears from the complaint that the county of Nelson has, under the provisions of the seed-grain act in question, taken all of the requisite preliminary steps, and is about to issue the bonds of the county, and sell the same, and will apply the proceeds of such sale to the purchase of seed-grain for such farmers of that county as come within the terms of the seed-grain law, and who make application for the seed-grain under oath, and in manner and form as prescribed by the law. It is conceded that all action taken by the defendants is warranted by the express terms of the law; nor is it pretended that the bonds, if issued, will create a county indebtedness exceeding in amount the limit prescribed by the constitution of the state. Under such circumstances, the writ of injunction will be refused as a matter of course, unless the statute under which the bonds are intended to be issued is itself unconstitutional or void for some reason. The question presented must turn upon the validity of the seed-grain statute.

The statute has twenty sections, but it will suffice to give the substance of such of its provisions as bear upon its validity as a law.

Section 1 provides as follows: "In any county of the state where the crops for any preceding year have been a total or partial failure by reason of drought, hail, or other cause, it shall be lawful for the board of county commissioners of such county to issue the bonds of the county under and pursuant to the provisions of this act, and with the proceeds derived from the sale thereof to purchase seed-grain for the inhabitants thereof who are in need of seed-grain, and who are unable

to procure the same, whenever said board shall be petitioned in writing so to do by not less than one hundred freeholders resident in the county; and said board, at a meeting called as hereinafter provided to consider said petition, shall, by a majority vote, determine that the prayer of the petitioners shall be granted; provided, that all such petitions shall be filed with the county auditor or county clerk on or about the twenty-eighth day of February; and thereupon it shall be the duty of said officer to forthwith call a meeting of the board of county commissioners of his county, to consider said petition; and provided further, that the total amount of bonds issued by any county under the provisions of this act shall not, with the then existing indebtedness of the county, exceed the limit of indebtedness fixed by the constitution in such case."

Section 4 provides: "The proceeds arising from the sale of said bonds shall be paid by the purchaser thereof to the county treasurer of the county, or to his authorized agent, at the time of the delivery thereof, and such proceeds shall be paid out only on the order of the board of county commissioners."

Section 6 provides that "for the purpose of securing prompt payment of the principal and interest of said bonds, there shall be levied by the board of county commissioners, at the time and in the manner that other taxes are levied, such sums as shall be sufficient to pay such interest, and in addition thereto, a sinking fund tax shall be annually levied, sufficient to pay and retire said bonds at their maturity; and it shall be the duty of the county treasurer to pay promptly the interest upon said bonds as the same shall fall due. No tax or fund provided for the payment of such bonds, either principal or interest, shall at any time be used for any other purpose."

Section 7 is as follows: "The fund arising from the sale of said bonds shall be applied exclusively by said board for the purchase of seed-grain for residents of the county who are poor and unable to procure the same; provided, that no more than one hundred and fifty bushels of wheat, or its equivalent in any grain, shall be furnished to any one person."

Section 8 provides that "all persons entitled to or wishing to avail themselves of the benefit of this act shall file with the county auditor or county clerk of the county where said applicant resides, on or before the first day of March, an application duly sworn to before said county auditor or clerk, or some other officer authorized to administer oaths. Said application shall contain a true statement of the number of acres

the applicant has plowed or prepared for seeding; how many acres the applicant intends to have plowed and prepared for seeding; how many bushels and what kind of grain he will require to seed the ground so prepared as aforesaid; how many bushels of grain the applicant harvested in the preceding year; that the applicant has not procured, and is not able to procure, the necessary seed-grain for the current year; that he desires the same for seed, and no other purpose; and that he will not sell or dispose of the same, or any part thereof, but will use the same, and the whole thereof, in seeding the land so prepared, or to be prepared for crop."

Section 9 provides that the commissioners shall examine all applications, and determine "who are entitled to the benefits thereof, and the amount to which each applicant is entitled."

Section 10 provides that the applicants under the act shall, before receiving the seed-grain, sign a "contract in duplicate, attested by the county auditor or county clerk, to the effect that said applicant, for and in consideration of — bushels of seed-grain received from — county, promises to pay to said county — dollars, the amount of the cost of the seed-grain; that said sum shall be taxable against all the real and personal property of said applicant; that such tax shall be levied by the county auditor or county clerk of his county, and collected as other taxes are collected under the laws of this state; that the amount of such indebtedness shall become due and payable on the first day of October, in the year in which said seed-grain is furnished, together with the interest on such amount from the first day of April of that year at the rate of seven per cent per annum; and if said indebtedness be not paid on or before the twentieth day of October of that year, it shall then be the duty of the county auditor or county clerk of the said county to cause the amount of said indebtedness to be entered upon the tax-list of said county for that year as a tax on the land on which said seed-wheat was sown, and upon any other land owned by the applicant, to be collected as other taxes are; and the sum so entered and levied shall be a lien upon the real estate owned by such person until said indebtedness is fully paid, when it shall be the duty of the proper officer to cancel the same."

The objects and purposes contemplated by the statute may be readily gathered from the above extracts, and they are clear and unmistakable in their character. The legislature, by this enactment, so far as it can do so, has clothed the sev-

eral counties of the state where there has been a preceding crop failure with authority to lend their aid in procuring seed-grain to such of their citizens as are engaged in farming pursuits, who make it appear, in manner and form as detailed by the law, that they are unable to procure such seed-grain by any other means. The law empowers the counties to lend their aid out of money to be obtained by the issue and sale of county bonds, such bonds to be paid, principal and interest, from funds obtained by means of a general tax levy upon all of the taxable property situated within the counties that issue such bonds. Two features of this statute stand out in conspicuous prominence: 1. All benefits obtainable under the act are confined to persons engaged in the pursuit of farming, and among farmers only those who propose to continue the business of farming after the aid in contemplation has been received by them. 2. No part of the fund is intended to be used in support or aiding such indigent persons as have already become a county charge, viz., paupers.

The objections which may be made to the validity of this statute are twofold: 1. It may be claimed that the tax authorized by the statute is not for a public purpose, hence not a valid tax; 2. It may be contended that, under section 185 of the state constitution, counties are expressly forbidden to make donations or lend their aid to either corporations or individuals, hence that the proposed aid is unconstitutional, as repugnant to said section. The courts of this country, and of all countries where constitutional liberty exists, agree with the elementary writers upon the science of government, that it is essential to the validity of a tax that it be laid for a public purpose. Difficulty has frequently arisen in discriminating between public and private objects; but where the object is primarily to foster private enterprises, and the only benefit to be derived by the public is incidental and secondary, the tax will be annulled by the courts as an abuse of the legislative prerogative. In the first instance, the duty devolves upon the legislative branch of the government to determine whether a proposed tax is or is not for a public purpose, and courts are loth to interpose and declare any tax unlawful, and will only do so in case of a palpable disregard of the wise limitations, express and implied, restricting the power of taxation. But where the legislature assumes, in the guise of taxation, to compel A to advance his private means to aid B in the prosecution of a purely private enterprise, the courts will not hesi-

tate to perform the duty of declaring such tax void, as subversive of fundamental and vested individual rights, and will do so even in cases where there is no express constitutional inhibition. The power of confiscation does not exist in the legislature. The cases cited below are but a few of the numberless cases which have applied these principles to statutes imposing pretended taxes: *Loan Association v. Topeka*, 20 Wall. 655; *Bank v. City of Iola*, 2 Dill. 353; *City of Parkersburg v. Brown*, 106 U. S. 487; *Cole v. City of La Grange*, 113 U. S. 1; *Allen v. Jay*, 60 Me. 124; 11 Am. Rep. 185; *Lowell v. Boston*, 111 Mass. 454; 15 Am. Rep. 39; *State v. Osawkee Township*, 14 Kan. 422; 19 Am. Rep. 99; *Coates v. Campbell*, 37 Minn. 498; *Cooley's Constitutional Limitations*, 487; *Cooley on Taxation*, 2d ed., 55, 126.

Under these authorities, the test to be applied to the seed-grain statute is this: Is the tax provided for in the statute laid for a public purpose? If this question is answered in the negative, the statute must be declared null and void, without reference to section 185 of the state constitution, to which the attention of the court has been particularly directed. The statute makes provision for levying a general tax, in counties issuing the bonds, for the benefit of a numerous body of citizens, who, without fault of theirs, and solely by reason of successive crop failures, are now reduced to extremities, and are in fact impoverished to such an extent that they are, for the present time, wholly without the ability to obtain the grain necessary for seeding the lands from which they derive the necessities of life. It is agreed on all sides that this class of citizens, having already exhausted their private credit, must have friendly aid from some source in procuring seed-grain, if they put in crops this year. The legislature, by this statute, has devised a measure which seems well adapted to meet the exigency, and promises to give the needed relief, with little prospect of ultimate loss to the county treasuries. It is reasonable to anticipate that the beneficiaries of the act will be enabled to tide over their present embarrassments, and through the aid granted them by this statute, a wide-spread calamity, both public and private, will be averted. The crisis in the development of the state which renders some measure of wholesale relief imperatively necessary is fully recognized by all well-informed citizens of the state, and this court will be justified in taking judicial notice of the existing *status*. The stubborn fact exists, that a class of citizens, numbered by

many thousands, is in such present straits from poverty, that unless succored by some comprehensive measure of relief, they will become a public burden, in other words, paupers, dependent upon counties where they reside for support. It is to avert such a wide-spread disaster that the seed-grain statute was enacted, and it should be interpreted in the light of the public danger which was the occasion of its passage. "The support of paupers, and the giving of assistance to those who, by reason of age, infirmity, or disability, are likely to become such, is, by the practice and the common consent of civilized countries, a public purpose": Cooley on Taxation, 2d ed., 124, 125. "The relief of the poor — the care of those who are unable to care for themselves — is among the unquestioned objects of public duty": Opinion of Brewer, J., in *State v. Osawkee Township*, 14 Kan. 424; 19 Am. Rep. 99. If the destitute farmers of the frontier of North Dakota were now actually in the almshouses of the various counties in which they reside, all the adjudications of the courts, state and federal, upon this subject could be marshaled as precedents in support of any taxation, however onerous, which might become necessary for their support. But is it not competent for the legislature, representing the tax-payers, in the exercise of its discretion, and within the limits of county indebtedness prescribed by the state constitution to clothe county commissioners with authority, to be exercised at their discretion, to make small loans, secured by prospective crops, to those whose condition is so impoverished and desperate as to reasonably justify the fear that, unless they receive help, they and their families will become a charge upon the counties in which they live?

We have carefully examined the authorities above cited, and many others of similar import, and while fully assenting to the principles enunciated by the cases, viz., that all taxation must be for a public purpose, we do not, with the single exception of the Kansas case, regard them as parallel cases, and applicable to the question presented in the case at bar. As we view the matter, the tax in question is for a public purpose, i. e., a tax for the "necessary support of the poor." The case of *State v. Osawkee Township*, 14 Kan. 424, 19 Am. Rep. 99, asserts a doctrine which would defeat the tax in question. This court has great respect for the court which promulgated that decision, and the most sincere admiration for the distinguished jurist now upon the supreme bench of the nation who wrote the opinion in that case. Nevertheless, we cannot yield

our assent to the reasoning of the case, leading to the conclusion that a loan of aid to an impoverished class, not yet in the poor-house, is necessarily a tax for a private purpose. In our view, it is not certain, or even probable, in the light of subsequent experience in the West, that the court of last resort in the state of Kansas would enunciate the doctrine of that case at the present day. The decision was made fifteen years ago. While the fundamental principles which underlie legislation and taxation have not changed in the interval, it is also true that the development of the western states has been attended with difficulties and adverse conditions which have made it necessary to broaden the application of fundamental principles to meet the new necessities of those states. Under the stress of adversity peculiar to the condition of the frontier farmer, there has come to be an expansion of the legal meaning of the term "poor" sufficient to embrace a class of destitute citizens who have not yet become a public charge. The main features of the seed-grain statute are neither new nor novel. It was borrowed from territorial legislation, and long prior to that, the state of Minnesota, in aid of agricultural settlers upon its western frontier, enacted a series of statutes which are open to every criticism which can be made upon the statute under consideration: Laws Dak. 1889, c. 43. See also Gen. Stats. Minn. 1878, pp. 1024-1030.

The legislature of Minnesota has frequently, and by a variety of laws, extended aid to the frontier farmers of that state, who, far from being paupers, were yet reduced to extremities by reason of continued crop failures resulting from hail-storms, successive seasons of drought, and from the ravages of grasshoppers. Under one law, towns are authorized to vote a tax to defray the expense of destroying grasshoppers; under another statute, the governor, state auditor, and state treasurer were authorized to borrow one hundred thousand dollars on state bonds to be issued by them, and the proceeds were to be expended in the purchase of seed-grain for the needy farmers. Again, and at the same session, the same state officials were empowered to issue additional bonds to the same amount, to pay a debt contracted for a similar purpose, upon warrants of the state auditor. Section 6 of the Minnesota act of 1878, chapter 93, provides as follows: "The credit of the state is hereby pledged to the payment of the interest and principal of the bonds mentioned in this act, as the same may become due." By another section the state auditor is authorized and

required to levy an annual tax necessary to meet the interest and principal of the debt created by these bonds. Many of the features of the two seed-grain statutes passed at the first session of the legislature of this state are borrowed from Minnesota. In principle, the legislation of the two states is identical. The aid extended is furnished in the form of a loan to individual farmers, secured on their crops, but to be met primarily by taxation. The destitute communities of farmers who were thus assisted in a neighboring state were enabled thereby to tide over their temporary necessities, and are now self-supporting.

This review of legislation in aid of destitute farmers will serve to illustrate the well-known fact that legislation, under the pressure of a public sentiment born of stern necessity, will adapt itself to new exigencies, even if in doing so a sanction is given to a broader application of elementary principles of government than have before been recognized and applied by the court in adjudicated cases. It is the boast of the common law that it is elastic, and can be adjusted to the development of new social and business conditions. Can a statute enacted for such broadly humane and charitable purposes be annulled by another branch of the government as an abuse of legislative discretion? We think otherwise. Great deference is due from the courts to the legislative branch of the state government, and it is axiomatic that in cases of doubt the courts will never interfere to annul a statute: *Cooley's Constitutional Limitations*, 487.

It will be presumed that the legislature, in passing the seed-grain statute, acted upon the fullest knowledge of the necessities of the situation, and also presumed that they have passed the statute after due deliberation, and with the clearest apprehension of the scope and purpose of the language used in section 185 of the state constitution. That section is not only restrictive upon counties, but it is also permissive. It permits counties to lend aid for "the necessary support of the poor." To our mind, the restrictive words of that section were intended to prevent the loan of aid, either to individuals or corporations, for the purpose of fostering business enterprises, either of a public or private nature; but that the people who adopted the constitution, as well as those who framed the instrument, expressly intended, by the language of that section, to grant a power affirmatively to the municipal corporations named in section 185 to lend their aid and

make donations for the "necessary support of the poor." The attention of the court has been directed to the constitutions of nineteen of the states, in which the language of section 185 is used *verbatim*, except only that in the states of North and South Dakota the words above quoted are interpolated. Why was this peculiar language introduced into the constitutions of North and South Dakota, when nothing of the kind was found in that of the other seventeen states? Why did not the conventions which formed the organic law for North and South Dakota simply copy the language which, with this exception, is borrowed from the other constitutions, without inserting the excepting clause under consideration? To our mind, the answer to these questions is found in the peculiar and alarming condition of the people of Dakota Territory in the year 1889, when the two Dakotas assumed the responsibilities of statehood. Such conditions had not before existed, and hence the constitutions of other states had made no provisions to meet such necessities. When the two states formed and adopted their constitutions, the fact was well known and recognized by the people of Dakota that the condition of many farming communities was such that some comprehensive measure for their relief was an imperative necessity. In such a conjuncture, the words were interpolated into section 185 of the constitution, which permit counties to loan their aid for the "necessary support of the poor." No constitutional grant of power was necessary to give the new governments authority to provide for the support of paupers in the poor-houses. That power is inherent, and exists in all governments, as among their implied powers and duties. By universal consent, taxes are valid when laid for the support of paupers, or those likely to become paupers. There was no necessity and no reason for inserting a provision in the state constitutions of North and South Dakota authorizing counties to loan their aid to maintain the almshouses. It would be absurd to assume that the framers of the constitutions, and the people who adopted them, intended by this provision to enable local municipalities to issue and sell bonds, and loan the proceeds to the inmates of the poor-houses; yet the power to loan aid in "support of the poor" is given. In our opinion, this power is conferred in the organic law expressly to meet the exigencies of the situation then existing, and that it is our duty to give it that effect. We believe, and so hold, that the class referred to in the exception contained in section

135 of the state constitution is the poor and destitute farmers of the state, and that the first legislature which met after the state was admitted has, by the seed-grain statute, put a proper construction upon the language in question. We therefore refuse to grant the writ applied for, and hold that the seed-grain statute is a valid enactment.

But our refusal to issue the writ can be placed upon still another ground. This case furnishes the first instance of an application to this court to put forth its original jurisdiction by issuing a writ, except in a single *habeas corpus* case. We deem it expedient, therefore, to now indicate briefly the circumstances under which this court, in the exercise of a discretion vested in it, will deem it its duty to take original cognizance of cases. Section 87 of the constitution of the state authorizes this court to "issue writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, and injunction." In the exercise of its appellate and supervisory powers over inferior courts, the supreme court may have occasion, from time to time, to issue certain of the writs above enumerated, but such writs will not issue out of this court, in the exercise of its original jurisdiction, except in a limited class of cases, and such as are not ordinarily of frequent occurrence. All of the original and remedial writs which can be issued out of this court, under the constitution, may, under section 103 of the state constitution, be issued, not only by the district courts, but the judges thereof. We think the intention was to devolve upon the district courts, which are readily accessible, and at all times open for public business, the duty of assuming original cognizance of all ordinary cases which are remediable by means of the writs aforesaid; and to confer upon the supreme court, in the exercise of a discretion vested in it, the duty of taking original cognizance only in the limited class of cases where the writs, except the writ of *habeas corpus*, are sought for on motion of the attorney-general as prerogative writs. Except in cases of *habeas corpus*, leave to file an information must be obtained by the attorney-general. When the information makes out a *prima facie* case, the writ will issue only in cases *publici juris*, and those affecting the sovereignty of the state, its franchises and prerogatives, or the liberties of its people. In such cases, the court will judge for itself whether the wrong complained of is one which demands the interposition of this court. The constitution of this state, with respect to the original jurisdiction of the supreme court, is substantially the same as that of the state of Wisconsin;

and the interpretation given by the supreme court of that state to that part of its state constitution meets with the full approval of this court: See *Attorney-General v. Chicago etc. Ry Co.*, 35 Wis. 425; *Attorney-General v. City of Eau Claire*, 37 Wis. 400; *Wheeler v. Northern Col. Irrigation Co.*, 9 Col. 248. The case at bar affects only the local concerns of the county of Nelson and its tax-payers, and hence does not fall within the limited class of cases indicated above, and in which alone this court will assume original jurisdiction.

It follows that for this reason, also, the writ must be denied.

CONSTITUTIONAL LAW — POLICE POWER — LOANS BY COUNTIES FOR PRIVATE USE. — The cases cited in the principal case are cited in the case of *State v. Oosaukee Township*, 14 Kan. 418, 19 Am. Rep. 99, in which case it was decided that a statute which authorized towns to issue bonds to raise money for the purpose of providing provisions and seed-grain for the destitute citizens of such towns was unconstitutional, as not being for a public purpose.

JURISDICTION — ORIGINAL, OF SUPREME COURT — WHEN EXERCISED TO ISSUE EXTRAORDINARY WRITS. — *Mandamus* can be issued by the supreme court of Maine only to courts of inferior jurisdiction, corporations, and individuals: *Deannett, Petitioner*, 32 Me. 508; 54 Am. Dec. 602. The power of the supreme court to issue a writ of *mandamus* depends exclusively upon the express language of the constitution: *Hawkins v. Governor*, 1 Ark. 570; 33 Am. Dec. 346, and extended note. As to the jurisdiction of the supreme court of Louisiana to issue writs of prohibition and *certiorari*, see *State v. Houston*, 40 La. Ann. 393; 8 Am. St. Rep. 532.

ELL v. NORTHERN PACIFIC RAILROAD COMPANY.

[1 NORTH DAKOTA, 336.]

MASTER AND SERVANT — FOREMAN AS FELLOW-SERVANT. — A foreman who has the control, direction, and supervision of a gang of railroad employees, with authority to employ and discharge them, is a fellow-servant, and not a vice-principal. A master is not liable for an injury to an employee, caused by the negligence of such foreman.

MASTER AND SERVANT — RESPONSIBILITY OF MASTER — FELLOW-SERVANTS. — The character of the negligence from which damage to a co-employee results, and not the superior rank of the negligent servant, determines the responsibility of the master.

MASTER AND SERVANT — MASTER CANNOT DELEGATE PERSONAL DUTIES. — A master must use due care in supplying his servants with safe appliances, and a safe place in which to work. He cannot escape liability by delegating these personal duties to another.

FELLOW-SERVANTS — SUPERIOR AND INFERIOR SERVANT. — A foreman, superintendent, or superior servant and an inferior servant, when the

two are engaged in the same general work for the master, are fellow-servants. The superior rank of the former cannot lift him above the grade of a fellow-servant into the position of a vice-principal, so long as he is engaged in the work of a servant only. In such case, the superior servant is no more the representative of the master than the inferior servant, except in the enlarged field of his action, and the wider scope of the trusts confided to him; nor does his rank increase the risks of his employment assumed by the inferior servant.

MASTER AND SERVANT — RISKS ASSUMED BY SERVANT. — A servant assumes all open and palpable risk of accident in the common course of the business, including the negligence of all fellow-servants, of whatever grade or rank, in the same employment.

FELLOW-SERVANTS — SUPERIOR AND INFERIOR SERVANTS. — The fact that an inferior servant may not be able to exert any influence for safety over his superior servant in the same general business or employment will not justify a refusal to apply the rules and principles applicable to fellow-servants.

MASTER AND SERVANT — LIABILITY OF MASTER, HOW DETERMINED — FELLOW-SERVANTS. — The liability of a master depends upon the character of the act in the performance of which the injury arises, and not upon the grade or rank of the employee whose negligence causes it. If the act is one pertaining to a personal duty that the master owes to his servants, he is responsible to them for the manner of its performance, by whoever performed; but if it pertains to the duty of an operative or employee, the person performing it is a mere servant, whatever his rank, and the master is not liable to a fellow-servant of inferior rank for its improper performance.

INTEREST — NEGLIGENCE — MEASURE OF DAMAGES. — In actions to recover damages for injury caused by negligence, awarding interest is in the discretion of the jury

John C. Bullitt, Jr., and John S. Watson, for the appellant.

S. L. Glaspell, for the respondent.

CORLISS, C. J. This litigation has its origin in an injury sustained by plaintiff while in the employ of the defendant. He, with several others, was engaged in removing long piles from a platform car to bents on the north side of the defendant's track. These bents were heavy timbers resting on piles driven in the ground, and running at right angles with the track, and the ends nearest to the track were about five feet therefrom. They were the same height as the platform of the car. At the time the accident occurred, they were covered over with piles to within two feet from the ends nearest to the track. The piles were rolled from the car to the bents over two round skids about eight inches in diameter, one end of each of which rested upon a pile on the car, and the other upon the pile on the bents which was nearest to the track. Both ends of the skids were on the same level. Reaching from the platform of the car to the ends of the bents were boards a foot wide, over which the

men passed from the car to the bents in rolling the piles along over the skids to the bents. In transferring the piles from the car, some of the men rolled them with their hands, and others used cant-hooks in the work. One of the piles which was being removed from the car rolled from the ends of the skids into the space between the pile on the bents nearest to the track and the next pile, and pushed the former pile towards the plaintiff, and upon his leg, breaking the same near the ankle. One of the grounds upon which plaintiff based and seeks to sustain his recovery was the alleged negligence of the foreman of the gang at work in failing to block this pile so as to prevent its being shoved towards the plaintiff. That the pile was not blocked at the end where plaintiff was working appears to be undisputed. There was evidence to show that the foreman was notified of this fact before the accident. While he denies this, yet there was sufficient evidence to warrant a jury in finding the fact against his testimony. We are clear that the jury were authorized, under the evidence, to find that plaintiff was injured by reason of the negligence of the foreman, Withnell, in failing to block the pile. Will the law hold the defendant responsible for this negligence? Against such liability, defendant invokes the fellow-servant rule, and our statute embodying it. To escape the force of this rule, plaintiff contends that the case is brought within the scope of the fellow-servant rule, and that such limitation has the voice of weightier authority, of better reason, and of more numerous precedents in its behalf. This issue of law we are to determine, and our investigation must run along the line of general principles; for the adjudications upon this subject,—so multitudinous as almost to warrant the simile, “thick as autumnal leaves that strew the brooks in Vallambrosa,”—these adjudications are so discordant, enumerating so many rules, stating so many limitations, applying the law to facts so diverse, that one is reminded of Gibbon’s remark upon the infinite variety of laws and opinions when Justinian entered upon the reform of codification,—that they were beyond the power of any capacity to digest. We are compelled to decide whether this superior-servant limitation shall be adopted in this state. The trial court declared it to be the law in his charge to the jury, and refused to charge against the adoption of the doctrine, although requested to so charge by defendant’s counsel. Whatever other ground of liability there may have been, the verdict cannot stand if the trial judge erred in this respect, for the

verdict may rest entirely upon the groundwork of such instruction.

The foreman, Withnell, through whose negligence it is insisted that plaintiff was injured, had control of the gang employed on the work, and was vested with authority to employ and discharge the men, who were subject to his direction and supervision. Hence it is urged that he was, in his position, and therefore in the prosecution of the work of unloading these piles, a vice-principal, and not a fellow-servant. In this connection, the authorities are cited which sustain the doctrine that the station of the employee, and not the character of the act, determines the question whether the master is responsible. In many of the cases where the superior-servant limitation was applied, such servant was in fact the fellow-servant of the employee injured. But, because of some superior position occupied by him with respect to the servant injured, the master was, by a legal fiction, regarded as personally present in the person of the superior servant, and made responsible to one servant for the manner in which another servant performed the duties and labors pertaining to a servant's employment. Here lies the difference between the two rules. Those cases which preserve the fellow servant rule in its full integrity bring the facts of each case to the test, not of the rank of the negligent servant, but of the character of the negligence from which damage results. Did the master owe to his servant a duty as master? Answer the inquiry in the affirmative, and he cannot escape a careless discharge of that duty by shifting the burden to the shoulders of a servant, however inferior his position may be. The negligence of a fellow-servant has not wrought injury in such a case. It is the negligence of the master himself, because that was carelessly done which he was bound to have carefully performed. The master must use due care in supplying his servants with safe appliances, and in providing them a safe place in which to work. These are duties of the master. They are none the less his duties because, from the necessities of business, or for other reasons, he confides their discharge to an employee. His personal negligence in this respect would create liability. He cannot gain exemption from negligence of another in this regard by delegating these personal duties to another. This doctrine is sound, and it in no manner is a limitation of the fellow-servant rule.

On the other hand, the other doctrine is a limitation — a very important limitation — of that rule. It finds no warrant

in the cases which first enunciated that rule. It rests on no subsequent legislation; and we are firm in the conviction that the mere superiority in the rank of the negligent servant—his right to control the servant injured, and to employ and to discharge him—calls for no modification of the fellow-servant rule. The bed-rock of that doctrine is, that every employee assumes the risk of his co-employee's negligence as one of the ordinary risks of his work. Is a superintendent or foreman so much more careless in the performance of work pertaining to a servant's duties than a subordinate employee that the risk of the former's negligence is an extraordinary one? If work belonging to the duties of a servant be done carelessly, what conceivable difference is there whether the negligence proceed from a commander or a subaltern, so long as the master himself is not personally at fault. The superior servant is in fact a fellow-servant. The two are engaged in the same general work for the master; one using his muscle chiefly, and the other perhaps working mainly with his brain. The only ground on which the superior's relation as fellow-servant is ignored is the constructive presence in his person of the master, because the master, in the distribution of labor, has appointed him to work in the line of superintendence and control. But this control, this superior rank, cannot lift him above the grade of a fellow-servant into the position of a vice-principal so long as he is engaged in the work of a servant only. If a servant of inferior rank should perform the same work, he would not be regarded as the master; and we are at a loss to understand how the higher rank of the servant can change the nature of the act, or increase the risk of the inferior servant, so as to render inapplicable the fellow-servant rule. The superior servant is no more the representative of the master than the inferior servant, except in the enlarged field of his action, and the wider scope of the trusts confided to him. They are both laboring for a common master in the same general business, both ultimately accountable to him, and employed, controlled, and discharged by him, either personally, or by some one selected by him for that purpose. The ultimate power to employ, control, and discharge is in his hands.

The reason for the fellow-servant rule applies with full force to the work of a servant, whatever the rank of the servant who performs it. It would be an anomalous condition of the law if the negligence of one servant was within the ordinary risks of the employment, while the negligence of another, no more

prone to carelessness, should be without the domain of such risks merely because he had been set in a higher place of service by reason of superior skill or ability. Judge Cooley says: "In some quarters, a strong disposition has been manifested to hold the rule not applicable to the case of a servant who, at the time of the injury, was under the general direction and control of another, who was intrusted with the duties of a higher grade, and from whose negligence the injury resulted. But it cannot be disputed that the negligence of a servant of one grade is as much one of the risks of the business as the negligence of a servant of any other; and it seems impossible, therefore, to hold that the servant contracts to run the risks of negligent acts and omissions on the part of one class of servants, and not those of another class. Nor, on grounds of public policy, could this distinction be admitted, whether we consider the consequences to the parties to the relation exclusively, or those which affect the public, who, in their dealings with the employer, may be subjected to risks. Sound policy seems to require that the law should make it for the interest of the servant that he should take care, not only that he be not negligent himself, but also that any negligence of others in the same employment be properly guarded against by him, so far as he may find it reasonably practicable, and be reported to his employer, if needful. And in this regard it can make little difference what is the grade of the servant who is found to be negligent, except as superior authority may render the negligence more dangerous, and consequently increase at least the moral responsibility of any other servant who, being aware of the negligence, should fail to report it": Cooley on Torts, 543.

Judge Dillon is equally emphatic against the limitation. He says: "The master owes certain defined, personal, unalienable, non-assignable duties towards servants. These duties may be devolved on others by the master, but not without recourse on him. . . . In the general American law, as I understand it, the doctrine of vice-principal exists to this extent, and no further, viz.: That it is precisely commensurate with the master's personal duties towards his servants. As to these, the servant who represents the master is what we may call for convenience a 'vice-principal,' for whose acts and neglects the master is liable. Beyond this the master is liable only for his own personal negligence. This is a plain, sound, safe, and practicable line of distinction. We know where to

find it, and how to define it. It begins and ends with the personal duties of the master. Any attempt to refine, based upon the notion of 'grades' in the service, or, what is much the same thing, distinct 'departments' in the service (which 'departments' frequently exist only in the imagination of the judges, and not in fact), will breed the confusion of the Ohio and Kentucky experiments, whose courts have constructed a labyrinth in which the judges that made it seem to be able to 'find no end; in wandering mazes lost.' The real inquiry is, Was the injury caused by another servant one of the ordinary risks of the particular employment? If so, the grade, whether higher, lower, co-ordinate, or the department of the faulty servant, is of no consequence. It is a condition of the contract of service that the servant takes upon himself the risk of accidents in the common course of the business, all open and palpable risks, including the negligence of all fellow-servants, of whatever grade, in the same employment": 24 Am. Law Rev. 175.

The superior-servant doctrine unfairly discriminates against masters whose business is of such nature that grades of service are indispensable. This case will furnish an illustration of the truth of this statement. The work with respect to which Withnell, the foreman, was careless — the blocking of the pile — was the work of a servant. Had the same accident occurred in the employ of a master whose servants were all of the same rank, no claim of liability would be thought of. The proprietor of a factory, of a machine-shop, of a mill, of any business in which gradations of service are not absolutely essential, is present in the persons of his servants only so far as his personal duties to his employees are concerned. But the railroad master, though Argus-eyed to discern, and Briarean to prevent, the negligence of its horde of vice-principals, — conductors, as in *Chicago etc. R'y Co. v. Ross*, 112 U. S. 377, superintendents, section bosses, foremen of various gangs, and many others, — would find itself impotent to save itself from enormous responsibility not incurred by many other masters, notwithstanding its utmost caution in the selection of its employees. According to this doctrine, the master that has fully discharged all its or his personal duties may be guilty, at the same time, in as many different places, of a score of negligent acts by construction of law, although they are acts pertaining to the duties of a mere servant, performed by one who is in fact a servant, and whose carelessness in this regard can as fairly be said to

be within the risks incurred by the injured servant as the carelessness of an employee of lower rank. If there is anything in the reason for the fellow-servant rule, it applies with even stronger force to a class of servants whose higher position is a guaranty of better skill and intelligence, and consequently of the exercise of greater care. Their enlarged responsibility to the master will tend to make them more cautious. Their compensation is frequently so large as to make the retention of their positions very desirable to them. This will augment their caution; for negligent performance of duty would be almost certain to result in their dismissal. There is nothing in the controlling power of the superior servant that warrants any difference in the law; for it cannot be said, as is frequently asserted in cases, that any employee is justified in submitting to the carelessness of a superior from fear of being discharged; and the fact is, that it is seldom in the power of the injured servant to anticipate or guard against the careless act of the fellow-servant causing injury to him. If he could and did, the accident would not happen. If he could and did not, he would be himself negligent, and his recovery would be defeated. In either case, there would be no occasion for the fellow-servant rule. The basis of the fellow-servant doctrine is, not that the servant can, as a rule, be on his guard against his co-servants' carelessness, but that he takes the risk of such negligence when he makes his contract of employment. It is said that a servant can exert an influence for care upon a fellow-servant of the same grade that he could not exert upon a superior servant by whom he had been employed and could be discharged, and therefore in the latter case the master is responsible. If this affects the question, then the master should have been held liable, in many cases, where the injured servant could not possibly have exerted any such influence upon the negligent servant.

The books are full of such cases, in none of which was the master adjudged responsible. The courts have held that the rule is "not confined to the case of two servants working in company, or having opportunity to control or influence the conduct of each other, but extends to every case in which the two, deriving their authority and their compensation from the same source, are engaged in the same business, though in different departments of duty": *Holden v. Fitchburg R. R. Co.*, 129 Mass. 268; 37 Am. Rep. 343. Many of the cases holding the master exempt from liability under the fellow-servant rule

were, as we have said, cases in which the injured servant could not possibly have exerted influence over the negligent servant. Their separate departments of service, or their usual stations of employment, kept them, as a rule, entirely aloof from each other. In the following cases the relation of fellow-servant was held to exist between persons who could exert little, if any, influence over each other: *Quebec Steamship Co. v. Merchant*, 133 U. S. 375, — the carpenter, the porter, and stewardess of a steamship; *St. Louis etc. R'y Co. v. Welch*, 72 Tex. 298, — foreman of a bridge gang, and servants operating train; *Elliot v. Chicago etc. R'y Co.*, 5 Dak. 523, — a section foreman and a conductor; *Fagundes v. Central Pac. R. R. Co.*, 79 Cal. 97, — a laborer employed to remove snow from track and a conductor; *Baughman v. Superior Court*, 72 Cal. 573, — a conductor and brakeman; *Randall v. Baltimore etc. R. R. Co.*, 109 U. S. 478, — a brakeman and conductor of different trains; *Van Wickle v. Manhattan R'y Co.*, 32 Fed. Rep. 278, — a track repairer and an engineer; *McMaster v. Illinois Cent. R'y Co.*, 65 Miss. 264; 7 Am. St. Rep. 653, — brakeman of one train and employee on another; *Naylor v. New York etc. R. R. Co.*, 33 Fed. Rep. 801, — engineer and switchman; *Van Avery v. Union Pac. R'y Co.*, 35 Fed. Rep. 40, — engineers of different trains; *Connelly v. Minneapolis etc. R'y Co.*, 38 Minn. 80, — a sectionman and an engineer or brakeman; *Howard v. Denver etc. R'y Co.*, 26 Fed. Rep. 837, — an engineer and fireman of different trains; *H. & T. C. R'y Co. v. Rider*, 62 Tex. 267; *Gormley v. Ohio etc. R'y Co.*, 72 Ind. 31; *Collins v. St. Paul etc. R. R. Co.*, 30 Minn. 31; *Clifford v. Old Colony R. R. Co.*, 141 Mass. 564; *Keyes v. Railroad Co.*, 3 Atl. Rep. 15 (Pa.); *Whaalan v. Mad River etc. R. R. Co.*, 3 Ohio St. 249, — in each case an engineer and a section-man. Without stating the relation of the injured to the negligent servant in each of the following cases, they are referred to as being in the same line: *Holden v. Fitchburg R. R. Co.*, 129 Mass. 268; 37 Am. Rep. 343; *Valtez v. Ohio etc. R'y Co.*, 85 Ill. 500; *Besel v. New York etc. R. R. Co.*, 70 N. Y. 171; *Brown v. Central Pac. R. R. Co.*, 68 Cal. 171; *Roberts v. Chicago etc. R'y Co.*, 33 Minn. 218; *Brown v. Minneapolis etc. R'y Co.*, 31 Minn. 553; *Cooper v. Milwaukee etc. R'y Co.*, 23 Wis. 668; *Heine v. Chicago etc. R'y Co.*, 53 Wis. 525; *Capper v. Louisville etc. R'y Co.*, 103 Ind. 305; *Henry v. Staten Island R'y Co.*, 81 N. Y. 373; *Blake v. Maine Cent. R. R. Co.*, 70 Me. 60; 35 Am. Rep. 297; *Harvey*

v. *New York Cent. R. R. Co.*, 88 N. Y. 481. The list might be greatly enlarged.

Going back to the fountain, we find this idea of exertion of influence by the injured servant as the basis of the servant rule distinctly repudiated. In *Farwell v. Boston etc. R. R. Corp.*, 4 Met. 60, Chief Justice Shaw says: "It was strongly pressed in the argument, that although this might be so where two or more servants are employed in the same department of duty, where each can exert some influence on the conduct of the other, and thus to some extent provide for his security, yet that it could not apply where two or more are employed in different departments of duty at a distance from each other, and where one can in no degree influence or control the conduct of the other. But we think this is founded upon a supposed distinction on which it would be extremely difficult to establish a practical rule. . . . When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department, and what a distinct department, of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately arise, How near or how distant must they be to be the same or different departments? Besides, it appears to us that the argument rests upon an assumed principle of responsibility which does not exist. The master in the case supposed is not exempt from liability because the servant has better means of providing for his safety when he is employed in immediate connection with those from whose negligence he might suffer, but because the implied contract of the master does not extend to indemnify the servant against the negligence of any one but himself; . . . and he is not liable in tort as for the negligence of his servant because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow-servant does not depend exclusively upon the consideration that the servant has better means to provide for his own safety, but upon other grounds. Hence the separation of the employment into different departments cannot create that liability, where it does not arise from express or implied con-

tract, or from a responsibility created by law to third persons and strangers for the negligence of a servant."

It is thus apparent that there is nothing in the fact that an inferior servant may not be able to exert any influence for safety over his superior to justify the refusal to apply the fellow-servant rule. On principle, we are opposed to the doctrine in the case of *Chicago etc. R'y Co. v. Ross*, 112 U. S. 377. We believe that the true rule was stated and applied in *Crispin v. Babbitt*, 81 N. Y. 516; 37 Am. Rep. 521. "The liability of the master does not depend upon the grade or rank of the employee whose negligence causes the injury. A superintendent of a factory, although having power to employ men or represent the master in other respects, is, in the management of the machinery, a fellow-servant of the other operatives. . . . The liability is thus made to depend upon the character of the act in the performance of which the injury arises, without regard to the rank of the employee performing it. If it is one pertaining to the duty that the master owes to his servants, he is responsible to them for the manner of its performance. The converse of the proposition necessarily follows: if the act is one which pertains to the duty of an operative, the employee performing it is a mere servant; and the master, although liable to strangers, is not liable to a fellow-servant for its improper performance." To same effect are *Lindvall v. Woods*, 41 Minn. 212; *Davis v. Central Vt. R. R. Co.*, 55 Vt. 84; 45 Am. Rep. 590; *State v. Malster*, 57 Md. 287; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Hussey v. Cogger*, 112 N. Y. 614; 8 Am. St. Rep. 787; *Capper v. Louisville etc. R'y Co.*, 103 Ind. 305; *Yates v. McCullough Iron Co.*, 69 Md. 370; *Baltimore Elevator Co. v. Neal*, 65 Md. 438; *McGovern v. Columbus Mfg. Co.*, 80 Ga. 227; *Lewis v. Seifert*, 116 Pa. St. 628; 2 Am. St. Rep. 631; *Olson v. St. Paul etc. R'y Co.*, 38 Minn. 117; *Anderson v. Winston*, 31 Fed. Rep. 528; *Webb v. Richmond etc. R. R. Co.*, 97 N. C. 387.

This list might be added to, but we are concerned not so much about the number of cases to be cited in support of our views as about the soundness of our position upon principle. We believe that the fellow-servant rule should hedge about all masters without discrimination; that its wise and just barrier against liability should not be broken down by a fiction; that those whose business, from its very nature, necessitates gradations of service should not be deprived of its protection on account of a distinction which in no manner affects the consid-

erations which gave it birth, and have led to its almost universal adoption. We see nothing to justify the limitation doctrine, except the increased safety of employees in a dangerous business; and this applies, if at all, equally to cases where the two servants are of the same grade. But so far from augmenting their safety, the liability of the master will have the contrary effect, if it produces any effect at all. That servant will grow more careless, who, instead of being exclusively liable for his own negligence, finds that beyond him is another liability, so much more desirable to the injured servant that the careless servant is invariably lost sight of,—the liability of the corporation, against which the verdict is more easily secured, and when obtained, is certain of payment.

We have assumed that our statutes on this question (Comp. Laws, sec. 3753) are only declaratory of the common law. But we do not decide whether they limit the liability of a master. They certainly impose upon him no greater responsibility than the common law, and as the question of their restrictive force has not been discussed, we do not decide it: See *Herbert v. Northern Pac. R. R. Co.*, 3 Dak. 38; on appeal, 116 U. S. 642, and dissenting opinion. We are clear that the trial court erred in refusing to charge the jury that the negligence of Withnell in failing to block the pile was the negligence of a fellow-servant, and in instructing them that it was not; and for this error the judgment of the district court is reversed. There are other questions in the case, on which we refrain from expressing any opinion, as the evidence on a new trial may be materially different. This does not apply to the question of interest, and we therefore hold that the trial court erred in charging the jury to give the plaintiff interest on his recovery, without submitting it to their discretion. "In an action for the breach of an obligation not rising from contract, . . . interest may be given in the discretion of the jury." Comp. Laws, sec. 4578.

Judgment reversed and new trial ordered.

MASTER AND SERVANT—VICE-PRINCIPALS—FELLOW-SERVANTS.—A foreman or vice-principal when in the discharge of duties which the principal owes his employees represents the principal. Beyond this, he is merely a fellow-workman with the other employees: *Ross v. Walker*, 139 Pa. St. 42; 23 Am. St. Rep. 160, and note; *Cullen v. Norton*, 126 N. Y. 1. A foreman, superintendent, or overseer of a job is not on that account to be considered as other than a fellow-servant: *Dube v. Lonsiston*, 83 Me. 211. As to who are and who are not fellow-servants, see note to *Bott v. Pratt*, 53 Am. Rep. 47.

For a full discussion of the liability of masters to inferior servants for the acts of superior servants, see extended note to *Fox v. Sandford*, 67 Am. Dec. 590.

MASTER AND SERVANT—DELEGATION OF AUTHORITY BY MASTER—LIABILITY TO SERVANT.—A master owes certain duties to his employees, and a delegation by him of them to some third person will not relieve him for a failure to discharge such duties: *Dayharsh v. Hannibal etc. R. R. Co.*, 103 Mo. 570; 23 Am. St. Rep. 900; *International etc. Ry Co. v. Kernan*, 78 Tex. 294; 22 Am. St. Rep. 52.

MASTER AND SERVANT—WHAT RISKS ASSUMED BY SERVANT.—A servant assumes all the risks of the employment which are obvious, and which he may fairly be supposed to understand: *Oriack v. Merchants' etc. Co.*, 151 Mass. 188; 21 Am. St. Rep. 438; *Nadaw v. White River etc. Co.*, 78 Wis. 120; 20 Am. St. Rep. 29, and note; *Sweet v. Ohio Coal Co.*, 78 Wis. 127; *Coal Co. v. Wombacher*, 134 Ill. 57. A servant assumes the risk of the negligence of fellow-servants: *Hefferen v. Northern Pac. R. R. Co.*, 45 Minn. 471.

MASTER AND SERVANT—LIABILITY OF MASTER, HOW DETERMINED.—It is the character of the employment, and not the instructions given by the master to the servant, that must determine the latter's liability: *McClung v. Dearborne*, 134 Pa. St. 396; 19 Am. St. Rep. 708; *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409; 19 Am. St. Rep. 180, and note.

SABLES v. MCGEE.

[1 NORTH DAKOTA, 365.]

MORTGAGES—PRIOR AND SUBSEQUENT MORTGAGES—NOTICE.—A prior mortgagee is not bound to protect the equitable rights of a subsequent mortgagee in the property of which the former has no notice, actual or constructive. The recording of the subsequent mortgage is not such notice so as to prevent the prior mortgagee from releasing from the lien of his mortgage any property upon which the subsequent mortgagee has no lien.

Edgar W. Camp, for the appellant.

John S. Watson, for the respondent.

CORLISS, C. J. Viewed in the light of the record, the plaintiffs sought and obtained against the defendant unwarranted relief, by invoking that equitable principle whose peculiar office it is to create a duty enforceable in a court of equity which a court of law does not recognize as of binding force. They prayed that they might be relieved from the injurious consequences of defendant's alleged disregard of an equitable duty which they claimed she owed to them. Did she owe such duty? The facts, so far as disclosed by the record, compel a negative reply to this inquiry. Defendant held a first mortgage upon certain premises. Plaintiff owned a second mortgage thereon. There

were buildings on the land. Upon them was insurance effected by the mortgagor in his own name, the policy stating that the loss, if any, should be paid to the first mortgagee, the defendant, as her interest might appear. These buildings were destroyed by fire, and the loss adjusted and paid. The amount exceeded the amount of defendant's mortgage. We will assume that it was all paid to her personally, and paid after the mortgage debt had all become due, although the record by no means necessitates such a view of the facts. A large portion of the money she paid over to the mortgagor, retaining an amount for which she gave credit on the mortgage. We will also assume, without deciding, that it was the defendant's duty, as first mortgagee, to respect the rights of subsequent encumbrances of which she had knowledge, and not suffer any of her security to pass from her control, to the prejudice of the subordinate lien; and that, it appearing that the value of the security held by the second mortgagees, the plaintiffs, was seriously impaired by the destruction of those buildings, it was the duty of defendant, if cognizant of plaintiffs' lien, to apply the insurance money in her hands to the extinguishment of her lien, and not suffer the greater portion of it to escape such lien by passing into the mortgagor's control. Still, not even in the forum of conscience would the relief sought for be granted upon the facts as shown by the record on this appeal. Defendant foreclosed her mortgage after this insurance money came into her hands, assuming that it did come within her control, and having purchased on the foreclosure sale, in course of time secured a deed vesting in her the title of the property under this foreclosure.

Plaintiffs, in this action to foreclose their second mortgage, ask that defendant's foreclosure proceedings, culminating in this deed, be annulled by the court, on the theory that it was the defendant's duty to apply the insurance money in extinguishment of her lien, because of her equitable duty not to impair the subordinate lien by her conduct with respect to the security. Plaintiffs insist that she had two distinct securities out of which she could collect her debt, — the land and the insurance money; that they held a lien on only one of these securities, — the land; that defendant owed to them the duty of obtaining their pay from the insurance money, which was sufficient to extinguish her lien; and that equity will regard such duty as performed, and the lien wiped out, on the principle that one who disregards duty shall not assert his own

dereliction, to the detriment of another to whom that duty was owing. In all this record we find nothing to render these considerations pertinent. There was no equitable duty, because defendant had no knowledge of the rights of the plaintiffs as junior encumbrancers. Equity compels no one to respect an unknown right. Defendant did not know of plaintiff's mortgage when she suffered this insurance money to pass from her control to the mortgagor. There is no averment of notice in the complaint. This demurrable defect was not cured by the reception without objection of evidence of notice on the trial. Under such a state of the record, the complaint might be amended to conform to the proof. But there is no such evidence in the record. There is no such fact found. There is no pretense of actual notice. Without notice of the lien to be protected, there arose no duty to protect it: *Deuster v. McCamus*, 14 Wis. 307; *Straight v. Harris*, 14 Wis. 509; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271; 59 Am. Dec. 478; *Vanorden v. Johnson*, 14 N. J. Eq. 376; 82 Am. Dec. 254; *Ward's Ex'rs v. Hague*, 25 N. J. Eq. 397; Wade on Notice, sec. 203, and cases cited. This principle is elementary. It is true that constructive notice is held to be sufficient to create the duty. But defendant did not have even constructive notice of plaintiff's inferior lien. The record of their mortgage constituted no such notice. It is only as to subsequent encumbrancers or purchasers that the recording of a mortgage or deed is notice. So the statute is written: Comp. Laws, secs. 3293, 4369. Similar statutes have been so constructed in many jurisdictions: *Deuster v. McCamus*, 14 Wis. 307; *Straight v. Harris*, 14 Wis. 509; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271; 59 Am. Dec. 478; *Vanorden v. Johnson*, 14 N. J. Eq. 376; 82 Am. Dec. 254; *Cheeseborough v. Millard*, 1 Johns. Ch. 409; 7 Am. Dec. 494; Jones on Mortgages, secs. 562, 723, 982.

The judgment of the court below annulled the foreclosure proceeding, treating the mortgage lien as extinguished as to plaintiffs. This judgment was unwarranted by the complaint, the findings, or the evidence, and must therefore be reversed, and the complaint dismissed.

MORTGAGES — PRIOR AND SUBSEQUENT MORTGAGES — NOTICE. — Equity which entitles the second mortgagee to benefit of a release by the first mortgagee of the part of the mortgaged premises not covered by the second mortgage arises only when the release was given by the first mortgagee with knowledge of the second encumbrance: *Vanorden v. Johnson*, 14 N. J. Eq. 376; 82 Am. Dec. 254, and note; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271; 59 Am. Dec. 478; see note to *Guion v. Knapp*, 29 Am. Dec. 747.

CLARKE v. WALLACE.

[1 NORTH DAKOTA, 404.]

PARTNERSHIP — POWER OF PARTNER TO BIND FIRM BY GUARANTY. — One who accepts negotiable paper bearing the indorsement of a firm as guarantors or sureties takes it subject to the presumption that the firm name was not signed in the usual course of business of the firm, and cannot recover on the indorsement alone, but must show special authority to make the indorsement on the part of the partner by whom the firm name was signed, or an authority to be implied from the common course of business of the firm, or a previous course of dealing between the parties, or that the indorsement was subsequently adopted and acted upon by the partnership.

PARTNERSHIP — GUARANTY OF NEGOTIABLE PAPER BY PARTNER. — A member of a banking or other partnership has no implied authority, without the consent of his copartners, to guarantee negotiable paper in the firm name for the accommodation of a third person, in consideration of obtaining security for a firm debt, especially when the liability thus incurred is several times greater than the debt secured. In such a case, the other partners will not be bound by such guaranty, in the absence of proof of express authority, or authority implied from the previous course of business between the parties, or that such guaranty was necessary for carrying on the firm business in the ordinary way, or that it was subsequently ratified by the firm.

Nickeus and Baldwin, for the appellants.

Edgar W. Camp, for the respondent.

BARTHOLOMEW, J. The findings of the court show that in 1883 the defendants Winslow and Allen, together with John A. J. Sheets and Samuel M. Bickford, — the two latter now deceased, and their administrators being defendants herein, — were copartners engaged in the banking, real estate, and loan business, at Jamestown, Dakota Territory, under the firm name of "North Dakota Bank." Allen was the managing member of the firm. The firm had about thirteen hundred dollars on deposit in the First National Bank of Jamestown. The defendant Robert E. Wallace was president of the latter bank. This bank was in failing circumstances. Wallace needed five thousand dollars to help him out of the embarrassments connected with the failure of the bank, and he proposed to Allen that if the North Dakota Bank would aid him in obtaining a loan of that amount, he would secure the deposit of that firm in the said First National Bank. Allen, in his individual name, opened a correspondence with the plaintiff, Clarke, who was a non-resident, which resulted in obtaining a loan from Clarke to Wallace for the required amount, the note to be guaranteed by the North Dakota Bank.

Accordingly, Wallace executed the note, and Allen guaranteed it in the name of the North Dakota Bank, and the money was paid over to Wallace. Plaintiff, Clarke, loaned the money largely on the credit of the North Dakota Bank. Wallace secured the deposit of the North Dakota Bank in the First National Bank by delivering collaterals to Allen, and the amount of the deposit was subsequently realized out of the collaterals. Allen had no express authority from the other members of the firm to guarantee the note of Wallace, nor did the other members of the firm have any knowledge of such guaranty, or ever, in any manner, ratify the same, nor did they, prior to the bringing of this action, have any knowledge that the deposit in the First National Bank was paid from the proceeds of collaterals delivered by Wallace to Allen.

This action, so far as these appellants are concerned, is brought on the guaranty heretofore mentioned, the defense being lack of authority on the part of Allen to thus bind the firm. The contract of guaranty was entered into contemporaneously with the execution of the note, and plaintiff parted with his money largely upon the strength of the guaranty, and the consideration therefor was ample: Baylies on Sureties, 54, 55; 9 Am. & Eng. Ency. of Law, 69, and cases cited. The benefit received by the firm in obtaining security on its deposit in the First National Bank becomes material only so far as it bears upon the question of the authority of Allen to bind the firm. It is not usual for persons in business to make themselves answerable for the conduct of other people; and it is settled law that the party who takes a promissory note bearing the indorsement of a firm, either as guarantors or sureties, takes it burdened with the presumption that the firm name was not signed in the usual course of partnership business, and no recovery can be had by simply showing the indorsement. The holder is required to show special authority to make the indorsement on the part of the partner by whom the firm name was signed, or an authority to be implied from the common course of business of the firm, or previous course of dealing between parties, or that the indorsement was subsequently adopted and acted upon by the firm: *Sweetser v. French*, 2 Cush. 309; 48 Am. Dec. 666; *Schermerhorn v. Schermerhorn*, 1 Wend. 119; *Bank v. Bowen*, 7 Wend. 158; *Foot v. Sabin*, 19 Johns. 154; 10 Am. Dec. 208; *National Security Bank v. McDonald*, 127 Mass. 82; *Moynahan v. Hanaford*, 42 Mich. 329. In this case, there was no previous course of deal-

CORPORATIONS — QUALIFICATIONS OF DIRECTOR. — AN ASSIGNEE OF STOCK who appears as a stockholder on the corporate books is qualified to vote the stock and hold the office of director, although the transfer was made to him for the sole purpose of so qualifying him.

CORPORATIONS — STOCKHOLDER. — UNRECORDED TRANSFER OF STOCK in a corporation is not valid for any purpose, except as between the parties, and until such transfer is made on the corporate books, the person in whose name the stock there appears will continue to be a stockholder, for the purpose of voting the stock, or of being eligible to the office of director.

A. C. Davis, B. F. Spaulding, and Benton and Amidon, for the appellant.

Edwin O. Faulkner, S. G. Roberts, and A. W. Edwards, for the respondents.

CORLISS, C. J. On this appeal we are asked to review the judgment of the district court in summary proceedings, instituted under section 2932 of the Compiled Laws, to determine the rights of certain persons to the offices of directors of the Argus Printing Company, a corporation. This statute provides that upon the application of any person or body corporate aggrieved by any election held by any corporate body, or any proceedings thereof, the district judge of the district in which the election is held must proceed forthwith summarily to hear the allegations and proofs of the parties, or otherwise inquire into the matters of complaint, and thereupon confirm the election, order a new one, or direct such other relief in the premises as accords with right and justice. This appeal must be decided as we determine which of two persons had the right to vote 546 shares of stock. The total amount of stock which had been issued at the time of the meeting to elect directors was 570 shares. At this meeting A. W. Edwards voted these 546 shares of stock for the following directors: A. W. Edwards, H. C. Plumley, M. R. Flint, Alexander Griggs, and William A. Stevens. At the same time and place one E. O. Faulkner voted these same shares for Alexander Griggs, W. A. Stevens, B. F. Spaulding, H. C. Plumley, and E. O. Faulkner as directors. In whom was the right to vote this stock? The stock at one time was the property of A. W. Edwards. For the purpose of securing a debt which he owed to J. J. Hill, this stock, with ten other shares, was transferred upon the corporate books to E. O. Faulkner, confidential clerk of Mr. Hill. Certificates representing the total number of shares, 556, were issued directly to Mr. Faulkner, the same being signed by Mr. Edwards as president of the company, the old certificates held

by Edwards being canceled. The stock, therefore, stood on the books of the corporation in the name of E. O. Faulkner.

Where there has been no transfer of the stock on the books of the corporation, a pledgee of such stock may not vote it. The beneficial ownership is still in the pledgor, and the records of the corporation still show him to be a stockholder. In none of the cases cited in which the right to vote was adjudged to be in the pledgor instead of the pledgee had there been a record of the transfer made: See *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274; *In re Barker*, 6 Wend. 509; *Ex parte Willcocks*, 7 Cow. 410; 17 Am. Dec. 525; *Strong v. Smith*, 15 Hun, 222.

We have discovered an Oregon case in which the stock stood upon the books in the name of the pledgee, but the court ruled that he could not vote it because he had no authority from the pledgor to make the transfer. This case we will refer to hereafter. In the case at bar, the stock stood in the name of the representative of the pledgee upon the corporate records. Was he a *bona fide* stockholder within the meaning of our statute which restricts the right to vote stock to those who are *bona fide* holders thereof? Comp. Laws, sec. 2931. It may be stated, in this connection, that Edwards could not vote the stock, as the stock had not stood in his name on the books of the corporation for ten days prior to the election: Comp. Laws, sec. 2931. If, then, the representative of the pledgee could not vote the shares, no election of directors could be held, for no one else had a right to vote it, and without its being represented at the election no election of directors could be had, for the reason that these shares constituted more than half of the capital stock. At all election or votes had for any purpose, there must be a majority of the subscribed capital stock represented, etc.: Comp. Laws, sec. 2931. No person can be chosen director without a majority vote: Comp. Laws, sec. 2925. At the time the legislature employed the word "stockholders" in the section prescribing the qualification of a voter at corporate meetings, that word had acquired a definite and fixed meaning, so far as a pledgee of stock was concerned. It had been repeatedly adjudged that a pledgee of stock whose transfer was upon the corporate records was a "stockholder," within the meaning of the statute providing for the liability of stockholders for the debts of corporations. The general reasoning upon which these decisions were based was, that the pledgee with a recorded transfer was a stockholder for the purpose of receiving dividends and voting at stockholders'

meetings; and that he could not enjoy all of the benefits enjoyed by a stockholder without being subject to a stockholder's liability. Said the court in *National Bank v. Case*, 99 U. S. 628: "It is thoroughly established that one to whom stock has been transferred in pledge, or as collateral security for money loaned, and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of creditors. We so held in *Pullman v. Upton*, 96 U. S. 328; and like decisions abound in the English courts, and in numerous American cases, to some of which we refer: *Adderly v. Storm*, 6 Hill, 624; *Rosevelt v. Brown*, 11 N. Y. 148; *Holyoke Bank v. Burnham*, 11 Cush. 183; *Magruder v. Colston*, 44 Md. 349; *Crease v. Babcock*, 10 Met. 535; *Wheelock v. Kost*, 77 Ill. 296; *In re Empire City Bank*, 18 N. Y. 199; *Hale v. Walker*, 31 Iowa, 344; 7 Am. Rep. 187. For this several reasons are given. One is, that he is estopped from denying his liability by voluntarily holding himself out to the public as the owner of the stock, and his denial of ownership is inconsistent with the representation he has made; another is, that by taking the legal title he has released the former owner; and a third is, that, after having taken the apparent ownership, and thus become entitled to receive dividends, vote at elections, and enjoy all the privileges of ownership, it would be inequitable to allow him to refuse the responsibilities of a stockholder." In *Pullman v. Upton*, 96 U. S. 328, the court said: "So in *Holyoke Bank v. Burnham*, 11 Cush. 183, it was decided that a transfer of stock on the books of the bank, intended merely to be held as collateral security, makes the holder liable for the bank debts. It was said that the creditor was to be considered the absolute owner, and that his arrangement with his debtor cannot change the character of the ownership." In *Magruder v. Colston*, 44 Md. 349, where it was held that the pledgee whose transfer was recorded was liable as a stockholder, the court said: "Stockholders are those who appear on the books of the bank as owners of shares, and who are entitled to manage its affairs, and they can only throw off the liabilities incident to that relation by transferring the stock."

That the word "stockholder," as used by the legislature, was, in the absence of any qualification of its meaning, understood by the legislature to be sufficient to embrace a pledgee with a legal title to the stock because of a transfer on the books, is clear from the provisions of section 2933 of the Compiled Laws, expressly declaring that the holding of stock by a

pledgee shall not render the holder a stockholder, within the meaning of that section rendering stockholders liable for debts of the corporation. It is significant that in section 2931, prescribing the qualification of a voter, and declaring that he must be a *bona fide* stockholder, no such limitation of the meaning of the word "stockholder" is to be found. There are numerous cases in which it is said that a pledgee is a stockholder, and entitled to vote when he appears to be a stockholder on the books of the corporation.

In *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350, 38 Am. Rep. 594, plaintiff loaned to one Foote, the president of defendant, a sum of money, and received as security a pledge of the capital stock of defendant owned by such president. Defendant having refused to transfer the shares on its books, plaintiff sued for the conversion of the stock. The court held that he could not recover, on the principle that one corporation will not be allowed to own stock in another corporation in the absence of statutory authority. Said the court: "Were this not so, one corporation, by buying up the majority of the shares of the stock of another, could take the entire management of its business, however foreign such business might be to that which the corporation so purchasing such shares was created to carry on. . . . Nor would this result follow any the less certainly if the shares of stock were received in pledge only to secure the payment of a debt, provided the shares were transferred on the books of the company to the name of the pledgee. A person in whose name the stock of the corporation stands on the books of the corporation is, as to the corporation, a stockholder, and has the right to vote upon the stock. . . . Hence if the plaintiff appeared upon the books of the defendant as the transferee or owner of the two hundred shares of stock represented by the certificate to Foote, it would have the right to vote upon the stock at all meetings of the stockholders of the defendant; and it would be only necessary for it to procure in pledge, as security for money loaned, a majority of the shares of the capital stock of the Commercial Bank (defendant in the case), in order to obtain full control of its affairs and take charge of its banking operations. . . . It therefore follows that the refusal of the defendant to permit the transfer upon its books to the plaintiff of the two hundred shares of its stock violated no right of the plaintiff, and consequently created no liability on the part of the defendant. Such refusal did not amount to a conversion of the stock. Its

action in refusing to transfer was but the denial of any right by the plaintiff to be placed in a position to interfere and participate in the control and management of its internal affairs." In *Poole v. West Point etc. Association*, 30 Fed. Rep. 513, Judge Brewer says: "The stock was assigned as collateral for moneys advanced by B. D. Brown. It was duly transferred on the books of the company, so that they unquestionably have all the rights of stockholders." In *State v. Ferris*, 42 Conn. 560, a bankrupt in whose name stock stood on the books of the company was adjudged entitled to the right to vote the stock after the title to the stock had passed to the assignee in bankruptcy under the provisions of the bankrupt act. The court observed: "It has been repeatedly held by this court that the books and records of a corporation determine who are its stockholders for the time being, and who have the right to vote on the stock, although the same may have been sold or pledged as collateral security. In such cases, the party who appears to be the owner by the books of the corporation has the right to be treated as a stockholder, and to vote whatever stock stands in his name." See also *People v. Robinson*, 64 Cal. 373; *State v. Pettineli*, 10 Nev. 141. Mr. Colebrooke, in his work on collateral securities, says: "In the absence of restrictive statutes, the pledgee of certificates of stock indorsed and transferred on the books of the company has a right to vote at its meetings. His name appearing as stockholder on the records, he becomes for all purposes a stockholder. The right to vote is an incident of the pledge, and according to the presumed intention of the parties": Sec. 283. In *Vail v. Hamilton*, 85 N. Y. 453, the action was brought to set aside a mortgage on corporate property, on the ground that it was void because two thirds of the stockholders had not assented to it. Certain of the stock stood in the name of the pledgee on the books of the corporation. The assent of such stock was essential to the validity of the mortgage. The pledgee did not give such assent, and the court adjudged the mortgage void, on the ground, among others, that the pledgee was, as to that particular stock, a stockholder, and his assent was necessary, because without it there was not the assent of the requisite two thirds. The court said: "It is true that the shares were transferred to Conklin as collateral security, but the certificate was absolute in its terms, and he was described therein as owner. He so appeared upon the proper books of the corporation. Under such a title, he had power to render the

security available by sale to satisfy the debt on default of payment, and until the debt was satisfied he was the one interested in protecting the property represented by the shares from diversion by liens or preferences improperly created. The company had a right of redemption, and so had an equitable interest in the stock; but upon defendant's theory, they could, without redemption, overreach the legal title, by creating a mortgage which, when enforced, would extinguish it, and until that event deprives it of value. Conklin had a clear interest in that matter. Except as limited by statute, no stockholder by any title could have more or greater rights, or be subjected to other liabilities. He is relieved by statute from personal liability." This, as we have already seen, is the case in this state. "He would be otherwise bound for the debts of the corporation, for a creditor need, in general, look only for the legal title. For the same reason he had a right to vote; his character upon the books of the bank would be conclusive upon the inspectors; and whether section 17 of the act of 1848 could, under any circumstances, be so construed as to deprive one with such a title from voting, it is not necessary to inquire, for the question does not arise; but it is clear that, except for the permission given in that section, even a pledgor could not vote. It has no application to an assent required to be given in writing to a specific act of the corporation, and which, without qualification, the statute requires to be given by a stockholder. Such we have no doubt was the character of Conklin as to the five hundred shares in question at the time of the execution of the mortgage. Including these shares as part of the stock to be represented, the assent required by statute was not given, and the mortgage is of no validity." In *Hoppin v. Buffum*, 9 R. I. 513, 11 Am. Rep. 291, the court said: "The object of the stock-book, and of requiring transfers of stock to be recorded by the corporation, is for the protection of the corporation, to enable it to know who are its members, who are entitled to dividends, and for no purpose is it more important than to enable it to know who are entitled to vote in case of an election." The language of the court in *In re St. Lawrence Steamboat Co.*, 44 N. J. L. 529, is equally emphatic on the proposition that the record determines the question who are stockholders in their dealings with the corporation, which embrace the payment and receipt of dividends, and the voting at stockholders' meeting for directors and for other purposes; although, on application to a court of equity, the

stockholder might be compelled to give a proxy to another or to vote as such other should direct. Said the court: "The general rule is, that the books of the corporation are the evidence of the persons who are entitled to the rights and privileges of stockholders in the management of the affairs of the corporation. With the single exception that stock really belonging to the corporation cannot, at any election for its directors, be voted upon, directly or indirectly (citing cases), the books of the corporation are the only evidence of who are the stockholders, and as such are entitled to vote at elections: *Downing v. Potts*, 23 N. J. L. 66. Neither the inspectors nor stockholders can dispute the right to vote of any one who appears by the company's books to be the holder of stock legally issued.

In *Pender v. Lushington*, L. R. 6 Ch. Div. 70, the articles of association provided that every member should be entitled to one vote for every ten shares, but should not be entitled to more than one hundred votes in all, and that no member should vote at any general meeting unless he had been possessed of his shares for three months previously thereto. It was held that the register of stockholders was the only evidence by which the right to vote could be ascertained, and that no vote of share-holders appearing on the register, and properly qualified, should be rejected, on the ground that their shares had been transferred to them by other share-holders, for the purpose of increasing their own voting power, or with an object alleged to be adverse to the interests of the company, or on the ground that the holders were not beneficial owners of the stock. So, also, it is held that a person has a right to vote on stock standing in his own name as trustee for another, or on stock which he has pledged or hypothecated, if it be in his own name on the company's books; and that inspectors of the election, in determining the qualifications of voters, have no authority to inquire whether the stockholder who appears by the books to be a stockholder is or not the real owner of the stock standing in his name. They must take the company's books as conclusive evidence of the qualifications to vote." To same effect are *Colebrooke* on Collateral Securities, sec. 282; 1 *Morawetz* on Private Corporations, secs. 170, 483; *Burgess v. Seligman*, 107 U. S. 20-29. In *State v. Smith*, 15 Or. 98 (on rehearing, 15 Or. 122), it was held that the pledgee, who had secured a transfer to himself of the stock on the books of the corporation under the authority of the express language of

the assignment of the stock, empowering the pledgee to transfer the stock to his own name on the books, was, nevertheless, not entitled to vote the stock. But the reason for the decision has no application in this jurisdiction. The court held that the power to make the transfer on the books, although unlimited, although without condition as to the time when it might be exercised, could not lawfully be exerted until the pledgee had destroyed the equity of the pledgor by foreclosure. This decision is clearly opposed to that of the court in *Nicollet Nat. Bank v. City Bank*, 38 Minn. 85, 8 Am. St. Rep. 643, where the court affirmed a judgment against the defendant for conversion of stock, because it had refused to transfer the same upon its corporate books to the name of a pledgee thereof before foreclosure of the pledge, and while still a mere pledgee. This case recognizes the absolute right of the pledgee to such a transfer. Said the court: "Although the assignment to the plaintiff was for the purpose of collateral security, the plaintiff was entitled to have the same entered on the books of the bank." To same effect, *Dayton Nat. Bank v. Merchant's Nat. Bank*, 37 Ohio St. 215. The right of the pledgee to insist upon a transfer upon the books at once is recognized by numerous cases: *Rich v. Boyce*, 39 Md. 314; *Hubbell v. Drexel*, 11 Fed. Rep. 115-118; Colebrooke on Collateral Securities, sec. 272; and dissenting opinion of Lord, C. J., in *State v. Smith*, 15 Or. 137, which accords with our views.

But our statute settles the question. It in express terms declares that a transfer of stock shall not be valid except between the parties, unless the transfer is entered upon the corporate books: Comp. Laws, sec. 2915. Under such a statute, the condition of a pledgee with an unrecorded transfer would be similar to that of a mortgagee whose real or chattel mortgage should not be recorded or filed. Nay, his situation would be worse. A mortgagee's lien in such a case cannot be defeated by the levy of an attachment without notice. But a creditor of a pledgor of stock, who attaches the same in ignorance of a transfer thereof, no transfer on the books having been made, secures a lien which is superior to the interest of the pledgee, and his paramount lien cannot be defeated by subsequent notice of the transfer: *In re Murphy*, 51 Wis. 519; *Fiske v. Carr*, 20 Me. 301; *Skowhegan Bank v. Cutler*, 49 Me. 315; *Naglee v. Pacific Wharf Co.*, 20 Cal 529; *Weston v. Bear River etc. Mining Co.*, 5 Cal. 186; 63 Am. Dec. 117; *Strout v. Natoma etc. Mining Co.*, 9 Cal. 78; *Fisher v. Essex Bank*, 5 Gray, 378

Sabin v. Woodstock Bank, 21 Vt. 353; *Cheever v. Meyer*, 52 Vt. 66; *People's Bank v. Gridley*, 91 Ill. 457; *Northrop v. Newtown etc. Turnpike Co.*, 3 Conn. 549; *Pinkerton v. Manchester etc. Co.*, 42 N. H. 462; *Ft. Madison Lumber Co. v. Batavian Bank*, 71 Iowa, 270; 60 Am. Rep. 789; *Colt v. Ives*, 81 Conn. 25; 81 Am. Dec. 161; *Sibley v. Quinsigamond Nat. Bank*, 133 Mass. 515; *Central Nat. Bank v. Williston*, 138 Mass. 244; *People v. Robinson*, 64 Cal. 373. To say, in the light of this statute and its construction, that a power vested in the pledgee to record the transfer was intended by the pledgor not for the purpose of conferring on the pledgee power to protect himself while a pledgee by making such a record is downright nonsense. Said the court in *Rich v. Boyce*, 39 Md. 314: "So far from the transfer of stock to the appellee's own name being a wrongful conversion, it was the exercise of an undoubted right conferred upon him by the appellant. Without such right the pledge would have been doubtful security, as the stock would have been liable to execution or attachment by any creditor of the appellant." To same effect, *Colebrooke on Collateral Securities*, sec. 288. But where the pledgor not only authorizes a record of the transfer to be made by the pledgee, such record being essential to the latter's protection, but makes the transfer on the books himself, as in the case at bar, by surrendering his old certificates and issuing directly to the pledgee new certificates signed by the pledgor himself as president of the corporation, no room is left for the inquiry whether the pledgee had authority to make the transfer upon the corporate books, as in the Oregon case. In *Day v. Holmes*, 103 Mass. 310, the court held that a pledgee was justified in procuring new certificates to be issued to himself in place of stock assigned to him in blank, and that this act did not constitute a conversion of the stock. See also *Colebrooke on Collateral Securities*, secs. 288, 323.

The provision of the statute, that a stockholder, to be entitled to vote, must be a *bona fide* stockholder, and have stock in his own name on the books at least ten days prior to the election, must be read and interpreted in the light not only of the decisions holding that a pledgee is a stockholder, but also in connection with the legislation which, under the decisions and by its terms, makes it necessary for a pledgee to secure a transfer on the books to protect himself against the creditors of his pledgor. Knowing that stock is frequently pledged, and that the pledgee would secure a transfer on the books to pro-

tect himself, it must be assumed that the legislature intended he should be regarded as a stockholder with power to vote, for it has disqualified his pledgor to vote the stock after transfer; and it would be unjustifiable to impute to the law-making power a deliberate design frequently to leave a majority of the stock of a corporation without power to act, and thus render it impossible to hold a stockholders' meeting for any purpose. Unlike the doctrine of the common law, which allows any minority of the stockholders, however small, to constitute a quorum (1 Morawetz on Private Corporations, sec. 476), our statute requires a vote of stockholders representing a majority of the subscribed capital stock (Comp. Laws, sec. 2925) to elect directors. Moreover, the provision that the pledgor, and not the pledgee, should be liable for the debts of the corporation, to the extent of a stockholder's liability, clearly indicates that it was intended that the latter should have the right to make a transfer on the books, for without such transfer he is never liable: *Anderson v. Philadelphia Warehouse Co.*, 111 U. S. 479. There is a class of cases in which the books are not conclusive of the right of the person to vote who appears upon the books to be a stockholder. The law will not allow the transfer upon corporate books to cover up the incapacity of the real owner to vote upon the stock. No corporation, in the absence of statutory permission, has any right to vote its own stock. Such stock having no vote, the colorable transfer of it upon the books will not give the person in whose name it stands authority to vote it: See *Ex parte Holmes*, 5 Cow. 426; *American R'y Frog Co. v. Haven*, 101 Mass. 398; 3 Am. Rep. 377. But there is a marked difference between such a case and the case of a pledgee who in good faith holds the legal title to the stock. The rights of the pledgor are in equity. He may, in a proper case, compel the pledgee to give him a proxy by a bill in equity: *Scholfeld v. Bank*, 2 Cranch C. C. 115; *Vowell v. Thompson*, 3 Cranch C. C. 428; *McHenry v. Jewett*, 90 N. Y. 58; *Hoppin v. Buffum*, 9 R. I. 513; 11 Am. Rep. 291. The fact that such suits have been instituted indicates the necessity for them. A pledgor who has a legal right to vote stock, notwithstanding it has been transferred on the corporate books, need not resort to equity for a proxy. Said the court in the last case cited: "If the real owner wishes to have his name or the true state of facts appear on the books, he has his remedy in equity to compel a proper transfer, or to compel the pledgee to give a proxy, as

was done in the case of *Vowell v. Thompson*, 3 Cranch C. C. 428." The pledgee sustains a relation to the corporation. This is determined by the record. In dealings with the corporation, his *status* as a stockholder is fixed by the books. "As between a corporator and the corporation, the records of the corporation, or its stock-book, as it is called, is the evidence of their relation. Meetings of the stockholders, elections, and dividends, etc., are regulated by this record": *Bank of Commerce's Appeal*, 73 Pa. St. 59. If the equities and contract relations between different persons claiming the right to vote the same stock are to be considered in determining the question of the right to vote, few elections would be certain, and the courts would often be called upon to investigate a multitude of collateral issues in determining who had been elected directors, or whether any other business transacted at a stockholders' meeting had the support of the requisite amount of stock. Said the court in *Hoppin v. Buffum*, 9 R. I. 513, 11 Am. Rep. 291: "Upon any other rule, it could never be known who were entitled to vote until the courts had decided the dispute. The corporation or its officers would have to decide it for the time, and it would leave the election in uncertainty."

The record fixes the *status* of a person as a stockholder; and another, having an equitable right to wield the power of a stockholder as between himself and the one who has the legal right, must enforce that equitable right by the decree of a court, before he can be recognized as a stockholder in his relations with the corporations. The legal title to the stock determines the right to vote, and the courts, on *quo warranto* or on summary proceedings under the statute, cannot regard and enforce a merely equitable right. It is true that under the statute the court is authorized to award broader relief than on *quo warranto*. It may declare a different set of directors elected, but the proceeding, in its essential nature, is a proceeding at law to determine who had the legal right to vote as stockholders at a stockholders' meeting for directors or for other purposes. That the legal title to stock hypothecated and transferred to the creditor on the books is in the creditor, so far as dealings with the corporation are concerned, is elementary: *National Bank v. Watson town Bank*, 105 U. S. 217; *Wilson v. Little*, 2 N. Y. 448; 51 Am. Dec. 307; Angell and Ames on Corporations, sec. 580; *Pullman v. Upton*, 96 U. S. 328; *National Bank v. Case*, 99 U. S. 628; Colebrooke on Collateral Securities, sec. 282. It is not strictly accurate to speak of

the creditor holding hypothecated stock transferred on the corporate books as a mere pledgee. His relation to the debtor and to the corporation may be more accurately described. He is a holder of the legal title to stock as collateral security. The debtor has a general right to the return of his property and its title on payment of his obligation. By his own voluntary act, the debtor has conferred upon the creditor all the rights of a stockholder, by authorizing him to transfer the stock on the corporate books. In this case, the debtor himself made the transfer by canceling his certificates, and issuing in their place others directly to the creditor's agent, signed by himself as president of the corporation. We are clearly of the opinion that Faulkner, and not Edwards, was entitled to vote the 546 shares of stock in question. The agreement between Hill and Edwards that the stock should be placed in the name of such person as Hill should designate, for the purpose of giving Hill control of the corporation, adds nothing to his legal rights, but it would be an important element in the case were Edwards here invoking equity to compel Hill to give him a proxy. The latter could use it as a defense to an application for such relief. If, however, as is contended by Mr. Edwards, Hill agreed to leave him in control of the corporation, a resort to equity to compel the giving of a proxy would be his proper remedy. Such issues cannot be tried at every election, nor is it the policy of the law that they should be. It would, indeed, be a startling doctrine that the legality of business transacted at stockholders' meetings should be subject to the ultimate decision of complicated questions arising between different claimants of the same stock. If Faulkner voted this stock at the meeting, it is our duty, under the statute, to declare the other set of directors elected: *Ex parte Desdoity*, 1 Wend. 98; *In re Barker*, 6 Wend. 509; *In re St. Lawrence Steamboat Co.*, 44 N. J. L. 529; *In re Cape May & D. B. N. Co.*, 51 N. J. L. 78. Before discussing this, however, we should dispose of a further question relating to the qualification of Faulkner to vote this stock.

The statute declares that a stockholder must be a *bona fide* stockholder to entitle him to vote. This phrase "*bona fide*," in this connection, is used in contradistinction to "bad faith." In *In re St. Lawrence Steamboat Co.*, 44 N. J. L. 529, the statute required a person to be a *bona fide* stockholder to be eligible to the office of director. The court said, in construing this statute: "A stockholder may have purchased stock with a

view of becoming a director, or have obtained it by gift, or he may hold it upon a trust, and be qualified to be a director. If the stock was legally issued, and was not the property of the corporation, and the legal title is in him, he is *prima facie* capable of being a director, and his right to be a director, in virtue of his legal title to such stock, can be impeached only by showing that title was put in him colorably, with a view to qualify him to be a director for some dishonest purpose, in furtherance of some fraudulent scheme touching the organization or control of the company, or to carry into effect some fraudulent arrangement with the company." But we do not think that Faulkner voted this stock for the persons who claim to be elected as directors. It is undisputed that he did not vote the stock at the meeting over which Mr. Edwards presided. At the hour named for the meeting, Edwards assumed to act as chairman, and directed a Mr. Flint to act as secretary. This was without objection. The call was then read. Next Edwards stated that the object of the meeting was to elect directors for the ensuing year. Ballot-boxes were then prepared, and nominations for directors were made by Edwards and by Mr. Faulkner. After that some other routine business was transacted, and then an adjournment was taken, on motion of Mr. Faulkner, until afternoon. When the meeting was reopened, after adjournment, Faulkner moved to reconsider all that had been done, on the ground that the president of the corporation had no right to act as chairman of the stockholders' meeting without election, and that he had not been elected or chosen chairman. In a word, Faulkner claimed that the meeting had not been properly organized. We think his claim came too late. He had acquiesced in the organization, and had participated in the business of the meeting. He had even recognized, by making nominations for directors, that at that meeting, as so organized, the candidates for directors should be voted for. Failing in his efforts to reorganize the meeting, he withdrew from it without voting, or offering to vote, his stock for directors. It is true that Edwards had notified him that he would not be permitted to vote his stock for directors. But this would not dispense with affirmative action on his part. His secret intention to vote for certain persons for directors, without expressing that intention in a legal way, would not elect any one to office. It is true that Edwards might, and probably would, have refused to refuse to receive the ballot which he might have offered. But

it was not in the power of Edwards, or any one else, to prevent his voting at that meeting. There was therefore no reason for his withdrawing. It was his duty to remain at the stockholders' meeting as organized, and vote his stock at that meeting. This he did not do, and we are of opinion that voting the stock at another meeting, which he held with others in the same room, at the same time, was of no effect. A minority must have a right to insist that after a meeting is organized, the majority shall not withdraw from it and organize another meeting, at which the minority must appear or lose their rights. Once concede the right, and there is no limit to the number of wrecked meetings which may, at the caprice of a majority, precede the transaction of any business.

Suppose the vote of two thirds of the stock voted is required to carry a measure under the law or the by-laws of the corporation. Stockholders having more than one third of the stock present can vote it down. Can a majority, constituting less than two thirds, withdraw from an organized meeting, and thus compel the minority to follow them or lose their right to defeat the measure? We believe it would be unwise, and unjust as well, to sanction such a rule. It is not essential to the protection of the majority who have the right to vote at the meeting as organized. On the other hand, the contrary rule is necessary for the protection of the minority. It is true that mere irregularities in conducting a meeting will not vitiate an election; but when a meeting is once organized, it is not a mere irregularity to withdraw from it and start a new one. The persons voted for at the second meeting cannot be adjudged to have been elected directors, without deciding both that the second meeting was valid and that the first was illegal. "The acts of a majority are not binding upon the company, unless the proceedings are conducted regularly, and in accordance with general usage, or in the manner prescribed by the charter and by-laws of the company": 1 Morawetz on Private Corporations, sec. 487, and cases. See *In re Long Island R. R. Co.*, 19 Wend. 37; 32 Am. Dec. 429. To elect directors, they must receive the vote of a majority of the subscribed capital stock: Comp. Laws, sec. 2925. This is fatal to the election of the persons voted for at the legal meeting. Only twelve shares were lawfully voted at that meeting. It was therefore error to dismiss the petition. It was the duty of the court, under the statute, to set aside the old and order a new election:

In re Long Island R. R. Co., 19 Wend. 37; 32 Am. Dec. 429; Comp. Laws., sec. 2932.

There remains to be considered the qualification of one of the directors voted for at the pretended meeting by Faulkner. To be a director one must be a holder of stock: Comp. Laws, sec. 2926. Shortly before the election, Faulkner transferred to B. F. Spaulding ten of the 556 shares held by him, and on the day of election, Spaulding demanded a transfer on the books. This request was refused. We do not think that he was eligible to the office of director. He did not appear to be a stockholder upon the books of the corporation. If he was entitled to have his transfer recorded, the corporation would be liable for its refusal, and he could recover the full value of his stock: 1 Morawetz on Private Corporations, sec. 217, and cases cited. Or he might compel a transfer by an application to a court of equity: 1 Morawetz on Private Corporations, sec. 220, and cases cited. But until such transfer is made, he is not, under our statute, a stockholder in his relations with the corporation. Our statute in express terms declares, as we have already seen, that a transfer of stock not entered upon the corporate books shall not be valid for any purpose, except as between the parties: Comp. Laws, sec. 2915. If it is effectual to qualify the transferee for the office of director, it is valid for a very important purpose. We may not disregard the imperative provision of this law, nor can we shut our eyes to its very obvious policy. It would be as unfortunate, and as fruitful of confusion and litigation, to have the eligibility of a person for the office of director left in doubt at a stockholders' meeting to elect directors, as to have left in uncertainty the qualification of a person to vote as a stockholder for a director at that meeting. Under a statute couched in the same language, it has been held that the assignor of stock not transferred on the corporate books, and not the assignee thereof, has the right to vote the stock at a meeting to elect directors: *People v. Robinson*, 64 Cal. 373; *State v. Pettineli*, 10 Nev. 141. See also 1 Morawetz on Private Corporations, sec. 483; *State v. Ferris*, 42 Conn. 560. The decisions in New Jersey and Oregon (*In re St. Lawrence Steamboat Co.*, 44 N. J. L. 529; *State v. Smith*, 15 Or. 98) are not of controlling force here, because our statute, by both its terms and its manifest spirit, compels the adoption of a different doctrine. A person who desires to be recognized as a stockholder, for the purpose of voting, of being a director, of suing for dividends, must

secure such a standing by recording his transfer on the corporate books. Nor will the assignee be without remedy. The law affords him the two remedies referred to against the corporation for an unwarranted refusal to make the transfer, and he may, by a resort to a court of equity, compel his transferrer to give him a proxy after he has been unjustifiably deprived of his right to have his name entered upon the books of the corporation as a stockholder. Moreover, he can always insist on a transfer as a condition precedent to his purchase or loan on the security of the stock. Business prudence would prompt this caution.

In cases where the corporation has a lien on the shares of its stockholders, the purchaser, without a transfer on the books, takes subject to the lien, and the corporation may refuse to record the transfer until the lien is discharged: 1 Morawetz on Private Corporations, sec. 203. By insisting upon a transfer upon the books before he pays his money, the purchaser will secure his stock free from such lien, as the act of the corporation in making such transfer would be a waiver of the lien: 1 Morawetz on Private Corporations, sec. 208; *National Bank v. Watson-town Bank*, 105 U. S. 217. In *Helm v. Swiggett*, 12 Ind. 194, it was held that a corporation, whose charter gave it a lien upon the stock of a stockholder for a debt owing to the corporation, had no lien for a debt of the assignee of stock on stock assigned, but not transferred on the books, the court saying: "Ownership simply of a certificate of stock in the bank did not constitute the owner of it a stockholder. It required a transfer of the stock to him upon the books of the bank." Referring to the provision requiring a transfer upon the books, Mr. Morawetz says: "It follows, therefore, that a transfer upon the books is essential to a novation of the contract of membership, where there is a provision of this description. An assignment of shares, although valid as between assignor and assignee, would not affect their legal relationship to the company until after a transfer was entered upon the books," etc.: 1 Morawetz on Private Corporations, sec. 170. Under our statute, no person can claim to be a stockholder, in his dealings with the corporation, until his name appears in some way as stockholder on the corporate books; and as the statute requires a person to be a stockholder, not stock-owner, to entitle him to be a director, we are clear that Spaulding was not eligible to that office. "The directors of a corporation are generally required to be share-holders by express provisions

of the company's charter or articles of association. A person is a share-holder, within the meaning of a provision of this description, if he holds shares on the books of the company, but not if he is merely the holder of the certificate. It has been held that the transferee on the books is eligible, although he is not the real owner of the shares, and the transfer was executed for the sole purpose of making him a director. A different rule might apply where the statute expressly requires the directors to be the owners of shares": 1 Morawetz on Private Corporations, sec. 506. Had Spaulding appeared as a stockholder on the corporate books, he would have been qualified to hold the office of director, although the transfer had been made to him for the sole purpose of so qualifying him. As he did not so appear, he was not eligible to that office.

It was urged that as Faulkner, subsequently to the issue of the stock, had indorsed it in blank, and left it in the possession of Hill, that he (Faulkner) had ceased to be a stockholder, and therefore had no right to vote the stock or be a director. Under our statute, providing that an unrecorded transfer of stock shall not be valid for any purpose except between the parties, we are clearly of the opinion, as we have already stated in another connection, that until a transfer should be made on the books, Faulkner would continue to be a stockholder for the purpose of voting the stock or of being eligible to the office of director: *People v. Robinson*, 64 Cal. 373; *State v. Pettineli*, 10 Nev. 141; 1 Morawetz on Private Corporations, sec. 483; *State v. Ferris*, 42 Conn. 560. There are certain findings of fact which we are unable to discover any evidence in the record to sustain. The view the trial court took of the law may, however, explain why they are embodied in the case. The court finds that Hill, in electing directors, was not to put in men unsatisfactory to Edwards. Mr. Faulkner, on cross-examination by Mr. Edwards himself, stated that Edwards said to Hill that Hill was to have a majority of the directors. Mr. Edwards then remarked: "Satisfactory to me, of course?" To this the answer was: "He was to pick his own men." This is all the evidence on the point. Mr. Edwards did not testify in the case. It is true that the record seems to show that Hill was not to put in men who were enemies of Edwards, but this will not justify a finding that the majority of the directors were to be satisfactory to Edwards. Many persons who were not his enemies might nevertheless be unsatisfactory to him. The most that it can be claimed that

the evidence discloses is, that the question as to what men the majority of the board should be composed of was to depend upon a fact not to be determined by Hill or Edwards finally, but by the courts; whereas the finding would make Edwards the sole and final arbiter of the question. This would be repugnant to the spirit of the arrangement which was to prevent Edwards from dealing with the corporation and its assets to the prejudice of Hill. Prior to this time Hill had held, as collateral for this same debt, stock in another corporation controlled by Edwards. Hill discovered that the organization of this corporation had been suffered to lapse; that his stock had therefore become worthless; and that Edwards had formed a new corporation. This stock had not been transferred on the books of the corporation, and Edwards, therefore, had full control of it, and by means of it had had complete control over the corporation. When Edwards proposed to give Hill stock in the new company as security, Hill said: "What good would that be if you form a third company?" To this Edwards replied, that, to prevent this, Hill could have the stock put in his own name, and have absolute control, and then he would be safe, and a third company could not be started. Certainly Mr. Hill would have no control whatever if Mr. Edwards were allowed arbitrarily to pronounce unsatisfactory every director for whom Mr. Hill or his representative should vote this stock. The effect would be, that Mr. Hill would have control only on condition that he suffered Mr. Edwards to control him in exercising that control. Other findings it is not important to refer to, as a new election must be had.

The third conclusion of law is unwarranted. It states that Faulkner held this stock subject to the joint order of Hill and Edwards. Having made a transfer of the stock upon the records by issuing new shares directly to Faulkner, Edwards, as pledgor, had no control over the stock without paying his debt. He could not control Faulkner in voting it, without appealing to a court of equity under peculiar circumstances creating an equity in his behalf. Such circumstances are not shown by this record to exist in this case. This he did not do, and it was error to hold that he could, at a stockholders' meeting, exercise any control over the stock, or over Faulkner, who held it. The judgment of the district court is reversed, and that court is directed to render judgment, setting aside as illegal the election of A. W. Edwards, H. C. Plumley, M. R.

Flint, Alexander Griggs, and William A. Stevens as directors, and ordering a new election to be had as required by the statute. The old directors will hold their office until their successors are elected and qualified: Comp. Laws, sec. 2924. It will be so ordered.

CORPORATIONS—RIGHT OF PLEDGEE TO VOTE STOCK.—The pledgee of stock standing on the books of the corporation in his name as "trustee" has a right to vote such stock: *Hoppis v. Bufum*, 9 R. L. 513; 11 Am. Rep. 291. The owner of hypothecated stock may vote thereon: *Ex parte Willcocks*, 7 Cow. 402; 17 Am. Dec. 525, and note.

CORPORATIONS—WHO ARE STOCKHOLDERS.—One who has subscribed to the constitution and by-laws of a corporation, and thereby subjected himself to all the rights and penalties thereof, is a stockholder in such corporation: *Palmetto Lodge v. Hubbell*, 2 Strob. 457; 49 Am. Dec. 604. See *Case of Philadelphia Sav. Inst.*, 1 Whart. 461; 30 Am. Dec. 226. The mere subscribing another's name for shares in a corporation does not constitute one a stockholder: *Salem etc. Corp. v. Ropes*, 9 Pick. 187; 19 Am. Dec. 363.

CORPORATIONS—QUALIFICATIONS NECESSARY TO VOTING STOCK.—Stock must stand in one's name upon the books of the corporation before he is entitled to vote it: *In re Long Island R. R. Co.*, 19 Wend. 37; 32 Am. Dec. 429, and note; *Ex parte Willcocks*, 7 Cow. 402; 17 Am. Dec. 525.

CORPORATIONS—RIGHT OF ASSIGNEE OF STOCK TO COMPEL TRANSFER.—The assignee of stock may maintain an action in equity to compel the company to issue him a certificate: *Iron R. R. Co. v. Fink*, 41 Ohio St. 321; 52 Am. Rep. 84, and note. An insurance company cannot refuse to transfer its stock on the ground that the assignor was indebted to the company: *Sargent v. Franklin Ins. Co.*, 8 Pick. 90; 19 Am. Dec. 306. A purchaser of stock may compel its transfer: *Fitzhugh v. Bank*, 3 T. B. Mon. 126; 16 Am. Dec. 90; *Blaisdell v. Bohr*, 77 Ga. 381; *Jostyn v. St. Paul etc. Co.*, 44 Minn. 183. See *Thorber v. Orump*, 86 Ky. 408.

CASES

IN THE

SUPREME COURT

OF

SOUTH CAROLINA.

TOWN COUNCIL OF SUMMERVILLE *v.* PRESSLEY.

[33 SOUTH CAROLINA, 36.]

CONSTITUTIONAL LAW — MUNICIPAL CORPORATIONS. — THE LEGISLATURE MAY DELEGATE to municipalities the power to regulate, restrain, or even to suppress particular branches of business, when deemed necessary for the preservation of the public health.

CONSTITUTIONAL LAW — POLICE POWER. — A municipal corporation whose charter gives its town council power to make such rules, by-laws, and ordinances respecting roads, markets, streets, and police as shall appear to them necessary and requisite for the security, welfare, and convenience, or for preserving health, peace, order, and good government, authorizes it to adopt and enforce an ordinance prohibiting the cultivation, for agricultural purposes, within the corporate limits, of more than one eighth of an acre of land for each family or household, and restricting the right to cultivate to that extent to the lot or premises of such family or household.

CONSTITUTIONAL LAW — FOURTEENTH AMENDMENT. — AN ORDINANCE OF A MUNICIPAL CORPORATION, by which persons are restricted in the right to cultivate land for agricultural purposes in a village to one eighth of an acre, though the operation of such restriction may be that the owner of that quantity of land may cultivate the whole of it, while owners of larger tracts must leave the greater part of them uncultivated, is not in conflict with the constitution of South Carolina, declaring "that no person shall be subject in law to any other restraint or disqualification in regard to personal rights than such as are laid upon others under like circumstances"; nor with that portion of the fourteenth amendment to the constitution of the United States, providing "that no state shall deny to any person within its jurisdiction the equal protection of the laws." The question of equality is not to be determined by the number of acres a citizen may happen to own.

CONSTITUTIONAL LAW. — THE LOCAL CHARACTER OF A STATUTE does not make it necessarily unconstitutional. The legislature must determine whether particular rules shall extend to the whole state and its citizens, or, on the other hand, to a subdivision of the state or a single class of citizens. It

is sufficient that the statute applies equally to all persons within the territorial limits described in the act. Hence an ordinance restraining the cultivation of lands for agricultural purposes in a municipality is not rendered invalid by the fact that such cultivation is not restricted in other municipalities in the same state.

PROSECUTION and conviction for violating an ordinance of the town of Summerville.

Inglesby and Miller, and Lord and Hyde, for the appellant.

Charles Boyle, contra.

MCGOWAN, J. The village of Summerville was originally chartered in 1847, and the corporate authorities were "invested with all the powers and privileges conferred, and subject to the same restrictions and penalties imposed, on the village of Newberry, by an act passed on December 17, 1841," of which act section 5 provides as follows: "And the intendant and wardens shall have full power, under their corporate seal, to make and establish all such rules, by-laws, and ordinances respecting roads, streets, markets, public spring, and police of said village as shall appear to them necessary and requisite for the security, welfare, and convenience of the said village, or for preserving the health, peace, order, and good government within the same," etc. The charter of Summerville was amended in 1885, enlarging the boundaries, adding two wardens, and changing the name to that of the "Town of Summerville," but without changing the powers and privileges conferred by the charter of 1847, adopting those given in the charter of Newberry.

In 1888, the town council passed an ordinance "to limit the culture of the soil, and more effectually to prevent the destruction of trees in the town of Summerville." The preamble recited: "Whereas, it is necessary for the protection of the public health of Summerville, that the soil should not be cultivated beyond a limited extent, and that the injury and destruction of trees should be more effectually prevented"; the ordinance prohibited entirely the culture of rice, and then provided as follows: "That from and after the date herein, the maximum quantity of land which it shall be lawful for any family or household, or the immediate servants or employees of such family or household, to fertilize, plant, or cultivate for agricultural purposes within the corporate limits, shall be one eighth ($\frac{1}{8}$) of one acre, which shall be on the lot or premises of such family or household, regardless of the

quantity or extent of the lot or tract of land owned or occupied by such family or household, or its immediate servants, or which may form part of the premises of said family residence or tract of land. But this section shall not be construed so as to abolish or prohibit the planting of oats, rye, or barley between the first day of November and February 15th, or the planting and proper cultivation of flower-gardens, or of the grape or fruit trees, or any other kind of trees whatsoever," etc.

It seems that under this ordinance the town council imposed upon the defendant, a citizen of the town, a fine of twenty dollars for violating the ordinance, in cultivating his lands for agricultural purposes without regard to the limit imposed. He admitted that he had violated the ordinance, but denied the authority of the town council to pass such an ordinance. Upon appeal, Judge Witherspoon held that the duty of the court was limited to the inquiry, whether or not the power existed, and if so, whether or not its exercise violated any constitutional provision. Concluding that the ordinance was valid at the time the fine was imposed on the appellant, he ordered that the appeal be dismissed, and the judgment of the town council in imposing the fine be affirmed.

From this decision the defendant now appeals to this court upon the following grounds: "1. Because his (defendant's) garden has been continuously cultivated in excess of said town ordinance for more than thirty years, and there is no allegation, claim, or proof that such cultivation was negligent, or in any manner so conducted as to create a nuisance; 2. Because, in the absence of such allegation and proof, the legislature has not conferred and could not confer on the town council any authority to prevent the usual proper use of cleared land by the owner, without full compensation to him; 3. Because the ordinance of said town council is unequal and unjust, in that it permits the owner of one fourth or one half of an acre of land to cultivate one fourth or one half of his possessions, and denies to the owner of six acres the right to cultivate more than one forty-ninth part of his land; 4. Because his honor omitted to decide one important point argued by the defendant before him, to wit, the power of the town council, reversed in section 8 of said ordinance, whereby it may give permission to any one to cut down trees in the town, violates the fourteenth amendment of the United States constitution."

There must be some misprint in the last ground of appeal,

especially in reference to the word "reversed." But as there is no question before this court, arising under the third clause of the ordinance, which allows permission to be given to some persons and not to all, to cut down trees, etc., within the corporate limits, it will not be necessary to consider now whether it violates the fourteenth amendment of the constitution of the United States.

The first exception complains that a citizen of the corporation, who owned cleared land in excess of the limit imposed by the ordinance at the time of its passage, was not bound to conform to the restriction as to the amount to be cultivated for general agricultural purposes, without allegation and proof that such cultivation was negligent, or of such a character as to create a nuisance. As it seems to us, this view ignores entirely the existence of the ordinance. Undoubtedly, as a rule, every man may cultivate his own land in his own way, but even in that case he may use his land in such manner as to amount to a "nuisance," indictable at common law. That, however, does not touch the question under the ordinance passed by virtue of the powers conferred upon the corporate authorities by the legislature "for preserving the health, peace, order, and good government of the town." The ordinance, by its declared purpose, was a police regulation for preserving the health of Summerville, a small town in the pines, about twenty miles out of Charleston, which affords a convenient summer resort for health. Assuming, for the present, that the town council had the power to pass the ordinance, no question can be made whether "a nuisance" had been created, nor whether the restrictions complained of were necessary to accomplish the purpose in view. It was their exclusive right to judge what was "necessary and requisite" to preserve the health of the town: 1 Dillon on Municipal Corporations, sec. 146, and authorities in note.

The second exception makes the objection that the legislature has not conferred and could not confer on the town council any authority to prevent the usual proper use of cleared lands by the owner, without full compensation paid to him. The state, through the law-making body, certainly possesses the police power, which from its very nature has no well-defined limits, but must be as extensive as the necessities which call for its exercise. Judge Dillon describes it thus: "Every citizen holds his property subject to the proper exercise of this (police) power, either by the state legislature directly or by

public corporations to which the legislature may delegate it. Laws and ordinances relating to the comfort, health, convenience, good order, and general welfare of the inhabitants are comprehensively styled 'police laws or regulations.' And it is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its proper use and enjoyment by the owner. If he suffers injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits, which the regulations are intended and calculated to secure. The citizen owns his property absolutely, it is true. It cannot be taken from him for any private use whatever without his consent, nor for any public use without compensation; still he owns it subject to this restriction, namely, that it must be so used as not to injure others, and that the sovereign authority may, by police regulations, so direct the use of it that it shall not prove pernicious to his neighbors or the citizens generally. These regulations rest upon the maxim, *Salus populi suprema est lex*. This power to restrain a private injurious use of property is very different from the right of eminent domain. It is not a taking of private property for public use," etc.

In the great leading case upon the subject, of *Commonwealth v. Alger*, 7 Cush. 85, Chief Justice Shaw said: "Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary or expedient. This is very different from the right of eminent domain, — the right of a government to take and appropriate private property to public use whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same. It is much easier to

perceive and realize the existence and sources of this power than to mark its boundaries or to prescribe limits to its exercise," etc.

It would seem that these authorities are conclusive of the right of the state, in the exercise of the police power, to make the restriction complained of. If the legislature itself had passed the Summerville ordinance just as it stands, it could not, as we think, be doubted that it was a constitutional exercise of the police power. It is said, however, that it was a mistake to suppose that the cultivation of the soil in certain crops was dangerous to health, and therefore the restriction was not a "proper" one. We suppose that the cultivation inhibited must have been considered as dangerous to health in the locality of Summerville. But be that as it may, it was a question for the law-making body. "The judiciary can only arrest the execution of a statute when it conflicts with the constitution. It cannot run a race of opinions upon points of right reason and expediency with the law-making power": Cooley's Constitutional Limitations, 201. Assuming that the legislature had the power to pass the Summerville ordinance, there can be no doubt that it had the right to delegate that power to the municipal authorities of Summerville as the governmental agent of the state within the corporate limits of the town. "The preservation of the public health and safety is often made a matter of municipal duty, and it is competent for the legislature to delegate to municipalities the power to regulate, restrain, and even suppress particular branches of business, if deemed necessary for the public good": See 1 Dillon on Municipal Corporations, 3d ed., sec. 144; *Harrison v. Baltimore*, 1 Gill, 264.

The charter of the town of Summerville has the following: "Sec. 5. And the said intendant and wardens shall have full power, under their corporate seal, to make all such rules, by-laws, and ordinances respecting the roads, streets, markets, public spring, and police of said village as shall appear to them necessary and requisite for the security, welfare, and convenience of said village, or for preserving health, peace, order, and good government within the same," etc. This provision was adopted from the charter of the town of Newberry, and seems to be as full and comprehensive as municipal charters generally are. We think that the legislature intended to give to the city council of Summerville all the police powers it possessed, to be exercised within the corporate limits of the

TOWN. As was said by the court in the case of *Harrison v. Baltimore*, 1 Gill, 264: "By its charter, the city of Baltimore was vested with full power and authority to make all ordinances necessary to preserve the health of the city. The transfer of this salutary and essential power is given in terms as explicit and comprehensive as could have been used for such a purpose. To accomplish within the specified territorial limits the objects enumerated, the corporate authorities were clothed with all the legislative powers which the general assembly could have exercised. Of the degree of necessity for such municipal legislation, the mayor and city council of Baltimore were the exclusive judges. To their sound discretion is committed the selection of the means and manner (contributory to the end) of exercising the powers which they might deem requisite to the accomplishment of the objects of which they were made the guardians," etc.: 1 Dillon on Municipal Corporations, sec. 144; *City Council v. Baptist Church*, 4 Strob. 310; *State ex rel. Copes v. City of Charleston*, 10 Rich. 502.

The third exception complains that the ordinance is "unequal and unjust, in that it permits the owner of one fourth or one half of one acre of land to cultivate one fourth or one half of his possessions, and denies the owner of six acres the right to cultivate more than one forty-ninth of his lands." The second clause of the ordinance declares what shall be the maximum quantity of land it shall be lawful for any family to cultivate in ordinary agricultural crops. Section 12, article 1, of our constitution declares "that no person shall be subjected in law to any other restraint or disqualification, in regard to any personal rights, than such as are laid upon others under like circumstances." And the fourteenth amendment of the constitution of the United States provides, among other things, "that no state shall deny to any person within its jurisdiction the equal protection of the laws," etc. Under these provisions, one of both, it is contended, that the section of the ordinance which fixes a maximum of soil to be cultivated is unconstitutional,—being, as alleged, "unequal and unjust," in that the maximum allowed is the same for all citizens, without regard to their "possessions," respectively.

The intent of the ordinance was to limit to a certain point the cultivation of certain crops; and, as it seems to us, the question of "equality" should be determined, not by the number of acres a citizen may happen to own, but by the limit

imposed, which, it is admitted, is precisely the same upon all. It is manifest that the object was, not to impose a burden on the citizens in the nature of a tax, which, of course, would have to be levied in proportion to property, but to limit the cultivation of the soil, with a view to the preservation of the health of the town. A restriction only according to the quantity of land owned, as suggested, would certainly have failed in accomplishing the purpose in view; and possibly might have been obnoxious to the very objection made here,—as creating a distinction among citizens, dependent upon the amount of lands owned by them respectively. Although the citizens may own lands within the corporate limits in different amounts, some more and some less, yet in that regard we are obliged to consider that they are all “under like circumstances,” and the amount of soil allowed to be cultivated in particular crops being the same to all, we cannot hold that this section of the ordinance is unconstitutional on the ground of “inequality” in its provisions.

It is further contended in the argument, that the ordinance was unconstitutional for another reason, to wit, that it violated the constitutional law of “equality,” by “prohibiting the cultivation of dry land in one village of the state without including in the act all its towns and villages like situated and under like circumstances. A nuisance in one place must be a nuisance in every other place in like circumstances.” As we have endeavored to show, there is no question of actual nuisance in the case. The town council, which alone had the right to judge, deemed the ordinance necessary to preserve the health of the town, and we have no right to review that judgment. In reference to the local character of the ordinance, it can hardly be necessary to say more than repeat what was said in *Utsey v. Hiott*, 30 S. C. 385; 14 Am. St. Rep. 910. “The local character of the act does not make it necessarily unconstitutional. While there may be some just objection to local laws in general, it is well established that the authority that legislates for the state at large must determine whether particular rules shall extend to the whole state and all its citizens, or, on the other hand, to a subdivision of the state or a single class of its citizens. The circumstances of a particular locality, or the prevailing sentiment in that section of the state, may require or make acceptable different police regulations from those demanded in another. As Mr. Justice McIver said in the case of *State v. Berlin*, 21 S. C. 296, 53

Am. Rep. 677: 'The whole matter is well summed up in a note to 1 Cooley's Constitutional Limitations, 2d ed., 390: "To make a statute a public law of general obligation, it is not necessary that it should be equally applicable to all parts of the state; all that is required is, that it shall apply equally to all persons within the territorial limits described in the act"' (and authorities).

The judgment of this court is, that the judgment of the circuit court be affirmed.

CONSTITUTIONAL LAW — MUNICIPAL CORPORATIONS — ORDINANCES REGULATING A PARTICULAR BUSINESS. — The power to pass ordinances relating to health and sanitary matters conferred upon a municipal corporation by express grant can be exercised in the cases and to the extent allowed by the act: *Huesing v. Rock Island*, 128 Ill. 465; 15 Am. St. Rep. 129, and note; *Ex parte Byrd*, 84 Ala. 17; 5 Am. St. Rep. 328, and note. The legislature may authorize a municipal corporation to make by-laws for local objects: *Tanner v. Trustees*, 5 Hill, 121; 40 Am. Dec. 337.

STATUTES — LOCAL — WHEN NOT UNCONSTITUTIONAL. — An act, though local and special in its application, where the accomplishment of its principal object would be very difficult if not impossible, may not be obnoxious to a constitutional requirement that the legislature may not pass local or special laws: *Richtman v. Supervisors*, 77 Iowa, 513; 14 Am. St. Rep. 308, and note. The legislature may pass laws which affect only certain localities, but it cannot go further, and exempt persons from the operation of such laws: *Utsey v. Hiett*, 30 S. C. 360; 14 Am. St. Rep. 910, and note; extended note to *State v. Elliot*, 21 Am. St. Rep. 782.

CHARLESTON, CINCINNATI, AND CHICAGO RAILROAD COMPANY v. LEECH.

[38 SOUTH CAROLINA, 176.]

CONSIDERATION FOR CONVEYANCE OF LAND, or of an interest therein, need not be in money, but may consist of anything deemed by the parties to be of value. A person owning land along and through which a railroad is proposed to be built may, in consideration of the benefit which he believes will result to him from its construction, execute a release or conveyance of the right to enter upon his lands, and to construct and maintain such railway, and to use for its purposes a designated strip of land. Such consideration is sufficient to support a conveyance, though a statute of the state forbids any jury impaneled to determine the compensation to which a land-owner may be entitled from taking into account any benefit which he may derive from the construction of a railway.

CO-TENANCY. — A GRANT BY A MOTHER to a railway company of a right of way over lands of which she is a tenant in common with her children, who reside with her, cannot have any effect whatever on their rights.

A CO-TENANT MAY COMPEL A PARTITION OF LANDS OF A CO-TENANCY, though another co-tenant does not desire it.

A GRANT OF A THING IMPLIES THE RIGHT TO ALL THE MEANS OF ENJOYING IT, so far as the grantor was possessed of those means.

CO-TENANT MAY BE COMPELLED TO SECURE A PARTITION, by a grantee to whom he has conveyed an interest in severalty; and therefore, where a co-tenant had given a railway company the right to enter upon land and construct and maintain a railway, it was held that the company could sustain an action against the grantor and his co-tenants to compel the partition of the land, for the purpose of ascertaining whether the portion assigned to the grantor would embrace the lands over which the right of way was granted.

CO-TENANCY. — A GRANTEE FROM ONE OF SEVERAL CO-TENANTS OF AN INTEREST IN SEVERALTY in a portion of the lands of a co-tenancy may compel his grantor and the other co-tenants to partition their lands, in order that it may be ascertained whether or not the portion thus granted will be awarded to the grantor, and his grant thereby made effective.

CO-TENANCY. — A proceeding to obtain compensation for lands taken and used by a railway company will be suspended until a partition of the lands of the co-tenancy is made, where such company has received from one of the co-tenants a grant of the right to construct a railroad over lands belonging to the co-tenancy.

ACTION against Mrs. Leech and her four children to compel the partition of certain lands over which she had granted plaintiff permission to construct and maintain its railway. Judgment for the defendants.

G. W. S. Hart, for the appellant.

C. E. Spencer, for the respondent.

McIVER, J. The defendant, M. Elizabeth Leech, with her four minor children, her co-defendants herein, are the owners, as tenants in common, of a certain tract of land which descended to them as heirs at law of Joseph W. Leech, deceased, through and over which tract the plaintiff's railroad has been constructed. On the 4th of May, 1887, the said M. Elizabeth Leech, by her writing under seal, "being desirous of promoting the building of said railroad, and also for and in consideration of the sum of one dollar," the receipt of which was acknowledged, "conveyed, released, and surrendered" to the plaintiff "the right and privilege . . . to enter upon each and every parcel of land belonging to or held by me, the said M. Elizabeth Leech, wheresoever the same may be situate, and through which they . . . may desire to construct a railroad, with the right and privilege to lay out on the line of said road, for its construction and all the uses thereof, a strip of land not exceeding fifty feet on each side of said road, to be measured from the center thereof."

This conveyance or release contained certain reservations and conditions for the benefit of Mrs. Leech, which it is not material to state. The railroad having been completed through and over said tract of land in October, 1888, and its operation commenced, the minor defendants, by their guardian *ad litem*, on the 13th of August, 1889, filed their petition in the court of common pleas, "praying that a jury might be impaneled to assess and determine the compensation that should be awarded to them for their interest, being two thirds thereof, in the strip of land, the right of way over which was released and conveyed to the plaintiff herein by the said M. Elizabeth Leech, whose interest was one third therein, and also praying an assessment for damages to the whole tract. And the petitioners in the said petition aver and charge that said tract of land, because of said release, and the construction of said railroad-bed over and along the strip described, has been injured and damaged in the sum of two thousand four hundred dollars." Upon the filing of this petition, an order was granted, directing that a jury be impaneled for the purpose of making the assessment demanded.

Thereupon this action was commenced to enjoin and restrain any further proceedings under said petition for assessment of damages, until partition of the said land can be made, and for this purpose judgment is demanded that a writ of partition may be issued, requiring the commissioners to allot to the said M. Elizabeth Leech "the one-third part in value of the said lands, including that portion, if it can be done, upon which she executed to this plaintiff the release aforesaid, and to allot to the minor defendants herein the remaining portion of the said land, either individually or as tenants in common, as to the court may seem just. And if the lands cannot be so allotted, that said easement shall be entirely upon the lands set apart to the said M. Elizabeth Leech, then that the said easement, and any and all damages therefrom, be adjudged to be a charge on the interest of the said M. Elizabeth Leech in the tract of land hereinabove described."

In the complaint, in addition to the facts above stated, together with other allegations not material to be mentioned, it is alleged that the release was executed for valuable consideration, and that the said M. Elizabeth Leech "was in the sole charge, management, and control of the said lands, and was acting as owner thereof," at the time she executed said release, and that the said minor defendants resided with their

mother, and were under her protection and control"; but in the answer it is denied that there was any valuable consideration for the release; and while defendants admit that they were residing together as one family, they deny any assumption by Mrs. Leech of the management or control of her children, or management or control or ownership of said land, other than that incident to the relationship of the parties; and they especially deny that she acted as the owner of the land, either in her own right or as guardian of her children.

It is stated in the "case" that "by request of counsel the hearing was simply upon the pleadings and the release of right of way,"—whatever that may mean,—but, as we understand it, the case was heard by the circuit judge without any evidence except such as could be derived from the pleadings and the terms of the release, who rendered a decree dismissing the complaint, apparently because he regarded the release as voluntary, and because Mrs. Leech had not thereby either expressly or by implication bound herself to seek partition of the land, which, in his judgment, was not contemplated by either of the parties at the time.

From this judgment plaintiff appeals, upon the following grounds, substantially: 1. Because of error in holding that the release was voluntary and without valuable consideration; 2. In holding that partition was not contemplated by either of the parties at the time; 3. In not holding that Mrs. Leech had such absolute control and management of the land as would authorize her to release the right of way in behalf of her cotenants as well as herself; 4. In not adjudging that the writ of partition should issue as prayed for in the complaint.

It seems to us that the circuit judge erred in holding that the release was voluntary, that is to say, without any valuable consideration. There was no testimony upon this subject, except that afforded by the terms of the paper; and to say nothing of the fact that the seal imported a consideration, it seems to us that the terms of the paper show that there was a valuable consideration. Of course such a consideration need not necessarily be in the shape of money, but may consist of anything deemed by the parties to be of value, and whether, in the opinion of the court, it was sufficient, is not a question to be considered; and if it were, there is no evidence before us upon which such a question could be determined. All that we know is, that for a consideration deemed sufficient by Mrs. Leech, she executed the release, and the only question before

us is as to the quality, and not as to the quantity, of the consideration.

It is quite certain that the release was either intended as a free gift to the railroad company by Mrs. Leech, or that she was moved by some consideration deemed by her of sufficient value to induce her to surrender a certain portion of her rights to the company. There is certainly no reason to suppose that a free gift was intended. The paper is not in a form which would indicate such an intention. The consideration is not, as is usual where a mere gift is intended, confined to the stereotyped nominal consideration of "one dollar," but an additional consideration is stated. The language is: "That I, M. Elizabeth Leech, being desirous of promoting the building of said railroad, and also for and in consideration of the sum of one dollar," etc. Now, experience shows that it is not at all uncommon for persons owning lands along the proposed route of a railroad, moved by considerations of some supposed benefit to themselves or their property by reason of the construction of the road through or near their land, to execute just such releases as this; and these supposed benefits or advantages which the land-owner counts upon receiving from the construction of the railroad constitute a valuable consideration just as much as a given sum of money. It seems to us that the terms of the release show that this was the real consideration which moved Mrs. Leech to execute it, and that it was not intended as a free gift to the company, but was based upon what she regarded as a sufficient valuable consideration.

It is contended, however, that the statute providing for the mode of acquiring the right of way (Gen. Stats., sec. 1552) expressly forbids the jury impaneled to determine the compensation to which the land-owner may be entitled from taking into the account any benefit which the owner may derive from the construction of the railroad. This is quite true, but it is difficult to see how it applies to the question under consideration. The provisions of the statute only apply where there is an absence of any agreement between the land-owner and the railroad company. In such a case, it may be all right and proper that the land-owner shall not be compelled to accept any supposed benefits which may accrue to him as a part of his compensation for the invasion of his rights of property without his consent. But there is certainly nothing in the statute which forbids a land-owner from making any lawful contract with a railroad company in regard to the right of way

over his lands. He may sell the right of way for a given sum of money, or he may release such right for any other valuable consideration, or he may make a free gift of it. If a valid contract for the sale or release of the right of way is made, based upon a valuable consideration, the courts will enforce it just like any other contract, and will hold the party making it to all its legal consequences.

The second ground of appeal will be passed over until we come to consider the fourth ground, which presents the real question in the case.

The third ground of appeal clearly cannot be sustained. The terms of the release show that Mrs. Leech did not even undertake to release or convey any of the rights of her minor children, which she unquestionably had no power to do. It only purports to release and convey her own rights, and cannot have any effect whatever upon the rights of her co-tenants, her minor children.

In considering the main question in the case, it will be, perhaps, best to state, first, certain well-settled propositions, which need no authority to sustain them. There can be no doubt that any one of several tenants in common may, by proper proceedings for partition, have his share or interest in the common property separated, so that he may enjoy the same in severalty; and there is as little doubt that this may be done even where the other co-tenants do not desire a partition. If the parties are all *sui juris*, they may make such partition by agreement amongst themselves; but if they are not, or if some of the co-tenants refuse to make partition, the tenant desiring to have his share in severalty may go into court and demand a partition, which will be enforced by proper orders to that end. This being the case, there can be no doubt that Mrs. Leech had the power to enforce partition of the land in question, even though the other co-tenants do not desire, as they say in their answer, to have the partition made.

The real question, then, in this case is, whether the plaintiff has any equity to require Mrs. Leech to exercise her conceded power to demand partition, in order that the plaintiff may have and enjoy the full benefit of the grant which she has made to the plaintiff. The authorities cited in the argument of appellant's counsel, to which may be added the case of *Sheets v. Selden's Lessee*, 2 Wall. 177, fully sustain the proposition, "that where a thing is granted, the grant implies a right to

all the means of enjoying it, so far as the grantor was possessed of those means"; or, as it is more fully expressed by Mr. Justice Field in *Sheets v. Selden's Lessee*, 2 Wall. 177: "The true rule on the subject is this, that everything essential to the beneficial use and enjoyment of the property designated is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing by the conveyance." Now, in this case the thing granted was the right of way for a railroad over a tract of land in which the grantor had an undivided one-third interest; and it certainly was essential to the beneficial use and enjoyment of the thing granted that the undivided interest of the grantor should be severed from that of her co-tenants in order that the grantee might know whether any, and if so, how much, of its road ran over the lands of others, and how much of it was embraced in the land of its grantor. This could only be ascertained by means of a partition which the grantor had the means of enforcing, and was, therefore, under the rule above stated, bound to enforce, as the grantee, not having any such interest in the land itself as would authorize it to demand partition, had no means of doing.

It seems to us, therefore, that the circuit judge was in error in holding that partition was not contemplated by either of the parties at the time of the execution of the release. For if, as we have seen, "everything essential to the beneficial use and enjoyment of the property designated is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing by the conveyance," and if the partition was "essential to the beneficial use" of the right of way, then clearly that must be regarded as in the contemplation of the parties at the time, as it cannot be pretended that there is any language in the release indicating a different intention on the part of the grantor. And for a like reason, we think there was error in refusing the prayer for partition and dismissing the complaint. See also the case of *Steedman v. Weeks*, 2 Strob. Eq. 145, 49 Am. Dec. 660, which, though not exactly in point, is quite suggestive, — especially the language of Dunkin, chancellor, hereinafter quoted. In that case Steedman bought from Weeks one half of all the saw-timber on a certain tract of land owned by Weeks, and the bill was for partition of the timber, which was granted, Dunkin, chancellor, using this language: "The defendant sold one half of the timber for the valuable consideration of one

thousand dollars. He is bound to afford his vendee every practicable facility for enjoying the benefit of his purchase." So here, we say that Mrs. Leech sold the right of way over her land to the plaintiff, and she is bound to afford her vendee every practicable facility for enjoying the benefit of its purchase, by a partition which she has full means of procuring, so that plaintiff may enjoy the full benefit of the right of way which she had conveyed to it.

This conclusion, deduced from what we regard as well-settled legal principles, is also in accordance with manifest justice and equity. If the partition is ordered, no injustice can possibly result to any of the parties; but if it is refused, it may result in the grossest injustice to the plaintiff. It is conceded on all hands that in no event can Mrs. Leech be entitled to compensation or damages by reason of the construction of the railroad, for she has released her right thereto. It is likewise conceded that the minor defendants are fully entitled to such compensation and damages as they may have sustained by reason of the construction of the road over any part of their land; but we do not see how it is possible for this to be determined until it is ascertained by a partition what portion of their land has been taken by the railroad. Suppose the proceedings instituted by the minors for compensation and damages is allowed to proceed to final judgment before any partition is made, of course the plaintiff would be compelled to pay to them the amount so adjudged; and suppose that after this, when partition is made, it shall turn out that the railroad does not go through or over any portion of the land allotted to the minors, but goes only over the land allotted to Mrs. Leech, would not this be the grossest injustice to the plaintiff, for in such case the plaintiff will have been required to pay for a right of way over land for which it holds a grant, and to persons who, as it turns out, are not entitled to a foot of the land over which such right of way has been paid for. But if the partition is first made, no possible injustice can result to any one. If the land covered by the track of the railroad is allotted to Mrs. Leech, then the plaintiff would have nothing to pay, having her grant for the same; and if, on the other hand, the whole or any part of the land covered by the railroad is allotted to the minors, then the plaintiff would have to pay them for the same, as it would then appear that it was their property which had been taken, and they would be clearly entitled to compensation therefor.

It seems to us, therefore, that the judgment below must be reversed and the case remanded, for the purpose of enabling the circuit court to proceed with the partition, in the mean time suspending any further proceedings under the partition filed by the minor defendants for compensation and damages until the partition has been effected. The question as to how the partition shall be made, and the claim made by the complaint to subject the share of Mrs. Leach to the payment of any amount which the plaintiff may be required to pay the minor co-tenants by way of compensation or damages, not having been considered by the court below, are matters not now before us, and have not, therefore, been considered.

The judgment of this court is, that the judgment of the circuit court be reversed, and that the case be remanded for the purposes above indicated.

CONSIDERATION FOR CONVEYANCE OF LAND—WHETHER MONEY NECESSARY.—A promise by a grantor is a good consideration for a deed: *Smith v. Allen*, 5 Allen, 454; 81 Am. Dec. 758, and note. Love and affection is a sufficient consideration for a deed from father to daughter: *Pierson v. Armstrong*, 1 Iowa, 282; 63 Am. Dec. 440, and note. A grantee's liability as surety for a grantor is a good consideration for a deed: *Buffum v. Green*, 5 N. H. 71; 20 Am. Dec. 562. Past illicit cohabitation is a good consideration for a deed; but a contract made in consideration of future illicit cohabitation is void: *Cusack v. White*, 2 Mill, 279; 12 Am. Dec. 669, and note. To constitute a deed of bargain and sale, there must be a money consideration: *Olney v. Watkins*, 1 Har. & J. 527; 2 Am. Dec. 530.

CO-TENANCY—POWER OF CO-TENANT TO CONVEY ESTATE.—A co-tenant cannot convey any greater title or interest than he has: *Tuttle v. Campbell*, 74 Mich. 652; 16 Am. St. Rep. 652. An attempted dedication of common property to public use by one co-tenant does not affect the rights of the others: *St. Louis v. Laclede etc. Co.*, 96 Mo. 197; 9 Am. St. Rep. 334, and note; note to *Benedict v. Torrent*, 21 Am. St. Rep. 593.

CO-TENANCY—RIGHT TO PARTITION.—Every co-tenant is entitled to demand partition, even though it be injurious to the other parties in interest: *Donnor v. Quartermas*, 90 Ala. 164; 24 Am. St. Rep. 778, and note; *Barker v. Jones*, 62 N. H. 497; 13 Am. St. Rep. 586, and note.

KENNEDY v. GRAMLING.

[28 SOUTH CAROLINA, 267.]

STATUTE OF FRAUDS. — A DEFECT IN THE DESCRIPTION OF REAL PROPERTY in a contract or memorandum of sale may be supplied by evidence showing the situation and surrounding circumstances of the parties; and if from such evidence it is apparent that both parties referred to the same property, the requirements of the statute of frauds are fulfilled, and parol evidence may be resorted to for the purpose of designating the particular piece of property to which the parties so referred.

STATUTE OF FRAUDS — DESCRIPTION OF REALTY. — If a person in writing offers another a specified price for property, without describing it otherwise than by stating, in connection with his offer, that if it is accepted, deeds and papers should be sent for examination, and if not accepted, that he is "ready at any time to settle for the year's rent," and the owner responds that he accepts the offer for his house, clear of expenses of title, that the taxes are paid, and that there is one year's insurance on the house which he expects the purchaser to pay, and it further appears by parol evidence that the intending purchaser was a tenant as to a certain house and lot, the proposal and acceptance will be considered as relating to the property of which the purchaser was such a tenant, and that property being ascertained, the offer and acceptance together constitute a memorandum of sale containing a sufficient description to satisfy the statute of frauds.

SALES — OFFER MUST BE ACCEPTED WITHOUT QUALIFICATION. — If a proposal to buy real property for a price specified, and no more, is followed by an acceptance providing that the property is to be clear of expenses of taxes, and that the purchaser is to repay one year's insurance which has been paid on the property, this is not an unqualified acceptance of the offer, and there is no contract between the parties.

DEED SIGNED "A, PER B," WILL BE PRESUMED to have been signed in the presence and by the authority of the former, if he was unable to read or write, and B was in the habit of signing deeds for him, and the persons claiming under the deed have been in undisturbed possession for many years.

TRUST DEED MADE TO A GRANTEE, "FOR THE BENEFIT AND BEHOOF OF THE GRANTOR'S WIFE," is not presumed to be upon the same trusts as are set forth in an antenuptial trust deed, whereby certain property was vested in the same trustee.

TRUST DEED. — WORDS OF INHERITANCE are not necessary in a conveyance vesting property in a trustee, if the purposes of the trust indicate that an estate in fee was intended.

JUDGMENT AGAINST PURCHASER OF REAL PROPERTY, WHAT PROPER. — A decree against a purchaser of real property who has refused to comply with his contract of purchase may be against him personally, making him liable for the amount which he agreed to pay, and authorizing process for its enforcement against his person, and in case of his failure to comply with the decree, to attachment for contempt of court.

SUIT by a vendor to enforce an alleged contract of purchase of real property. Plaintiff was the owner of a house and lot on Spring Street, in Charleston, of which the defendant was

her tenant, and she made the offer to sell the property, and received the acceptance shown in the opinion of the court. The defendant denied the sufficiency of the alleged purchase and sale, and further insisted that the title of the plaintiff was not marketable. One John Magee was, on August 15, 1854, the owner of the property, and a conveyance was executed at that date, which purported to be signed by him, per Arthur Magee, and to be executed in the presence of two subscribing witnesses, conveying the property to Charles R. Cassidy. Cassidy conveyed to P. J. Sires. On this latter conveyance was the following indorsement:—

“Mesne Conveyance Office, {
Charleston County. }

“For valuable consideration, I hereby assign all my right, title, and interest in the property described in the within deed to B. S. D. Muckenfuss, trustee of Martha M. Sires, for the benefit and behoof of my wife, the said Martha M. Sires.

“January 1, 1860.

P. J. SIRES. [L. s.]

“Witness:

“HENRY TRESCOT.

“J. W. GRAY.

“Personally appeared James W. Gray, who made oath that he saw P. J. Sires sign, seal, and execute the above assignment, this 1st of January, 1860.

J. W. GRAY.

“Sworn to before me this 6th of February, 1866.

“HENRY TRESCOT,

“N. P., and Ex-off. Magt.”

Muckenfuss, by the antenuptial settlement dated October 4, 1881, between Sires and Martha M. Ireland, who were then about to contract marriage, had been constituted her trustee as to certain moneys and furniture. The trust was for the benefit of the intended wife and the children of the marriage then contemplated, and the husband and wife were given power to apply any portion of the trust fund to the purchase of real property, and “thereafter to revoke the uses therein limited, and to declare new uses.” There was no evidence, however, to show that the indorsement on the deed made by P. J. Sires was intended to convey property to be held under the same trusts mentioned in the antenuptial settlement, or that it was in any way connected with that settlement or its trusts, and the contracts and dealings of the parties indicate the contrary intent. With respect to the deed made to Cassidy, the evi-

dence established the death of both subscribing witnesses, as well as of John and Arthur Magee; that John could neither read nor write, and his son Arthur was in the habit of signing deeds for him; and that the parties claiming under the deed had held possession since its execution. The master to whom the case was referred held that the objection to the mode in which the deed from John Magee was signed was not, under the circumstances, a valid objection to the title. As to the objection arising out of the assignment made in the deed to Cassidy, the opinion and decision of the master were as follows:—

“The counsel for the defendant contends that the assignment by Peter J. Sires on the conveyance of Cassidy, being to Muckenfuss, trustee of Martha M. Sires, and said Muckenfuss being then the trustee for the said Martha M. Sires, under the deeds hereinbefore set forth, he held upon the trusts of those deeds; that the sale and conveyance by said trustee to C. S. Gadsden, under which plaintiff claims title, was without power, and did not pass the interest of the children of Mrs. Sires, who were *cestuis que trust* under said deeds; that if said assignment is construed to be a complete deed, there being no words of inheritance used, either as to the trustee or the said Martha M. Sires, Mrs. Sires would take under it only an estate for life, and there would be a reverter to the grantor, Peter J. Sires; that if it shall be construed as an agreement which equity will enforce, the question will be, for whose benefit will it be enforced? If it is held that the trust is only for the life of Mrs. Sires, then the trust being only partially declared, there will be a beneficial interest in the heirs of Peter J. Sires, the grantor; that the assignment being for valuable consideration, “and not for natural affection or other good consideration,” such consideration must have been paid by the grantor, Muckenfuss, trustee, and if paid by him from trust fund, the agreement will be carried into effect for the benefit of those beneficially interested in said trust funds, viz., the children of Mrs. Sires, who are not parties, and are not bound by these proceedings, and who are not estopped by any previous deeds of the trustee; that if it is doubtful only whether the said children, who are *in esse*, and whose title did not accrue until the death of their mother, less than a year before the institution of these proceedings, have an interest in the property, and the purchaser having notice of such trusts, then the title is not such as the court will compel a purchaser to take, and that the complaint

praying specific performance should be dismissed, with costs. It is further in evidence that on the 14th of February, 1866, the said B. S. D. Muckenfuss executed and delivered to Francis Sires his bond for two thousand dollars, secured by a mortgage of this lot in Spring Street; the bond is signed 'B. S. D. Muckenfuss, trustee for M. Sires, by consent of the parties'; the mortgage is signed 'B. S. D. Muckenfuss, trustee [L. s.], by consent of the parties, P. J. Sires [L. s.], Martha M. Sires [L. s.].' By deed dated the 19th of March, 1869, the said B. S. D. Muckenfuss, trustee for Martha M. Sires, in consideration of three thousand five hundred dollars, conveyed this lot in Spring Street to C. S. Gadsden in fee. The deed is signed 'B. S. D. Muckenfuss, trustee for Mrs. M. Sires; with my consent, Martha M. Sires [SEAL].' By deed dated the 1st of October, 1872, executed by 'Martha M. Sires, executrix,' it is recited that the said Peter J. Sires, having on the 1st of January, 1860, executed the assignment to B. S. D. Muckenfuss, and afterwards died without having executed any more formal conveyance of the premises; that the said premises, having been since conveyed to C. S. Gadsden, and a question having arisen as to sufficiency of such assignment to pass more than an equitable title, that a suit had been threatened against the estate of the said Peter J. Sires, to compel his executrix to execute a proper conveyance of the legal title; to avoid the expense of such suit, the said Martha M. Sires, as executrix under the will of the said Peter J. Sires, dated the 17th of February, 1859, and in pursuance of the power to her given in said will, 'to sell, dispose of, and convey all or any part of his estate, in such manner, and upon such terms and conditions, and to such person and persons, as she may deem best,' in confirmation of the act of her testator, and to convert and change the equitable estate created by the assignment into a legal estate, conveys the said premises to the said C. S. Gadsden in fee. It appears from indorsement thereon, that the said C. S. Gadsden assumed payment of the said bond on the 19th of May, 1869, and that he paid the same in full on the 20th of May, 1872, and that the said Francis Sires entered satisfaction on the mortgage, which was duly recorded. It is further in evidence that the said C. S. Gadsden went into possession of said premises, and lived therein until he sold the same and delivered possession to Mary A. Kennedy, the plaintiff, by deed dated the 18th of November, 1872, and that the plaintiff has held the same continually from that time. The case has been carefully and

thoroughly argued before me by counsel of both plaintiff and defendant, and authorities cited in support of their several positions. I will give my conclusions on the several questions, without attempting to recapitulate the argument, or to give all the authorities cited by counsel. A critical examination of the assignment on the conveyance from C. R. Cassidy to Peter J. Sires, executed by Peter J. Sires the 1st of January, 1860, makes it extremely doubtful whether it was executed in the presence of two witnesses, it being very doubtful whether Henry Trescott signed as a witness or only as register of mesne conveyance, a doubt which is increased by the fact that J. W. Gray, the witness, makes affidavit only that he saw P. J. Sires execute, without stating that he, with Henry Trescott, witnessed the execution. This affidavit was not made until the 6th of February, 1866, at which time it was recorded. The assignment is, I think, therefore, 'an informal paper, purporting to be an assignment of the maker's interest in a tract of land, witnessed by only one witness, but based upon a valuable consideration,' as was the assignment in the case of *Pope v. Montgomery*, 24 S. C. 594, and which the court held 'is sufficient in equity to transfer such interest, and a proper conveyance could be enforced.' But even if it was executed in presence of two witnesses, I think it is wanting in some essential requisites of a complete deed, and operates only as an equitable transfer, and a proper conveyance would be enforced. The assignment is expressed to be 'for valuable consideration'; but apart from that being under seal, and made in favor of the wife of the maker, it will be executed in this court: See *Caldwell v. Williams*, Bail. Eq. 176. For whose benefit will it be executed? The assignor was, of course, familiar with the marriage settlement of 1831, and the deed of 1834, executed by him and his wife, under both of which B. S. D. Muckenfuss was trustee; but his assignment is not to the said Muckenfuss as trustee under either of said deeds, nor to the uses and upon the trusts declared and limited in either of said deeds; but upon trusts essentially different from those declared in said deeds, the assignment is 'for the benefit and behoof of my wife, the said Martha M. Sires.'

"In exercising its jurisdiction over executory trusts, the court of chancery is not bound by the technical rules of law but takes a wider range in favor of the intent of the party; and in ascertaining the nature and extent of the trust estate of Mrs. Sires under this assignment, we are not bound by the

strict technical rules which would govern in the construction of a conveyance creating a legal estate, but must look to the intent of the parties, as evinced by the terms of the assignment. Therefore, although there are no words of inheritance used either as to the assignee or the beneficiary, if it is clear that the assignor intended to create in his wife an absolute estate in fee-simple, the court will carry out that intent. See *Bratton v. Massey*, 15 S. C. 285. In 1860 it was necessary that there should be a trustee interposed to protect a married woman in the complete enjoyment of her separate estate, which no doubt was the reason why the assignor assigned to a trustee for the benefit and behoof of his wife. If the same terms used in the assignment were used in a conveyance since the constitution of 1868, the use would be executed, and the wife would take the legal estate. The arguments used by the defendant's counsel, that if the 'valuable consideration' expressed in the assignment was paid by Muckenfuss from funds derived from the estates of which he was trustee under the previous deeds, the agreement should be carried into effect for those who have a beneficial interest under said deeds, viz., the children of Mrs. Sires who are not parties to these proceedings, and that therefore the title which can be made by the plaintiff is defective, is based, it seems to me, on the ground that such payment is to be presumed from the fact that the assignment was to him as such trustee, which I have held not to be the case, for the reasons above given. I do not think the position of the counsel is sustained by the case of *Salinas v. Pearsall*, 24 S. C. 179, which he cites. In that case the circuit judge, whose decree was affirmed, held that 'the bond and mortgage, the foundation of that case, were unquestionably subject to the same trusts as the property originally conveyed.' In the case of *Barrett v. Cochran*, 11 S. C. 29, also cited by defendant's counsel, it was said: 'The fundamental allegation upon which this appeal is based is, that funds used to make the cash payment on the land mortgaged were trust funds. It was incumbent upon the appellant to establish this allegation by proof, and this he has wholly failed to do; while, on the other hand, the testimony adduced by the respondent goes far to show the contrary.' In this case the defendant has not only offered no evidence that the consideration for the assignment was paid from the funds of the trust estate of which Muckenfuss was trustee; but, on the contrary, the evidence introduced by him as to the history and disposition of the trust funds so held by him

'goes far to show the contrary.' The action of the 'parties in interest,' in making the bond and mortgage to Francis Sires, assumed and paid by C. S. Gadsden, the conveyance to C. S. Gadsden by Muckenfuss and Martha M. Sires, and the deed of confirmation of Martha Sires, executrix of Peter J. Sires, to Gadsden, are all evidence of the construction given to the assignment, and the *bona fide* action thereunder, and are confirmatory of the conclusion I have reached, that C. S. Gadsden, under whom the plaintiff claims title, took a good and complete title in fee, free from all trusts. The possession in the parties is, in my judgment, sufficient to cure any defects in the paper title, and to make the title good: See *Lyles v. Kirkpatrick*, 9 S. C. 270; *State v. Pacific Guano Co.*, 22 S. C. 53. Although it is admitted that a purchaser cannot be compelled to take a doubtful title, yet it is also true that the court acts not on mathematical but on moral certainty, and a person will not be permitted to object to a title on account of a bare possibility. It is not enough to invalidate a contract of sale, that some deed in the chain of title may be set aside by some future proceeding. Moral probability sufficient to make a good marketable title is all that is required. It is not sufficient for the defendant to show that the title tendered to him may possibly be defeated. He must show that there is reason to apprehend that it will be defeated: See *Laurens v. Lucas*, 6 Rich. Eq. 222; *Thompson v. Dulles*, 5 Rich. Eq. 375. The plaintiff having tendered such a title as is above described, the defendant is bound to comply with his contract, and the plaintiff is entitled to the relief prayed."

The report and decision of the master having been excepted to, the exceptions were overruled, and a decree was entered requiring the defendant to accept a conveyance of the property, and to pay therefor the price stipulated, with interest. From this decree defendant appealed. The decree from which the appeal was taken required the defendant, within thirty days from its date, to comply with his purchase, and accept the deed tendered "to him, in compliance with the contract of sale and purchase, paying therefor the price stipulated, with interest." The form of this decree was objected to, on the ground that "it would require process for its enforcement against the person, and render defendant liable in case of failure to comply to attachment as for contempt of court, and so have the effect of imprisonment to enforce a debt or contract in a case free from fraud."

J. E. Burke, for the appellant.

Smythe and Lee, and Brawley and Barnwell, contra.

McIVER, J. This was an action to enforce the specific performance of a contract for the sale of real estate. The defendant set up two defenses: 1. That there was no contract valid under the statute of frauds; 2. That the title of the plaintiff was not a good and marketable title. The issues in the action were referred to master Miles, who made a full and elaborate report, clearly setting forth the facts and discussing the legal issues, finding that there was a valid contract, and that the title was good and marketable. To this report defendant excepted, and the case was heard by his honor Judge Hudson, who, in a short order, overruled the exceptions, confirmed the report, and adjudged that the defendant do, within thirty days, comply with his contract. From this judgment defendant appeals, upon the several grounds set out in the record, which need not be set out here, as they will sufficiently appear from the discussion of the questions raised thereby.

First, was there such a contract for the sale and purchase of the real estate in question as would be valid under the statute of frauds? The claim on the part of the plaintiff is, that the contract is to be found in a letter from the defendant to the plaintiff, and the reply thereto, of which the following are copies:—

“CHARLESTON, S. C., Jan. 7, 1888.

Miss M. A. KENNEDY, Summerville, S. C.

“After thinking over the matter in reference to purchasing the property at your figures, I have decided that I would not give more than three thousand eight hundred dollars cash. Should you accept, please give me an early reply; also send deeds, papers, etc., for examination. If not, I am ready at any time to settle for the year's rent.

“Yours very respectfully,

“GEO. H. GRAMLING.”

“SUMMERVILLE, S. C., Jan. 9, 1888.

“MR. GEORGE H. GRAMLING, Charleston, S. C.

“Dear Sir, — Your favor of 7th inst. came duly to hand, and carefully noted. I would like to have realized more than your offer of three thousand eight hundred dollars for my house, as I really think it is worth more, but as you state you will not give more, I will accept your offer of three thousand eight hundred dollars; this is to be clear of expense of titles, etc. All

taxes is paid, both state and city. There is one year's insurance paid on the house, which I expect you to pay. I will send all the papers to you by Tuesday.

Yours very respectfully,

"M. A. KENNEDY, per D. C. EBAUGH."

Now, while it is not and cannot be denied that a valid contract for the sale of real estate may be made out by putting together a letter of the defendant to the plaintiff, and the plaintiff's reply thereto, or *vice versa*, provided all the essential terms of the contract can be gathered from the terms of such letters, the contention in this case is, that all the essential terms of the contract cannot be gathered from these letters: 1. Because the property is not specified; 2. Because the price to be paid is not agreed upon definitely. It is true that no particular piece of property is in terms specified in either of the letters, and if there is nothing in the letters designating the particular property for which the offer is made and accepted, that would be fatal to the validity of the contract: *Church of Advent v. Farrow*, 7 Rich. Eq. 378; *Hyde v. Cooper*, 18 Rich. Eq. 250; *Humbert v. Brisbane*, 25 S. C. 506. But while parol evidence is inadmissible to supply an omission in the writing of any reference to the particular property, yet such evidence is competent to show the situation and surrounding circumstances of the parties, and thereby identify the particular property referred to in writing. Thus where there is a proposition to sell and an agreement to buy the house in which plaintiff resides, there is no doubt that parol evidence would be admissible to show in what particular house he did reside, as there could not be a shadow of doubt that both of the parties — the one in making the offer, and the other in accepting it — had reference to the same property; and that is the great point.

Hence it may be stated as a rule, that whenever the writing or writings relied upon show, in themselves, that both parties referred to the same property, then the requirements of the statute are fulfilled, and parol evidence may be resorted to for the purpose of designating what particular piece of property both parties had reference to; but where it does not appear from the writings themselves what property was referred to by the parties, then parol evidence is not competent to show that fact. In other words, the writings relied upon must, in and of themselves, furnish the evidence that the minds of the parties met as to the particular property which the one proposed to sell and the other agreed to buy; and when such evidence is not

found in the writings, it cannot be supplied by parol; but when it is found there, then parol evidence of extrinsic circumstances may be resorted to for the purpose of specifically designating the property to which both parties are shown to have referred by the terms of the writings. This doctrine is fully established by the authorities cited in the master's report, which need not be repeated here.

Apply this rule to the present case. While it is true that no specific property is described in the letters which passed between the parties, yet we do not think there can be any doubt that the terms of the letters show that both parties referred to the same property, — the property which the defendant had rented from the plaintiff. When the defendant wrote to the plaintiff, proposing to give a certain price for a piece of property, and concluding by saying that if his offer to buy was not accepted he was ready to settle for the year's rent, could there have been a doubt in the mind of the plaintiff that the defendant proposed to buy the property which he then occupied under a lease from the plaintiff? It seems to us that the terms used in defendant's letter to plaintiff admit of no other construction than that he proposed to buy at a stated price the property which he had rented from the plaintiff; but if his offer should not be accepted, he was ready to settle for the year's rent. Rent of what? Why, necessarily of the property which he had proposed to buy. The plaintiff could not have failed to understand from the terms of the defendant's letter that he wished to buy the property which he was then renting from her, and offered a specific sum of money therefor; but if his offer should not be accepted, he was ready at any time to settle for the year's rent of the property. When, therefore, the plaintiff replied to that letter, accepting the offer (if, indeed, she did accept), there can be no doubt that the minds of the parties met as to the particular property referred to, and hence we think it clear that defendant's first objection to the validity of the contract cannot be sustained.

The second objection raises a question of more difficulty. It cannot be doubted that the price to be paid is one of the essential terms of a valid contract for the sale of real estate, and the practical inquiry here is, whether the letters relied upon contain in themselves evidence that the minds of the parties ever met as to the price of the property in question. The defendant's letter undoubtedly does contain an offer of a specific sum of money, — three thousand eight hundred dollars

cash, — and the defendant distinctly declares, “I would not give more.” The plaintiff replied, saying, “I will accept your offer of three thousand eight hundred dollars; this is to be clear of expense of titles, etc.” Can this be regarded as an unqualified acceptance of defendant’s offer? or is it not rather to be regarded as a conditional acceptance? Is it not the same thing as if plaintiff had said, “I will accept your offer of three thousand eight hundred dollars, provided you will pay the expense of titles, etc.”? It seems so to us. If so, then it cannot be said that the letters contain in themselves the evidence that the minds of the parties ever met as to the very material matter of the price to be paid, for defendant’s letter not only contained an offer of a specific sum of money, but was accompanied by a declaration that he would not give more, while plaintiff’s letter does not furnish the evidence of an unqualified acceptance of defendant’s offer, but on the contrary, shows that she accepted upon condition that defendant will pay more. In other words, defendant’s letter contains an offer of three thousand eight hundred dollars, and nothing more, while plaintiff’s reply shows that she was willing to accept the defendant’s offer, provided he would pay more, viz., the “expense of titles, etc.” We do not see, therefore, how it can be said that the letters show that the minds of the parties ever met as to the material matter of price. It is true that the difference between the amount offered and the amount agreed to be accepted is small, but that cannot affect the question. The fact that there was a difference is quite sufficient to show that the minds of the parties never met. The maxim, *De minimis non curat lex*, has no application to money demands: *Nix v. Bradley*, 6 Rich. Eq. 43.

It is stated in the argument of one of the counsel for plaintiff, that “the well-established rule in Charleston is, that the purchaser pays for papers”; but we find no evidence in the “case” of any such rule or custom, and in the absence of any such evidence, we must consider the case under the rule of law. That rule, as we understand it, is, that in the absence of any agreement to the contrary, shown either by direct evidence or inferred from the custom shown to prevail in any particular place, the vendor must pay for the expense incurred in making titles. When a person makes a contract to sell a piece of real property, it is necessarily implied that he must make a conveyance thereof, and consequently he must bear the expense of making such conveyance. Hence it has become

a very general, if not universal, custom, when property is to be sold under the order or process of the court, to provide in the order and advertisement that the purchaser is to pay for papers.

It only remains to consider, on this branch of the case, an authority much relied on to sustain a contrary view to that which we have adopted, and that is the case of *Neufville v. Stuart*, 1 Hill Ch. 159. In that case, as in this, the effort was to establish the contract by letters which had passed between the parties. The defendant's letter, dated the 1st of March, 1831, contained a specific offer of six thousand dollars cash, and two thousand dollars in January, 1832, for the plantation on which Mr. Neufville resided, containing 869 acres, to which plaintiff, through her attorney, replied, saying: "I have to acknowledge your letter of the 1st of March, which came to hand by this day's mail, offering eight thousand dollars for the tract of land, being the settled plantation on which Mrs. Neufville resided, containing 869 acres, viz., six thousand dollars cash, and two thousand dollars in January, 1832. I accept the offer, and will deliver possession as soon as you please. The deed will be signed by Mrs. Neufville as soon as a conveyance can be forwarded to her. I will be ready to receive the six thousand dollars when possession is taken, and your bond and mortgage for the two thousand dollars (with interest, I presume, from the date) may be delivered when Mrs. Neufville's deed is delivered to you. . . . I have written to the overseer to prepare for giving you possession."

The question in the case was, whether the letter of the plaintiff contained an unqualified acceptance of the offer contained in defendant's letter, or whether the words in parenthesis, — "with interest, I presume, from the date," — contained in plaintiff's letter, imported a conditional acceptance only. It was very properly held that there was an unqualified acceptance of the offer made by defendant, and that the words in parenthesis in a subsequent part of the letter, in reference to the mode of drawing the bond to be given for the credit portion of the price which had been agreed upon, were not used for the purpose of importing any additional term into the contract, but simply as indicating the construction which plaintiff thought ought to be placed upon one of the terms of the contract as made by a previous part of the letter.

It is very obvious that there is a marked difference between that case and this. There the plaintiff, after reciting the

terms of defendant's offer, says explicitly: "I accept the offer, and will deliver possession as soon as you please." This undoubtedly was an unqualified acceptance of the offer as made by the defendant, and was manifestly intended so to be; and the fact that plaintiff, in a subsequent part of the letter, used the expression found in parenthesis, in reference to the interest, was clearly intended not to import any additional term into the contract which had already been closed, but was simply intended to indicate the construction which plaintiff thought ought to be placed upon a contract already made. Here, however, there was no unqualified acceptance of defendant's offer of three thousand eight hundred dollars, but the acceptance was upon condition that the defendant should pay more than that sum, to wit, the expense of titles, etc. It is very obvious, from the discussion of the question in *Neufville v. Stuart*, 1 Hill Ch. 159, that if the plaintiff there had, as here, accompanied the acceptance of the offer of defendant with a condition that the two thousand dollars was to bear interest from date, the conclusion would have been different. If, for example, the plaintiff in that case, in stating the terms of defendant's offer, had added to the words "two thousand dollars in January, 1832," the words "with interest, I presume, from the date," or had added to the words "I accept the offer" the words, "the credit portion to bear interest from the date," there can be no doubt that the court would have held the alleged contract invalid under the statute of frauds; for in such a case the defendant would be found making an offer to buy on certain terms, while the plaintiff would be found accepting the offer with an additional term incorporated into it. It is clear, therefore, that the case of *Neufville v. Stuart*, 1 Hill Ch. 159, is so entirely different from this as to furnish no authority in the present case.

It seems to us, therefore, that there is no valid contract under the statute of frauds established in this case, and that upon this ground the judgment below must be reversed.

This would obviate the necessity of considering the question as to the validity of plaintiff's title, but as that question has been made and fully argued, we will proceed to determine it. In view of the very satisfactory manner in which the question of title has been discussed by the master in his report, we do not deem it necessary to go over the same ground, but are content to adopt his conclusion, concurred in, as it is, by the circuit judge.

The only remaining question — as to the form of the judgment — is not, under the view which we have taken, a practical question, but we may say that it appears to be in the usual form, and not objectionable. The question in reference to this matter, raised by appellant, would more properly arise when it is sought to enforce such a judgment by attachment.

The judgment of this court is, that the judgment of the circuit court be reversed, and that the complaint be dismissed, upon the ground that the contract, of which specific performance is sought to be enforced, is not a valid contract under the statute of frauds.

VENUE AND PURCHASER — AGREEMENT TO SELL REAL ESTATE — SUFFICIENCY OF DESCRIPTION. — An agreement to sell real estate need not describe the property with such certainty that it can be ascertained only from the writing. The rule is, that the situation of the parties and the surrounding circumstances can be shown by extrinsic evidence: *Preble v. Abrahams*, 88 Cal. 245; 22 Am. St. Rep. 301, and note; *Caldwell v. Center*, 30 Cal. 539; 89 Am. Dec. 131, and note.

TRUSTS. — Necessity for technical words in creating: See note to *Leathers v. Gray*, 9 Am. St. Rep. 35. The absence of words of inheritance in executory contract to convey land will not prevent the passing of the fee: *Phillips v. Stuart*, 120 Pa. St. 76; 6 Am. St. Rep. 691, and note.

YOUNG v. EDWARDS.

[38 SOUTH CAROLINA, 404.]

CO-TENANCY. — CONVEYANCE MADE BY ONE OF SEVERAL CO-TENANTS, PURPORTING TO CONVEY A SPECIFIC PART OF THE COMMON PROPERTY, IS NOT VOID.

CO-TENANCY. — A CONVEYANCE BY A CO-TENANT OF A SPECIFIC PART OF THE lands of the co-tenancy, equivalent in value to his share in the entire property, with covenants of warranty, will, as against him, be treated as a conveyance of his entire interest in the common land.

PARTITION. — WHEN A CO-TENANT HAS CONVEYED IN SEVERALTY a part of the common lands, a court in decreeing partition will direct it to be so made as to set apart to his grantee the lands so conveyed, if it can be done without prejudice to the interests of his co-tenants.

Croft and Chafee, for the plaintiffs and Elizabeth Howard.

Henderson Brothers, for Patience Edwards.

McIVER, J. This was a proceeding for partition of real estate, and the controversy grows out of the following state of facts: On the 8d of April, 1871, a certain lot of land in the town of Aiken was duly conveyed to one John Young, the

father of the plaintiffs, and the husband of the defendant Elizabeth. Soon after this conveyance was made, John Young died intestate, leaving as his heirs at law his widow, the defendant Elizabeth, who subsequently intermarried with one Peter Howard, and his children, the plaintiffs. On the 3d of April, 1883, the defendant joined her second husband, Peter Howard, in a deed with full covenants of warranty, conveying to one Frank Edwards a part of said lot of land, by metes and bounds, and the said Frank Edwards, by his will, devised the same to the defendant Patience Edwards, who is now in possession thereof. The action below was commenced by plaintiffs against Patience Edwards alone, for the partition of that portion of the original lot conveyed to said Frank Edwards by the said Peter Howard and his wife Elizabeth. The plaintiffs were required to amend by making said Elizabeth Howard a party defendant, which having been done, the case was referred to a referee to hear and determine the issues.

The referee reported, that while no money passed between the parties at the time the deed to Frank Edwards, above referred to, was made, yet there were other considerations moving the said Elizabeth Howard to make said deed, and he found that said deed operated as a conveyance of the whole interest of the said Elizabeth in the original lot of land to the said Frank Edwards, which by his will passed to the defendant Patience Edwards, and as a consequence, he held that the plaintiffs and the defendant Patience Edwards were tenants in common of the entire lot, and entitled to share therein in the following proportions; Patience Edwards one third, and the plaintiffs one sixth each. He further held that while one of several co-tenants could not convey his share, by metes and bounds, to a third person, so as thereby to prejudice the right or interests of his co-tenants, yet where such conveyance does not operate to the prejudice of the other co-tenants, it should be respected and given its full force in any partition that might be ordered. And having found that the portion of the original lot conveyed to Frank Edwards by the said Elizabeth Howard did not exceed, either in area or value, the share to which said Elizabeth was entitled (to which finding of fact there was no exception), he recommended that a writ of partition do issue to divide the entire lot amongst the parties named, in the proportions above specified, and that in making such partition the portion of the lot conveyed to Frank Edwards be allotted to defendant Patience Edwards, and that

the costs of the action be paid by said parties in the same proportions. To this report both parties excepted, and the case was heard by his honor Judge Witherspoon, upon the report and exceptions, who rendered judgment overruling all the exceptions, and confirming the report.

From this judgment both parties appeal, upon the several grounds set out in the record.

The appeal of the defendant Patience Edwards rests solely upon the ground that it was error to impose upon her any of the costs. To this it is only necessary to say, that the matter of costs is peculiarly within the discretion of the circuit court in cases of this kind, and there was no abuse of such discretion here.

The first point of plaintiffs' grounds of appeal, that a deed, by metes and bounds, of a portion of the common property, made by one of several tenants in common, is void, cannot be sustained. It is conceded that we have no direct authority in this state upon this point, and that there is a conflict in the authorities elsewhere. There can be no doubt that one of several tenants in common may make a valid conveyance of his undivided interest in the common property, and we see no reason why a conveyance, which purports to describe by metes and bounds the portion of the common property which the grantor intends to convey, is not valid as between the parties to such a deed. Of course such a conveyance will not be allowed to operate to the prejudice of the rights and interests of the other co-tenants; but where it can be given full effect without injury to other co-tenants, there is no reason why it should not be sustained. Such we understand to be the view sustained by the weight of the authorities elsewhere.

It is contended, however, that while such a conveyance may not be absolutely void, yet it only operates as a conveyance of the undivided interest of the grantor in that portion of the common property which is embraced within the metes and bounds set out in the conveyance, leaving the undivided interest of the grantor in such of the common property as lies outside of such metes and bounds still in the grantor, and leaving the undivided interests of the other co-tenants in the portion embraced within the metes and bounds still in the other co-tenants. This may be true as an abstract theory, but the practical inquiry is, Can such a theory be applied to the facts of this case? Here the facts are, that the portion of the common property which was designated by metes and bounds

does not exceed, either in area or value, the interest of the grantor, and that it was conveyed by a deed containing full covenants of warranty; and we agree with the referee, that these facts are sufficient to show that the grantor intended to convey her entire interest in the original lot; for otherwise she must be regarded as intending to commit a fraud upon her grantee. Elizabeth Howard was unquestionably entitled to an undivided one third of the entire lot, and having such interest, she proceeds to measure off what she supposed, and what in fact turns out to be, one third of the lot, and conveys the same, with full covenants of warranty, to the grantee, Frank Edwards. She did not convey to him her undivided interest in the portion of the lot so cut off, but she conveyed to him what she manifestly supposed was her share of the entire lot,—one third,—by metes and bounds; and we cannot doubt that she intended to convey and did convey her entire interest in the original lot.

Now, while, as we have seen, such a conveyance cannot be allowed to operate to the prejudice of the other co-tenants, and if it had turned out that, in order to protect their interests, it would be necessary to assign a portion or all of the lot embraced within the metes and bounds set out in the deed from Mrs. Elizabeth Howard to Frank Edwards, that might have done. But in that event, what would be the effect of the covenants of warranty in the deed? Mrs. Howard by her deed has warranted to Frank Edwards the title to every foot of land embraced in the metes and bounds set out in her deed,—not simply the title to her undivided interest in such land; and hence, if her grantee should be ousted from any portion of such land, she would be bound to make good to him or his devisee such warranty; and to effect this, resort could be had to the share of Mrs. Howard in the entire lot. If it should become necessary, in the interest of the other co-tenants, to disregard the conveyance from Mrs. Howard to Frank Edwards, in order to effect a proper partition of the entire lot as it originally stood, then whatever portion of the original lot, outside of the metes and bounds set up in such conveyance, should on such partition be ascertained to be the share of Mrs. Howard, would, upon the principle of estoppel arising from the covenants of warranty, belong to Frank Edwards or his devisee. But in such a case, a court of equity, upon well-settled principles, would, in decreeing partition, direct it to be so made as to set apart to the grantee of Mrs. Howard that portion of the lot

which she had undertaken to convey to him, provided the same could be done without prejudice to the interests of the other co-tenants; and this is precisely what we understand to be the effect of the judgment appealed from.

The plaintiffs urge strenuously that the deed from Elizabeth Howard to Frank Butler was without consideration, and she supposed it only conveyed the estate to him for his life. To say nothing of the fact that this seems inconsistent with the frame of the complaint, by which it is conceded that Patience Edwards, the devisee of Frank Edwards, is entitled to a one-sixth interest in the portion of the lot conveyed by said deed, it seems sufficient to say that the concurrent findings of the referee and circuit judge, which appear to be supported by the evidence set out in the "case," are entirely at variance with this view. The nature of the estate conveyed must be determined by the terms of the deed, which unquestionably conveyed the fee, and while there is no evidence that any money passed at the time the deed was executed, yet there is evidence that there were other valuable considerations moving Elizabeth Howard to make the deed.

The judgment of this court is, that the judgment of the circuit court be affirmed.

CO-TENANCY — CONVEYANCE BY CO-TENANT. — If several pieces of land are held in common by the same persons, either may convey his interest in each parcel: *Shepherd v. Jernigan*, 51 Ark. 275; 14 Am. St. Rep. 50, and note. A conveyance by a co-tenant of his interest in land specified will convey no more than his interest in that certain land: *House v. Dew*, 90 Ala. 178; 24 Am. St. Rep. 783. See note to *Whitton v. Whitton*, 75 Am. Dec. 171; note to *Benedict v. Torrent*, 21 Am. St. Rep. 594.

PARTITION — RIGHTS OF PURCHASER FROM ONE CO-TENANT IN. — When partition is had between co-tenants, a conveyance by one co-tenant, purporting to convey a portion of the land in severalty, may be considered in the proceeding so as to secure the interest of such purchaser: *Benedict v. Torrent*, 83 Mich. 181; 21 Am. St. Rep. 589.

FLEMING v. FLEMING.

[33 SOUTH CAROLINA, 506.]

STATUTE OF LIMITATIONS — PLEADING ACKNOWLEDGMENT OR NEW PROMISE.

— If it is sought to avoid the effect of the statute of limitations by some subsequent promise, either express or implied, the action must be upon such promise as a cause of action, and not upon the original indebtedness.

STATUTE OF LIMITATIONS — PLEADING NEW PROMISE, WHAT IS NOT. — A complaint which alleges the making of a promissory note, that it is past due, and that no payments have been made thereon, except as follows (stating the amounts and dates of certain payments), is based upon the note alone, and will not be treated as a complaint upon a new promise arising from the acknowledgment of continuing liability implied from such payments, especially if the complaint does not clearly state that the payments were made by the defendant.

STATUTE OF LIMITATIONS. — PAYMENTS UPON A PROMISSORY NOTE BEFORE THE STATUTE OF LIMITATIONS has interposed any obstacle to its enforcement do not prevent the running of that statute; and if they are relied upon as new promises, they must be pleaded as such.

APPELLATE PRACTICE. — An appellate court whose jurisdiction is limited to the review of the rulings of the court below will not consider grounds or questions not presented at nor passed upon by that court.

W. H. Martin, for the appellant.

Johnson and Richey, contra.

McIVER, J. The plaintiff by his complaint alleges: 1. That on the first day of February, 1877, the defendant made his note in writing, under seal, whereby he promised to pay, one day after said date, to the order of J. H. Fleming, with interest at ten per cent, \$374.50; 2. "That the said note is past due, and no part thereof has been paid except the following sums, to wit: one dollar January 22, 1883; two hundred dollars May 11, 1883; fifty dollars May 10, 1884; fifty dollars April 2, 1885; and three dollars November 5, 1886"; 3. That said J. H. Fleming died intestate the 25th of April, 1882; 4. That on the 3d of July, 1882, letters of administration on the estate of said J. H. Fleming were duly granted to the plaintiff, who thereupon duly qualified and entered upon the discharge of his duties as such administrator; 5. That plaintiff, as such administrator, is the legal owner and holder of said note. Then follows the demand for judgment in the usual form.

To this complaint the defendant answered as follows: "1. He alleges that he has no knowledge or information sufficient to form a belief as to the allegations of paragraph 2 of

plaintiff's complaint; 2. He alleges that plaintiff's cause of action accrued more than six years next preceding the commencement of this action. Wherefore defendant asks that the complaint be dismissed, with costs." It is stated in the "case" that the action was commenced on the 17th of January, 1889, which was considerably more than six years after the plaintiff's cause of action, if the note be regarded as such, had accrued.

At the trial, the plaintiff, having offered the note in evidence, proposed to prove the several payments indorsed thereon, to which defendant's counsel objected, saying that it was apparent that the action on the note was barred by the statute of limitations, and that he objected to his proving payments as a new cause of action which was not set out in the complaint. The objection was overruled, and the plaintiff proceeded with his evidence, tending to show that the several payments mentioned in the complaint were made by the defendant, and closed his case. Defendant offered no testimony, and the jury were instructed that if a note was given in 1877, "it will go out of date in six years, unless there is some acknowledgment by the maker of the note as to its validity. It goes out of effect in that time. It does not matter whether it had a seal to it or had not. I charge you that any payment upon that note, indorsed upon it, would keep the note alive and continue it in force, and if six years had not elapsed since the last payment made on the note, then the statute of limitations is no bar to the plaintiff's recovery, and that he is entitled to recover upon the note the amount of the note, less these payments upon it, with interest at the rate of ten per cent, as stated in the note."

The jury having rendered a verdict for the plaintiff, and judgment having been entered thereon, defendant appeals, upon grounds which allege the following errors: "1. In admitting in evidence the payments indorsed on the note upon which this action is founded; 2. In instructing the jury that 'if six years has not elapsed since the last payment made on the note, then the statute of limitations is no bar to the plaintiff's recovery'; 3. In instructing the jury 'that plaintiff is entitled to recover the amount of the note, less the payments, with interest at the rate of ten per cent.'" The plaintiff's counsel has also given notice that he will insist upon sustaining the judgment appealed from, upon the following grounds: "1. Because no part of plaintiff's complaint was denied; 2.

Because the statute of limitations was not sufficiently pleaded by the defendant to avail himself thereof."

It must now be regarded as the settled law of this state, that where an action is brought to recover a sum of money originally secured by a note, and the same is not commenced within the time prescribed by the statute of limitations, no recovery can be had on the note as the cause of action, if the statute be properly pleaded, for the right of action on the note is barred and gone forever; but if it is sought to avoid the bar of the statute in such a case by some subsequent promise, either express or implied, the action must be upon such subsequent promise as a new cause of action, a consideration for which may be furnished by the original liability, either legal or moral, as the case may be, upon the original note: *Walters v. Kraft*, 23 S. C. 578; 55 Am. Rep. 44; *Dickson v. Gourdin*, 29 S. C. 343, and the cases cited in these two cases.

This being so, the practical inquiry in the present case is, whether the action is upon the note set out in the first paragraph of the complaint, or upon some subsequent promise, implied from the payments mentioned in the second paragraph. It seems to us clear that the action is based upon the note alone, and therefore subject to the bar of the statute. There is no allegation in the complaint which, even by the most liberal construction, can be regarded as setting up any subsequent promise as the cause of action. Indeed, the very manner in which the payments relied upon as implying a new promise are stated shows conclusively that they were stated, not for the purpose of alleging a subsequent promise to pay the sum of money originally secured by the note, but simply for the purpose of indicating the amount really due on the note; and this view is confirmed by the fact that in the demand for judgment, the plaintiff prays for judgment for the amount mentioned in the note, with interest from the date thereof at the rate of ten per cent per annum, "less the credits herein set out." But what is absolutely conclusive upon this point is, that there is no allegation in the complaint that the payments were made by the defendant, and it is quite certain that such an allegation would have been absolutely essential if the cause of action intended to be set out was the subsequent promise, implied from the payments; for nothing can be clearer than that it would be necessary to allege that the defendant had done the act from which the subsequent promise was to be implied.

There being, then, no allegation in the complaint that the defendant had made any subsequent promise to pay the sum of money mentioned in the note, and no allegation that he had done any act from which a subsequent promise could be implied, it follows inevitably that the action must be regarded simply as an action on the note, to which the allegations found in the complaint are quite appropriate, and not an action upon any subsequent promise, either express or implied. From this it follows that the circuit judge erred in overruling defendant's objection to testimony introduced to prove a contract not set out in the complaint, and hence defendant's first ground of appeal must be sustained.

For a like reason, the second ground must also be sustained. If, as we have seen, the action was on the note, and if, as is manifest from the terms of the note and the time when this action was commenced, the action was barred by the statute of limitations, then unquestionably there was error in charging the jury that "if six years has not elapsed since the last payment made on the note, then the statute of limitations is no bar to the plaintiff's recovery," for it is apparent that much more than six years had elapsed since the accrual of the right of action on the note before this action was commenced, and that therefore the statute was a complete bar.

Under this view, the question presented by the third ground of appeal, as to whether plaintiff could recover interest at the rate of ten per cent on a new promise, cannot arise, and need not therefore be considered.

The position taken by counsel for respondents, that the action on the note was never barred, because the payments commenced before the expiration of six years from the maturity of the note, and that period had not elapsed between any of the successive payments, the last having been made within six years before the commencement of this action, cannot be sustained; for it is directly opposed to the express terms of the statute, as construed by the former court of appeals in *Smith v. Caldwell*, 15 Rich. 365, which construction has in terms been approved by this court in *Walters v. Kraft*, 23 S. C. 578; 55 Am. Rep. 44. One of the rules laid down by Wardlaw, J., in *Smith v. Caldwell*, 15 Rich. 365, as settled, was expressed in the following language: "That where the statutory period, counting from the original accrual of the cause of action, expired before commencement of the suit, a promise shown for the purpose of opposing the plea of the statute is

itself the true cause of action; and this, whether such promise was made before or after the expiration of the period just mentioned. If before, the legal liability was its consideration; if after, the moral obligation." This, especially the words which we have italicized, affords a conclusive answer to respondent's position.

It only remains to consider the additional grounds upon which respondent has given notice that he will seek to sustain the judgment below. Under the ruling in the case of *Bonham v. Bishop*, 23 S. C. 105, it is very questionable whether these grounds could be considered at all; but another insuperable difficulty is encountered. This is a court for the correction of errors of law, and our jurisdiction, except in a limited class of cases, of which this is not one, is confined to a review of the rulings of the court below. Now, in this case it does not appear that either of these additional grounds was considered or passed upon, or even presented to the circuit court. On the contrary, it is manifest from the proceedings below that it was assumed by all parties that the allegations of the second paragraph of the complaint were properly put in issue, and the plaintiff proceeded to offer testimony, against the objection of defendant, to sustain those allegations; and as the whole controversy below manifestly turned upon the question whether the action was barred by the statute of limitations, and there is nothing to indicate that any objection was taken as to the form in which that defense was pleaded, and hence there is nothing for us to review on this point. It is quite clear, therefore, that if there was no other objection, the questions which these grounds purport to raise cannot be considered by a court whose jurisdiction is limited to a review of the proceedings below. It must not be inferred, however, that we think that either of these grounds, even if properly presented, could have been sustained.

The judgment of this court is, that the judgment of the circuit court be reversed, and the case be remanded to that court for a new trial.

McGOWAN, J., concurred by his separate opinion, as follows: The obligation sued on was a sealed note, but having been given for the payment of money only after the code, the period of limitation was six years. When the action was brought, six years had expired, but in the mean time, and before the bar was complete, one or more payments were made, and the question is, whether the six years must be counted from

the date of the note or of the last payment. Section 131 of the code provides that "no acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this title, unless the same be contained in some writing signed by the party to be charged thereby; but payment of any part of principal or interest is equivalent to a promise in writing," etc. It is clear that the last payment on this note was equivalent to a promise in writing to pay the balance still due, and was recoverable for six years from that payment.

So that the only question is one of pleading,—whether the amount left due at the last payment could be recovered by action on the note itself, stating the payment, or could only be recovered on the acknowledgment, as an implied new contract. The question reaches only to the form of action. The old practice certainly allowed the balance due to be recovered in an action on the note itself, when the payment was made, leaving a balance, before the bar was complete. In *Pyles v. Bell*, 20 S. C. 369, it was said: "In regard to the statute of limitations, the rule is well settled that after the debt is barred, nothing short of an express promise, or what is equivalent to such promise, will suffice to take a case out of the statute; but before the bar of the statute is complete, mere acknowledgments, as shown by part payments or otherwise, are sufficient to keep the original debt alive, by giving at each acknowledgment a new starting-point for the running of the statute": *Rucker v. Frazier*, 4 Strob. 94; *Lomax v. Spierin*, Dudley (S. C.) 357; *Bowdre v. Hampton*, 6 Rich. 212. It has always seemed to me that this old practice afforded the most simple and convenient form to recover that which can be nothing more nor less than a balance on the original note, renewed by acknowledgment. But as it is really only a question as to the form of action, and it is very desirable that the practice should be clearly settled, I yield my objection, and concur.

Judgment reversed.

LIMITATIONS OF ACTIONS — PLEADING ACKNOWLEDGMENT OR NEW PROMISE. — A cause of action is founded upon the new promise, and not upon the original contract, where a creditor relies upon a new promise after the statute has run upon the original contract; the original contract, or the moral obligation arising therefrom, being the consideration for the new promise: *McCormick v. Brown*, 36 Cal. 180; 95 Am. Dec. 170; *Elliot v. Leake*, 5 Mo. 208; 32 Am. Dec. 314; *Jones v. Moore*, 5 Binn. 573; 6 Am. Dec. 428; *Danforth v. Culver*, 11 Johns. 146; 6 Am. Dec. 361.

LIMITATIONS OF ACTIONS — EFFECT OF PART PAYMENT. — Part payment of a firm note by one of the partners before the statute of limitations has at-

tached forms a new point from which the statute begins to run: *Clement v. Clement*, 69 Wis. 599; 2 Am. St. Rep. 760, and note; note to *Whitney v. Chambers*, 52 Am. Rep. 401-404; *Blaks v. Sawyer*, 83 Ma. 129; 23 Am. St. Rep. 762.

STATUTE OF LIMITATIONS. — As to what acknowledgment or new promise will remove the bar of the statute, see note to *State v. Finn*, 14 Am. St. Rep. 680.

PRICE v. RICHMOND AND DANVILLE RAILROAD COMPANY.

(38 SOUTH CAROLINA, 586.)

DEATH — RELEASE OF RIGHT TO SUE FOR INJURIES RESULTING IN. — A release of damages resulting from injuries, given by the party injured, and who but for such release might have sustained an action, continues operative on his subsequent death as a consequence of such injuries, and precludes any recovery by his personal representative for his death, or for the injuries from which it resulted.

ACTION by the administratrix of Philip H. Price to recover damages resulting to herself and child by the negligence of the defendant, causing his death while acting as a conductor of one of its freight trains. After the decedent had received the injuries complained of, he executed a release to and in favor of the defendant, in which, for the consideration of \$390, he released and forever discharged the defendant from any claim, demand, or liability for the payment of any other or further sum of money for or on account of his claim for damages arising out of the injuries suffered by him. When this release was offered in evidence, it was excluded upon the objection of the plaintiff, the court ruling that the cause of action was a new and distinct one arising in favor of the beneficiaries upon the death of the party injured, and that no release executed by him in his lifetime could affect an action brought on behalf of such beneficiaries. To the exclusion of this evidence the defendant excepted, and the trial resulted in a verdict and judgment in favor of the plaintiff for \$6,974.

B. L. Abney, for the appellant.

Melton and Melton, and *R. W. Shand*, contra.

McIVER, J. This was an action brought by the plaintiff, as administratrix of Philip H. Price, deceased, to recover compensation in damages for the killing of her intestate by the

alleged fault of the defendant company, under the provisions of the act of 1859, now incorporated in the General Statutes as sections 2183 to 2186. The defendant, after denying all allegations of negligence, for a further defense, alleged that after the time of the alleged injury, and before the commencement of this action, the said intestate, for a valuable consideration, executed a paper, acknowledging full satisfaction for all damages resulting from the alleged injury, and releasing and discharging the defendant company from all liability therefor. After the plaintiff had closed her testimony, the defendant moved for a nonsuit, upon the ground that there was no evidence of any negligence on the part of the defendant company, which motion was refused. The defendant then offered evidence for the purpose of showing that the deceased was injured by reason of his own negligence, and not through any want of care on the part of the defendant company; and also proposed to introduce the release executed by deceased prior to his death, set up as one of defenses in the answer, which, upon objection from the plaintiff, was ruled to be inadmissible. There were also other questions raised as to the admissibility of testimony, which, under the view we take of the effect of the release, need not be specifically mentioned.

The jury having rendered a verdict in favor of the plaintiff, the defendant appeals upon the several grounds set out in the record, which need not be repeated here, as we think the leading and controlling question in the case is as to the admissibility and effect of the release above mentioned. The undisputed facts are, that plaintiff's intestate received the injury complained of on the 18th of February, 1887, from the effects of which he died on the — day of November, 1887; and that in the mean time, to wit, on the 8th of August, 1887, the intestate executed the release in question. So the practical inquiry in this case is, whether an action of this kind can be maintained under our statute, where the party injured has, prior to his death, released his right of action.

The two sections upon which, in our judgment, this question turns, read as follows: —

“Sec. 2183. Whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every case, the

person or corporation who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as make the killing in law a felony."

"Sec. 2186. The provisions of the three preceding sections of this chapter shall not apply to any case where the person injured has, for such injury, brought action which has proceeded to trial and final judgment before his or her death."

It seems to us that, by the terms of section 2183, the capacity of the deceased to maintain an action, based upon the injury which caused his death, is made the test of the right of the administrator to maintain the action provided for by the statute. Hence if the deceased has debarred himself by his contributory negligence, or by any other cause, from maintaining his action, based upon the injury which caused his death, it follows, necessarily, that his administrator is likewise barred of his right of action, which would otherwise be secured to him by the statute. In all cases like the present, the controlling question, therefore, is, whether the deceased, if he had not died, could have maintained the action. It seems to us clear, therefore, that the circuit judge erred in refusing to receive in evidence the release offered by the defendant; for it cannot be doubted that if the deceased had not died, and such release had been pleaded and proved in an action instituted by him to recover damages for the injury alleged to have been done him by the wrongful act of the defendant, it would have been a bar to such action, unless it had been made to appear that such release was obtained by fraud or duress. So far as we are informed, we have no authoritative construction of the provisions of this statute by the courts of this state, and it cannot be denied that the cases elsewhere, upon similar statutes, are somewhat conflicting. But the construction which we have adopted seems to us to be the only legitimate one which can be deduced from the terms of the statute, and it has the support of high authority, both in decided cases and in the treatises of eminent authors: See *Read v. Great Eastern R'y Co.*, L. R. 3 Q. B. 555; *Senior v. Ward*, 102 Eng. Com. L. 392; *Griffith v. Earle of Dudley*, L. R. 9 Q. B. 357; *Littlewood v. Mayor of New York*, 89 N. Y. 24; 42 Am. Rep. 271; Cooley on Torts, 263, 264; 2 Redfield on Railroads, 4th ed., 250; Pierce on Railroads, 392; Patterson's Railway Law, 410-

508; Shearman and Redfield on Negligence, sec. 301; 2 Thompson on Negligence, 1286.

It is contended, however, that the provisions of section 2186 render it necessary to place a different construction upon section 2183 from that which has been applied elsewhere to similar statutes, because it is urged that section 2186, excluding a right of action in the case there specified, implies that there is no such exclusion in any other case under the maxim, *Expressio unius est exclusio alterius*. Such does not seem to be either the form or intent of section 2186. It does not purport to constitute an exception to any previous general declaration. On the contrary, its real object was to prevent a double remedy for the same wrongful act in any possible case. A right of action having been secured to the administrator in all cases in which an action might have been maintained by the deceased, if he had not died, it might have been contended that the administrator could still bring his action, even though the deceased had, in his lifetime, brought his action and recovered judgment, because the test of the right of the administrator to maintain his action, being the right of the deceased to recover, which had been demonstrated by his recovery of judgment in his lifetime, would, so far from barring, establish the right of the administrator to recover; and hence, to avoid this double liability for the same wrongful act, the provisions of section 2186 were inserted, not as an exception, but as a separate section.

We have not deemed it necessary to go into the question, much discussed elsewhere, as to whether the statute gives a new cause of action, or simply continues the original cause of action accruing to the parties injured, which would otherwise terminate with his life, enlarging its scope so as to embrace compensation for the injury resulting from the death; for our conclusion is drawn from the terms of the statute, as evidencing the true intent of the legislature. We may say, however, that if the purpose was to create a new and independent cause of action, it is a little singular that the legislature should expressly provide, as it has done in section 2186, for the defeat of one cause of action accruing to one person, by the enforcement of another cause of action which had accrued to another person. It seems to us, therefore, that the provisions of section 2186, so far from weakening, rather confirm our view of the true intent and meaning of the statute.

The judgment of this court is, that the judgment of the circuit court be reversed, and the case be remanded to that court for a new trial.

PERSONAL INJURIES RESULTING IN DEATH — RELEASE. — The case of *Donahue v. Drexler*, 82 Ky. 157, 56 Am. Rep. 474, is apparently in conflict with the principal case. John Donahue sued Drexler for damages alleged to have resulted from an assault and battery; but the suit was, in pursuance of a written agreement, "dismissed, settled, each party paying his own costs." Subsequently Donahue died, and his wife commenced an action against Drexler, claiming that her husband's death was the result of injuries suffered by him at the hands of the defendant, and relying, to sustain her action, on a statute giving a widow of any person killed by the careless or malicious use of fire-arms, or by certain other specified weapons, a right of action against the persons committing, aiding, or promoting such killing. The defendant pleaded the former action in bar, and thereupon the court determined that the death of the husband was a new grievance, creating in favor of the widow a new cause of action, in which her husband never had any interest, and therefore that no release or settlement by him could prejudice her.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

McILHENNY AND UNION TRUST COMPANY v. BINZ

[80 TEXAS, 1.]

RECEIVER OF INSOLVENT CORPORATION, PROPER PARTIES TO INSTITUTE SUIT FOR APPOINTMENT OF. — If a railway corporation becomes insolvent, and a receivership is necessary for the preservation of its property and the distribution of its assets among its creditors, the directors, as trustees for the stockholders and creditors, and not the company itself, would seem to be the proper parties to institute the suit for the appointment of a receiver.

INSOLVENT CORPORATION NOT INJURED BY FORECLOSURE OF MORTGAGE GIVEN BY IT, WHEN. — Where, upon the petition of a corporation, the court appoints a receiver, although such appointment is erroneous, the proceedings of the court consequent upon the appointment are not void; and if in such proceeding, the master's report and the evidence adduced upon the trial show that the corporation is hopelessly insolvent, it cannot be injured by the action of the court in foreclosing the mortgages given by it.

MORTGAGE ON PROPERTY OF INSOLVENT CORPORATION PROPERLY FORECLOSED THOUGH NOT YET DUE, WHEN. — When a court has the entire property of an insolvent corporation in the hands of its receiver, and all the creditors before it, it may properly treat the assets as a trust fund for distribution among such creditors, according to their respective priorities and liens, and may foreclose both a first and a second mortgage upon the property, although the first-mortgage bonds are not by their terms yet due, default in the payment of interest upon both mortgages having been made, and the second-mortgage bonds having by their terms become due. Under such circumstances, it would be anomalous to decree a sale of the property subject to the first mortgage.

ATTORNEY'S AUTHORITY TO APPEAR CANNOT BE QUESTIONED FOR FIRST TIME IN APPELLATE COURT. — The question of the authority of attorneys who signed and filed pleadings acted upon in the trial court cannot be raised for the first time in the supreme court. If the pleading was filed without authority, steps should have been taken in the lower court to have it stricken out.

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MINIMUM BID FOR PROPERTY SOLD BY RECEIVER MAY BE PRESCRIBED BY ORDER OF COURT. — The court has power, in decreeing the sale by a receiver of the property of an insolvent railroad corporation, to order that the sale shall not be made for a less price than one named in the decree. Such an order may be necessary to prevent a sacrifice of the property.

RECEIVER'S SALE, PROCEEDS OF, MAY BE ORDERED PAID ON FIRST-MORTGAGE BONDS, WHEN. — Where the court decrees a sale by a receiver of the property of an insolvent railroad corporation, it may properly provide that the proceeds of the sale, after the expenses of the receivership, costs of court, and of foreclosure, and the payment of such claims as have been awarded priority, shall be paid on the first-mortgage bonds given by the company.

RECORDS OF CORPORATION, TESTIMONY INADMISSIBLE TO DESTROY EFFECT OF, WHEN. — Where, for the purpose of proving the execution of mortgage bonds by a railroad corporation, a book found in the company's office, identified as the one in which the records of the meetings of the directors and stockholders were kept, and shown to be the only book recognized as such, is admitted in evidence, the testimony of the secretary of the company that he had written the proceedings at the dictation of the president of the company, and long after their dates, and that although the records show meetings from time to time, he believed no such meetings were held, is inadmissible to destroy the effect of the records contained in such book. Such testimony is too inconclusive, since it can serve merely to create a suspicion that there was an irregularity in the manner in which the records of the company were kept.

INTERVENTION, PETITION IN, PROPERLY STRICKEN OUT, WHEN. — When parties plaintiff, claiming in their original petition as heirs and legatees of their father, file at the time of the trial, in substitution and lieu of such original petition, an amended petition, claiming adversely to their father, and wholly as heirs of their mother, they in effect abandon their original cause of action, and the amended petition so filed may be treated as an original plea in intervention filed on the eve of the trial, seeking to introduce new issues, and calculated to protract the litigation, and the court may, in its discretion, upon motion, strike it out without prejudice.

DESCRIPTION OF LANDS IN ONE MORTGAGE NOT AIDED BY THAT IN ANOTHER, WHEN. — Where a railroad company executes a mortgage upon its property, including certain lands therein described and embraced in a schedule annexed thereto, and subsequently, for the purpose of remedying certain defects in this mortgage, executes a second mortgage, somewhat different in the extent of the property included, referring in no way to the description in the former mortgage, but referring to exhibits annexed, though no exhibits are attached, the description in the one mortgage cannot be aided by that in the other, and the lands described in the first mortgage cannot be considered as embraced in the second.

RAILWAYS, INSOLVENT — IN HANDS OF RECEIVER, CLAIMS HAVING PRECEDENCE OVER MORTGAGES. — In the settlement and distribution of the assets of an insolvent railway company which has been placed in the hands of a receiver, priority of payment is allowed to certain claims over the mortgage debts, and creditors who have labored, furnished supplies, made repairs or useful improvements in the operation, maintenance, and betterment of the railway, and who have been suddenly deprived of their remedies at law by the appointment of a receiver, are entitled to the equitable consideration of the court in the distribution of

the assets of the company, and to priority in payment from the net income of the property while in the hands of the court.

RAILWAYS, INSOLVENT — OPERATING EXPENSES OF. — Priority in payment is generally conceded to claims for the operating expenses of an insolvent railway in the hands of a receiver over the mortgage debts of the company.

RAILWAYS, INSOLVENT — CONSTRUCTION CLAIMS ENTITLED TO PRIORITY, WHEN. — Claims for construction of a railroad are not, as a general rule, allowed priority over mortgage debts of the company, unless the work was done or the material furnished in pursuance of an order of the court; but there may be construction claims that appeal as strongly to the conscience of a court of equity as the debts commonly known as operating expenses; and when mortgages are executed upon an unfinished road, and they show upon their face that it was contemplated that the work of construction should be prosecuted to completion, and when the mortgages attach to the new road as fast as it is finished, the new road should be considered a useful improvement; and if the road be put into the hands of a receiver before the work and materials are paid for, holders of the claims for such work and material should be paid from the net income of the road while under the control of the court, if there be a fund on hand that can be applied to such payment, and they have not been guilty of any laches.

RAILWAYS, INSOLVENT — FUND DIVERTED IN DEROGATION OF RIGHTS OF THOSE ENTITLED TO IT MUST BE RESTORED. — Where the net earnings of an insolvent railroad in the hands of a receiver sufficient to pay all the preferred claims have been appropriated to the making of betterments upon the property and to the payment of interest upon the bonds, this diversion being in derogation of the rights of those entitled to the fund, the court should restore the fund from the proceeds of the sale of the mortgaged property.

RAILWAYS, INSOLVENT — STATUTORY LIENS, CLAIMS HAVING, ENTITLED TO PRIORITY, WHEN. — Claimants having statutory liens against a railroad for labor performed in its construction, operation, and maintenance, who, before such liens expire, are prevented from enforcing them by the appointment of a receiver, will not be denied the priority to which they are entitled, merely because their claims accrued more than six months before the appointment of the receiver, notwithstanding the court has made a provisional order prescribing six months as the limit of time within which claims to be entitled to priority must have accrued.

ASSIGNMENT OF CLAIMS FOR WAGES DOES NOT DESTROY RIGHT TO PRIORITY OF PAYMENT. — Where an arrangement is made with a railroad company, whereby a sufficient amount of the wages of its laborers is retained by the company to pay their board, the claims of the boarding-house keepers for such amount are to be treated as claims originally due laborers, and duly assigned to the holders, and their assignment does not destroy their right to priority.

WAIVER OF RIGHT TO PRIORITY, TAKING ADDITIONAL SECURITY NOT, WHEN. — Where the holder of claims against a railway company for wages takes notes of the company indorsed by its president, but without intending to waive his right to priority of payment, the taking of such notes is not a waiver of his right.

PLEDGE OF EARNINGS OF RAILROAD INVALID, WHEN. — Where notes are given by a railroad company for money borrowed by it to pay interest on its

bonds, each containing a stipulation that "three quarters of the gross earnings of the road from date is pledged in liquidation of this note," such stipulation has no legal effect, the holder of the notes has no claim upon the gross earnings of the road, and the notes have no priority over the bonded debt of the road.

RAILWAYS, INSOLVENT — PRIORITY ALLOWED TO CLAIM THAT HAS ACCRUED MORE THAN SIX MONTHS BEFORE APPOINTMENT OF RECEIVER, WHEN. —

Where there is nothing to show laches on the part of the claimant, a claim for coal furnished to a railroad company is entitled to priority, although it did not accrue within six months before the appointment of a receiver.

Hutcherson, Carrington, and Sears, and F. F. Chew, for S. K. McIlhenny, administrator, and for the Houston East and West Texas Railway Company.

Wheeler H. Peckham, Baker, Botts, and Baker, and Gresham and Jones, for appellant Union Trust Company of New York.

McLemore and Campbell, and Jones and Garnett, for appellees Jacob Binz, Jacob Hornberger, A. Blau, Cary, Ogden and Parker, R. M. McManus, J. A. Ewing & Co., I. Heidenheimer, F. L. Johnson, Neil MacDonald, T. J. Todd, Henry S. Fox, and John Maher.

Houston Brothers, for Johnson and Hanson.

William H. Crank, for appellees the Dixon Manufacturing Company and F. Rohde.

O. T. Holt and Gustave Cook, for appellees John A. and Pauline Dozier, J. C. and Kate Zimmer, Walter E. and Nettie Lufkin, and Julia Bremond.

John G. Todd, for appellees Milby and Dow.

GAINES, A. J. This suit was originally instituted by the Houston East and West Texas Railway Company, and Mary Louise Bremond, Edward L. Bremond, Harriet Timpson, John A. Dozier and his wife, Mary Pauline Dozier, Kate Bremond, Walter E. Lufkin and his wife, Henrietta C. Lufkin, and Julia Bremond, a minor, against T. W. House and other creditors of the company.

The petition alleges that the company was incorporated by an act of the legislature of Texas, approved March 11, 1875; that Paul Bremond had died shortly before the institution of the suit, being the owner of the whole of the stock, and that the co-plaintiffs of the corporation, except John A. Dozier and Walter E. Lufkin, were his devisees, legatees, and heirs at law. The petition also averred that the corporation was

largely indebted both to secured and unsecured creditors, and that it was unable to meet its obligations. It was further alleged that certain unsecured creditors had prosecuted their demands to judgment, and had caused executions to issue thereon, and to be levied upon the rolling stock of the company, and that such rolling stock was under mortgage to secure the outstanding bonds of the company, and was necessary to enable it to operate its road, and to perform its duties to the state and the people. The prayer was for the appointment of a receiver to take charge of the assets of the corporation, and that, upon final hearing, its franchise and property be sold as an entirety, and that the proceeds of the sale be distributed among its creditors according to their respective rights, equities, and priorities, and the balance among the stockholders. At the time of the filing of the petition, neither an executor of the will of Paul Bremond, deceased, nor an administrator of his estate had been appointed.

The subsequent history of the suit is fully detailed in the brief of the appellant, the Union Trust Company, and from that brief we make up the following summary of the proceedings.

The petition having been filed on the 7th of July, 1885, on the next day the court made an order appointing a receiver, and directing that "all debts of said railway company for work and labor performed by its employees and laborers, and for supplies and materials furnished for equipping, operating, repairing, or improving the road, and all obligations incurred in the transportation of the passengers and freights, or for injuries to persons or property, which have accrued within six months last past, shall be paid out of the earnings of the road, as may be hereafter ordered."

A special master in chancery was appointed in the same order, with the powers usually incident to that position.

Soon after this original bill was filed, the defendants Jacob Hornberger, Johnson and Hanson, Jacob Binz, and T. J. Todd filed their answers to said original bill, setting up the company's indebtedness to them, all of which their pleadings show accrued after the date of the first mortgage, and most of it after the date of the second mortgage, and claiming what they call an equitable lien on the company's property to secure their debts.

Afterward, and before the Union Trust Company of New York became a party to the suit, by answer and cross-bill,

most of the creditors of said railway company intervened in said suit, and their debts were referred to the special master, who very uniformly reported most of the claims as entitled to priority of payment.

On the second day of December, 1887, the Union Trust Company, as trustee in the two mortgages intended to secure the bonds of the company, obtained leave of the court to make itself a party to the suit, and on the fifth day of March, 1888, filed its answer to the original bill, and also filed a cross-bill seeking to foreclose the mortgages. To this cross-bill the railway company filed an answer, attacking the validity of the mortgages. On the 26th of April, 1889, S. D. McIlhenny, as administrator of the estate of Paul Bremond and the railway company, filed a joint answer to the Union Trust Company's cross-bill, which, among other things, denied that the mortgages were issued in the manner authorized by law.

On October 7, 1889, the children and heirs of Paul Bremond, who were co-plaintiffs with said railway company in the original petition filed in this cause, and therein claimed that their father owned the entire capital stock of said company, and the same had descended and passed to them as his devisees, legatees, and heirs at law, filed their amended petition, attacking said mortgages, and denying that said railway company was ever organized, claimed that their father falsely and fraudulently assumed to have organized the company under said act, and then spent in the construction of said road the community fund of himself and his deceased wife, and claimed one half of said road through their deceased mother. They prayed for partition, and in the event this relief could not be had, that the road be sold, and that one half of the proceeds be paid to them. To this a demurrer was sustained.

On the 23d of April, 1889, the special master made a report of all the claims against the company which had been presented, including those of the Union Trust Company. At the fall term, 1889, of the court, the cause came on for trial, and by consent was submitted to the court without a jury as to all the issues presented, except the plea of *non est factum* to the mortgages. The issues made by these pleas were tried before a jury, who returned a verdict in favor of the Union Trust Company. The court thereupon rendered a decree ordering a sale of the property of the company, including its franchises as an entirety, and ranking certain of its debts into

three classes, denominated respectively as "statutory claims," "operating expenses," and "construction claims," and directing that from the proceeds of the sale these claims so classified should be first paid, that then the mortgage bonds should be next paid, and that the balance should be distributed among the general creditors. Such are the salient features of the decree. The details and other particulars need not be stated in this connection.

From the judgment, the railway company, S. D. McIlhenny, administrator, and the trust company have appealed. The heirs of Mary Bremond and Milby and Dow, intervening creditors, have filed cross-assignments of error, which are properly presented in briefs on file.

The appellant the Houston East and West Texas Railway Company complains that the court erred in decreeing a foreclosure of the first mortgage, and in decreeing a sale of the properties of the railway company to pay the bonds secured by that mortgage. It is insisted that so much of the decree is erroneous, "because, by the terms of said mortgage, it is provided that such foreclosure and sale can only be decreed in case default shall be made in the principal sum or sums by virtue of the said bonds, or any of them, or any part thereof, at maturity, and no part of said bonds mature or become payable until the first day of May, A. D. 1898 (eighteen hundred and ninety-eight)."

The contention seems to be, that since the mortgage was not subject to foreclosure for default in the payment of the interest on the bonds only, and since the principal was not due, the property of the corporation should have been sold subject to the mortgage. It may be that, according to the terms of the mortgage, the trustee was not entitled, as an original proceeding, to have a foreclosure and sale. But the cross-action of the Union Trust Company is not to be treated as such a proceeding. The railway company first filed its bill alleging its inability to pay its debts and to operate its road, and prayed that it might be sold and its proceeds distributed among its creditors according to their respective priorities. Upon the propriety of such suit, we are not called upon to pass. The only assignment in any of the numerous briefs on file which presents that question has been expressly abandoned. But we are unwilling to leave the subject without remark, lest it should be inferred that the appointment of the receiver for the property of the corporation upon its own peti-

tion merits the approval of this court. The case of *Wabash etc. Ry Co. v. Central Trust Co.*, 22 Fed. Rep. 272, in a circuit court of the United States, is the only precedent we have found for this practice. On the other hand, there are authorities which hold that a receiver should not be appointed to take charge of the assets of a corporation upon its own original proceedings: *Kimball v. Goodburn*, 32 Mich. 10; *Hugh v. McRae*, Chase Dec. 467. A natural person, because of his inability to meet the demands of his creditors, has no right to place his property under the control of a court of equity for the purpose merely of preventing its sacrifice by its sale under execution. We see no reason why, as a general rule, a corporation does not stand upon the same footing. If a railway corporation become insolvent, and a receivership be necessary for the preservation of its property and the distribution of its assets among its creditors, it would seem that the directors, as trustees for the stockholders and creditors, would be the proper parties to institute the suit.

But if the appointment of the receiver were erroneous, we are of the opinion that the proceedings of the court consequent upon that appointment were not void; and that of all parties in interest in the subject-matter of the litigation the original plaintiffs have the least right to complain of the consequences of that action. We also think that since the report of the master and the evidence adduced upon the trial show that the appellant railway company was hopelessly insolvent, it was not injured by the action of the court in foreclosing the mortgages. If any harm has resulted from the decree in this particular, it has occurred to parties who do not here complain of that ruling. We might rest our decision upon the question presented by the assignment of error under consideration upon this ground alone. But we are of the opinion that the court did not err in foreclosing the mortgages. The original petition alleged a state of facts which showed the company was unable to meet its obligations and operate its road, and the supplemental petition averred expressly its insolvency. When the trust company made itself a party to the suit the court had the entire property of the insolvent corporation in the hands of its receiver and all creditors before it, and properly treated the assets as a trust fund for distribution among such creditors according to their respective priorities and liens. At that time default had been made in the payment of interest upon both the first and the second mortgage bonds,

and by the terms of the latter mortgage the bonds secured by it had become due. Under such circumstances, we think it would have been anomalous to decree a sale of property of the company subject to the first mortgage, as this appellant contends should have been done. It may be that if the company had remained solvent, under the stipulations in the first mortgage, the trust company would have had no right to a foreclosure, although default had been made in the payment of the interest on the bonds secured by it.

The appellant railway company also complains that the court erred in treating a pleading filed in the cause, and styled an "amendment and supplement" to the original petition, as its pleading, and in entering judgment *pro confesso* upon it. One of the grounds of objection to the action of the court is, that the amended petition was not signed by the attorneys of the company. It is claimed that the attorneys who filed the pleading were the attorneys of the receivers, and had ceased to represent the railway company. We need not inquire into the propriety of the practice of permitting the attorneys of the plaintiffs, in a suit of this character, to act at the same time as attorneys for the receiver. The name of one of the attorneys in the original petition was signed to the amendment. If the pleading was filed without the authority of the plaintiff company, and if it desired to strike it out, action should have been taken in the lower court to accomplish that end. The question of the authority of the attorneys who signed and filed the pleading cannot be raised for the first time in this court. To rid itself of the pleading, it was only necessary for the company to dismiss its original counsel and to withdraw the amendment.

There was no error in so much of the final decree as directed that the property of the insolvent corporation, when offered for sale to the highest bidder, should not be "knocked off" for a less sum than \$1,200,000. We think the court had the power to make such an order, and that the power was properly exercised in order to prevent a sacrifice of the property. There is no reason why, after receiving enough cash to meet the expenses of the receivership, the costs of court, and of the foreclosure and the payment of such claims as had been awarded priority over the mortgage debts, the balance should not be paid in on the first-mortgage bonds.

During the progress of the trial, and after the secretary of the railway company had testified that a certain book identi-

fied by witness was the book in which the records of the meetings of the directors and stockholders were kept, and that he found the book in the office when he became secretary, and that it was the only book that had been recognized as such, the Union Trust Company offered in evidence from that book what purported to be a record of the proceedings of the board of directors and of a meeting of the stockholders authorizing the execution of the bonds, and of the first mortgage to secure the same. The railway company and McIlhenny, administrator, in support of their plea of *non est factum*, then proposed to prove by John Dozier the following facts:—

“In 1881 witness came into the company as its book-keeper, and to do almost any work imposed on him. There was at that time no minute-book of the company; he had knowledge of this. The witness had theretofore, from 1875, been the clerk of the City Bank of Houston, and the railway had no clerk; he did not know anything of it; that he then wrote up from scraps furnished him by Mr. Bremond, the president, and dictated to him the minutes which were found in the present purported minute-book, and though they were dated, a great many of them, in 1875, 1876, and 1877, and on up to 1881, yet he in fact wrote them there himself from such memorandum and dictation as the president of the road, Mr. Bremond, furnished him; yet he is satisfied that there were no such meetings held, or he would have known at the time they were held, and that he did not know of any such, though he was Bremond's son-in-law; that he does not know of but one genuine mortgage meeting which was held, and that was the one which provided for the call of the stockholders' meeting on December 4, 1884, and the stockholders' meeting held at that time, and which then sought to ratify the execution of the bonds and mortgages of the road; that this meeting was in fact held; that he believes and thinks he had an opportunity to know that what he believes, — that the balance never in fact took place.”

The trust company objected to the testimony, and it was excluded by the court. The ruling of the court was correct. When a corporation seeks to destroy the effect of entries upon its books, which purport to be regular records of the proceedings of its board of directors or stockholders, it should offer for that purpose testimony of a more conclusive nature than that which was offered in this case. The testimony of the witness would have served merely to create a suspicion that

there was an irregularity in the manner in which the records of the company were kept. If the evidence had been more conclusive in its nature and tendency, it would have still been questionable whether, under the circumstances of this case, both the company itself and the administrator of Bremond should not be held estopped to deny the validity of the mortgages.

The execution of the first mortgage was proved *prima facie* by the evidence introduced by the trust company, and there being no evidence to the contrary, the court did not err in instructing the jury to find for that company on the issue made by the plea of *non est factum*.

What has been said disposes of all the questions raised by the Houston East and West Texas Railway Company, and of all the assignments presented by McIlhenny, administrator, except one. That assignment complains that the court erred in sustaining the demurrer of the trust company to a portion of the answer and cross-bill of the administrator of Paul Bremond's estate. We are not cited to the page in the transcript which contains the ruling complained of, and after a careful examination, we are satisfied that the record does not contain the order.

In logical order, the cross-assignment of error of the heirs of Mrs. Mary Bremond, the deceased wife of Paul Bremond, comes next for consideration. They are Pauline Dozier, wife of John A. Dozier, Kate Zimmer, wife of J. C. Zimmer, Nettie Lufkin, wife of Walter E. Lufkin, and Pauline Bremond; and they, in connection with others, were parties plaintiffs in the original petition as heirs and legatees of Paul Bremond, deceased. At the term of the court at which the case was tried, the parties named, the married women being joined by their husbands, filed an amended original petition in lieu of their original petition. For the purposes of this opinion, the case made by their amended petition is sufficiently shown by the statement in the brief of the appellant trust company, which is as follows:—

“These heirs allege that their father was possessed of a community estate, one half of which they inherited through their mother after her death, but it is not alleged when she died. The petition is sworn to by Dozier, the husband of one of the heirs, and the witness whose testimony was rejected, as per bill of exceptions of said heirs and the railroad company, which was considered under the assignment of errors made

by the railroad company and Bremond's administrator, and alleges that the corporation was never organized under the act of incorporation, and that their father falsely and fraudulently assumed to have organized a company in pursuance of said act, and proceeded to survey and build the railroad so chartered. They aver and swear that all writings purporting to be minutes or accounts of said organization were false, forged, and mythical; that no certificate of stock was ever issued to any one, although in their original petition for a receiver they claimed as heirs of their father, who, they alleged, owned all the stock. They also allege that there never was any meeting of the stockholders, but that their father conceived the purpose, and intending to defraud them of their property and estate, converted the same to the building of said railway, falsely and fraudulently pretending that the same was being built, managed, and controlled by a company under an act of incorporation; that their father kept them in ignorance of what he was doing, and they believed from his representations that he was managing and controlling the estate belonging to them to the best advantage and for their interest, but that he concealed from them his actings, doings, and transactions, and kept them in total ignorance of the same; that their father invested more than five hundred thousand dollars in said railway. They sue for partition, alleging that said community fund built one hundred and twenty miles of said road, and ask that the same be set off to them in partition, and if not susceptible of partition, that it be sold and the proceeds given them."

The cross-assignment of error is, that "the court erred in sustaining the exceptions of M. G. Howe, receiver, to their amended original petition." We find an exception to the pleading purporting to be by "the Houston East and West Texas Railway Company, by M. G. Howe, receiver." The order complained of reads as follows: "Demurrer and motion to strike out all the pleadings of the heirs of Mary Bremond, as made by the plaintiff the Houston East and West Texas Railway Company, sustained, and motion granted. Ruling excepted to by said heirs without prejudice to their rights in some appropriate proceeding." This clearly means that their amended petition was dismissed without prejudice. We think the court did not err in its ruling. The pleading states expressly that it is filed "in substitution and lieu of their original petition," and it had the effect of an abandonment by

these parties of their original cause of action. Their original petition claimed as heirs and legatees of their father, and the amended petition claimed adversely to their father, and wholly as heirs of their mother. It alleged a new and distinct cause of action, and was properly treated as an original plea in intervention filed upon the eve of the trial. It sought to introduce into a suit already complicated new issues, and was well calculated to protract the litigation. Under such circumstances, the court had at least the discretion, upon motion of any party, to strike out the petition, and there would have to be a very clear case of an abuse of that discretion for this court to hold that the ruling was error. The dismissal of the petition was without prejudice, and their rights remain wholly unaffected by the result of this suit.

We will next consider assignments of error presented by the Union Trust Company. That appellant first complains that the court erred in holding that its second mortgage does not embrace certain lands and town lots upon which a foreclosure was sought. The first mortgage was executed on the first day of May, 1878. On the first day of January, 1888, a second mortgage was executed. It conveyed all the property embraced in the first, and in addition thereto the income of the road, and also certain lands by the following description: "Seventy-five thousand acres of land, or more, owned by said railway company, and lying contiguous to said trunk line and its authorized branches, the larger portion whereof being heavily timbered (which said lands are embraced in schedules thereof marked 'Exhibit A' and hereunto annexed as a part hereof), and such other lands as may be acquired by said railway company in east and northeast Texas in the section of country bordering on and adjacent to its trunk line and authorized branches, as will be shown by the records of the respective counties in which said lands may lie, save and except the blocks and lots designated and laid off in the town sites acquired and hereafter to be acquired." Attached to that mortgage is a schedule description of the lands conveyed. Doubts having arisen as to the validity or construction of the instrument, on December 4, 1884, the stockholders of the corporation in meeting authorized the execution of another mortgage to secure the same bonds. The resolution shows by its recitals that the main purpose of authorizing a new mortgage was to make a valid one to take the place of the former security on account of its doubtful validity. It authorized a

mortgage of the same property except the lands; and it was probably intended that it should embrace in the main the same lands, though that purpose is not directly expressed. The description of the lands in the resolution is as follows:—

“Seventy-five thousand acres of land, or more, owned by said railway company, and lying contiguous to said trunk line and its authorized branches, the larger portion whereof being heavily timbered, and also such as may be acquired by said company in any county through or into which said trunk line or any of its branches are now or may hereafter be constructed; and any and all land which said company may hereafter acquire in east and northeast Texas, in the section of country bordering on or adjacent to its trunk line and authorized branches; and also the blocks and lots laid off and designed in the town sites of said railway, and also the town lots situated in the city of Houston, Harris County, Texas, schedules of which lands and town lots and blocks are attached to the mortgage hereinafter set forth.”

No schedule accompanies the resolution.

In the mortgage in question, the same language is used as descriptive of the land conveyed, and schedule A and schedule B are referred to for a more particular description of the lands and town lots respectively. It was shown, however, that at the time of its execution and delivery no schedules were attached. After this suit was instituted, schedules were annexed to and recorded with the mortgage, but counsel for appellant attach no importance to that action, nor do they claim that the description in the mortgage is sufficient of itself. If the language had clearly shown that all the lands and town lots owned by the corporation in the localities named were intended to be included, they could be identified by proof of the lands so owned, and the reference to the schedules should be treated as mere false description, which is harmless. But there are no words used indicating that all the lands or town lots of the company were to be embraced; on the contrary, the inference is, that only such as should be named in schedules attached were to be included.

We understand the specific contention of the appellant trust company to be, that because the mortgage of 1884 was intended merely to cure the defects in that of 1883, therefore the description in the later instrument should be aided by that in the former. It is evident, we think, that the leading purpose of the mortgage of December, 1884, was to make valid and

effectual what was attempted to be done by that of January, 1883; but it is by no means clear that they were intended to cover precisely the same property. If such had been the intention, it would have been appropriate and easy to have expressed such intention, both in the resolutions authorizing the later mortgage and in the mortgage itself. But there is no such expression either in the resolutions or the mortgage. We think it evident that the intention in drawing the mortgage was, that it should contain a complete and independent description of the property conveyed, without reference to the former instrument, for which it was intended in the main as a substitute. It is probable that there had been some changes in the lands owned by the company, — some may have been disposed of and others acquired; that they were not intended to cover precisely the same lands, and that on this account no reference was made in the later to the previous instrument for description. Whether such reference was purposely avoided or not, it is apparent that none exists. We think, therefore, the description in the one mortgage cannot be aided by that in the other. It results that in our opinion the court did not err in holding that the lands and town lots in question were not embraced by the second mortgage.

By its other assignments, the trust company complains of the action of the court in allowing priority to certain creditors of the insolvent corporation over the bonds secured by the first and second mortgages. The debts of these creditors were ranked, as before stated, in three classes: 1. Statutory claims; 2. Operating expenses; and 3. Construction claims. For convenience in determining the questions involved, we will first consider the construction claims. These were certain debts incurred by the receiver in constructing new road under orders of the court. There is no objection urged to giving these claims priority. It is, however, insisted that the court erred in allowing priority to certain debts incurred by the company in constructing new road before the receiver was appointed.

Though the doctrine is of recent origin, it has become settled law in this country, that in the final distribution of the assets of an insolvent railroad corporation which has been placed in the hands of a receiver there are certain claims against the fund which, under certain circumstances, are entitled to priority of payment over the debts of the corporation secured by mortgage upon its property: *Galveston etc. R. R. Co. v. Cowdrey*, 11 Wall. 459; *Fosdick v. Schall*, 99 U. S. 235; *Hale v.*

Frost, 99 U. S. 389; *Milttenberger v. Logansport Ry Co.*, 106 U. S. 286. The expenses of operating the railway while in the hands of the receiver have been uniformly allowed, and it would seem that as to claims of this class there should never have been any serious difficulty. Being the expenses of administering the trust fund, they should be a first charge upon its funds, and should be awarded priority of payment. The cases cited also show that debts incurred by the company in operating its road, including necessary repairs and "useful improvements," within a limited time before the appointment of a receiver, have, at least as to the current earnings, been allowed a preference in payment over the bonded debts secured by mortgage upon its property; and when the earnings have been diverted to the payment of interest upon the bonds and in making betterments upon the property, the holders of these claims have been reimbursed from the proceeds of the sale of the railway.

The reasons assigned for this doctrine are not the same in each of the cases. In *Fosdick v. Schall*, 99 U. S. 235, the proposition was laid down that "when a court of chancery is asked by railway mortgagees to appoint a receiver of railway property pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership of outstanding debts for labor, supplies, equipment, or permanent improvement, as may, under the circumstances of the particular case, appear reasonable"; and "that if no such order is made when the receiver is appointed, and it appears in the progress of the cause that bonded interest has been paid, additional equipments provided, or lasting and valuable improvements made out of earnings which ought in equity to have been employed to keep down debts for labor, supplies, and the like, it is within the power of the court to use the income of the receivership to discharge obligations which but for the diversion of funds would have been paid in the ordinary course of business." The opinion in this case was by Chief Justice Waite, and was concurred in by the whole court. In *Hale v. Frost*, 99 U. S. 389, the supreme court, upon a certificate that the judges below were opposed in opinion, expressly affirmed the proposition, "that the net earnings of the road while in possession of the court and operated by the receiver are not necessarily and exclusively the property of

the mortgagees, but are subject to the disposal of the chancellor in the payment of claims which have superior equities, if such be found to exist." And in *Burnham v. Bowen*, 111 U. S. 777, the court says: "Every railway mortgagee, in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim on the income. . . . Such being the case, when the court of chancery, in enforcing the right of mortgage creditors, takes possession of a mortgaged railway, and thus deprives the company of the right to receive any further earnings, it ought to do what the company would have been bound to do if it had remained in possession,—that is to say, pay out from what it receives of the earnings all debts which, in equity and good conscience, considering the character of the business, are chargeable upon such earnings. In other words, what may properly be termed debts of the income shall be paid from the income before it is applied in any way to the use of the mortgagees. The business of a railway should be treated by a court of equity, under such circumstances, as a 'going concern,' not to be embarrassed by any unnecessary interference with the relations of those who are engaged in or affected by it."

Such are the various principles announced in support of the modern doctrine, that in the settlement and distribution of the assets of an insolvent railway company which has been placed in the hands of a receiver, priority of payment should be allowed to certain claims over the mortgage debts. The principle of implied consent laid down in *Fosdick v. Schall*, 99 U. S. 235, seems to have been disregarded in the case of *Union Trust Co. v. Illinois etc. Ry Co.*, 117 U. S. 434, in which the receiver was not appointed at the instance either of bond-holders or of their trustees; but the doctrine is still maintained, that creditors who have labored, furnished supplies, made repairs or useful improvements in the operation, maintenance, and betterment of the railway, and who have been suddenly deprived of their remedies at law by the appointment of a receiver, are entitled to the equitable consideration of the court in the distribution of the assets of the company, and to priority in payment from the net income of the property while in the hands of the court.

As to what is commonly known as operating expenses, there is no difficulty, and so much is conceded in this case. The claims we now have under consideration are for construction

of new road before the receiver was appointed, and for material furnished for such construction. They accrued within six months before the appointment. It has been held that claims for construction, unless the work was done or the material furnished in pursuance of an order of the court, cannot be allowed priority. We may concede that, as a general rule, this is correct. But we think there may be construction claims which appeal as strongly to the conscience of a court of equity as the debts which are commonly known as operating expenses, and we further think we have such claims in those now under consideration.

At the time the first mortgage was executed the railway was but an inchoate enterprise. The face of that mortgage shows that but a few miles had been completed, and that it was contemplated between the company and the mortgagees that the construction was to continue, and that the bonds secured by the mortgage should issue as the road progressed. The second mortgage also shows upon its face that the construction of the road was to continue. The mortgages covered not only the road which was completed at the time they were executed, but also that which was to be subsequently constructed. While the construction was still progressing, the receiver was appointed, and the holders of the claims deprived of their ordinary remedies for the collection of their debts. From the operation of the road, the receiver made net earnings amounting to \$270,721.41, a sum more than sufficient to pay these claims, and all others to which priority was allowed. This money was expended under the orders of the court in paying interest on the bonds, and in making valuable and permanent improvement upon the property subject to the mortgages.

The question here is as to the right of priority of payment out of the net earnings of the road while under control of the court. The opinion in *Fosdick v. Schall*, 99 U. S. 235, recognizes that debts incurred for "useful improvements" have, as to the net income, a preference over the mortgage debts. We understand the term "useful improvements" to include not only necessary repairs, but also such changes in and additions to structures already completed as may be deemed advantageous to the road in a financial point of view, and such as prudent management would demand. Such, we would think, would be debts created in substituting an iron and stone bridge for one made of wood. Such would be the ex-

pense of a change from a narrow gauge to a standard gauge, when the exigencies of the traffic or other circumstances are such as to demand that change in order to prevent the utter failure of the enterprise, and to keep up the railway as "a going concern." Ordinarily, when mortgages are issued upon completed roads, it is not contemplated that its income is to be applied to the construction of new road. In such cases, debts incurred for such new construction ought to have no claim against the bond-holders, either as to the *corpus* or the income of the property. But when mortgages are executed upon an unfinished road, and they show upon their face that it was contemplated that the work of construction should be prosecuted to completion, and when the mortgages attach to the new road as fast as it is finished, we are of opinion that the new road should be considered a "useful improvement," and that if the road be put in the hands of a receiver before the work and materials are paid for, holders of the claims for such work and material should be paid from the net income of the road while under control of the court, if there be any. The claims now under consideration accrued within six months before the appointment of a receiver, and the holders, being guilty of no laches, were prevented by the action of the court from subjecting the property to the payment of their debts through the courts of law. We think, therefore, it was the duty of the court to protect them in its final decree, if there was on hand a fund which could be applied to the payment of their debts.

The net earnings of the road were not on hand at the time of the trial, but had been expended by order of the court in paying interest on the bonded debt and in improvements upon the property subject to the mortgage, which enhanced its value to the full amount so expended upon it. In reference to the earnings of the road, counsel for this appellant expressly concede "that the mortgagees' rights thereto, as against common creditors, did not attach until the trustee or the mortgagees took possession in person or by agent, or by a receiver appointed at their instance." Their concession is the result of a well-established line of decisions in the highest court of the country: *Galveston etc. R. R. Co. v. Cowdrey*, 11 Wall. 459; *Gilman v. Illinois Tel. Co.*, 91 U. S. 603; *American Bridge Co. v. Heidelberg*, 94 U. S. 798; *Fosdick v. Schall*, 99 U. S. 235. They insist, however, that since they were not parties to the suit when the court ordered the funds to be

applied to the several purposes mentioned, and since they cannot be considered as having consented to such application, the appropriation to the payment of interest and of improvements upon the road is not to be considered such a diversion as "would require them to be reimbursed either by the mortgagees or out of the *corpus* of the property." We do not understand that the right of creditors having an equitable claim upon the net earnings of an insolvent railway to be reimbursed, when these earnings have been diverted to another purpose, depends upon the consent of any party. The principle is, not that the mortgage creditors are responsible for the diversion, but that the diversion was in derogation of the rights of those entitled to the fund, and that therefore the money should be restored. The bond-holders have received the entire benefit of the diversion in this case, either directly in money or indirectly in the enhancement of the value of the property subject to their mortgages; and if they have no superior right to the net earnings, it follows that they have no right to complain of the action of the court in restoring that fund from the proceeds of the sale of the mortgaged property.

We have found no case in which preference to claims for work done and material used in construction of new road have been given a preference over the debts secured by mortgage. On the other hand, there are several cases in which such preference has been denied; but we think each of these cases differs in some important particular from this. In *Hale v. Frost*, 99 U. S. 389, a claim for construction material was denied priority. The report of the case is meager, but it would seem, from a remark in the opinion in *Williamson v. Washington City etc. R. R. Co.*, 83 Gratt. 631, "that this material was used in the construction of an independent branch road." In *Porter v. Pittsburg Bessemer Steel Co.*, 120 U. S. 649, and *Hand v. Savannah etc. R. R. Co.*, 17 S. C. 219, the effect was to charge the construction claims upon the railway itself, in preference to the mortgage debts. It does not appear that in either case there was any net income from the operation of the road while in the hands of the court. From the report of the case of *Addison v. Lewis*, 75 Va. 701, it does not appear that there was any net income to the credit of the cause, or that it had been diverted. The petition of interveners simply showed that their claim was due them as contractors in building an extension of the railway, without an averment, so far as the

opinion shows, of any other circumstance entitling them to equitable consideration.

It follows that we are of opinion that the court did not err in awarding priority to the construction claims.

The appellant trust company also insists that the court erred in giving priority to the class of claims designated as claims having "statutory liens." The court found that the holders of these claims were secured by a lien upon the railway and its equipments, by virtue of the act of February 18, 1879: Sayles's Civ. Stats., art. 3179 a, and note. The first mortgage was executed before the passage of this act, and it is urged that by reason of this fact the act is inoperative as against the bonds secured by that mortgage. The argument is, that the act as applied to the holders of obligations secured by mortgages existing on the railway at the time the act took effect is in derogation of the constitution of the state and that of the United States, and is therefore void. We doubt whether this position can be successfully maintained: *Provident Institution v. Jersey City*, 113 U. S. 506; but we do not deem it necessary to decide the question. The special master found that all these debts were due for labor performed in the construction, operation, and maintenance of the railway within twelve months before the appointment of the receiver. The report in this respect was not contested. The claims are therefore of such a character as to entitle them to priority of payment out of the net earnings of the property in the hands of the receiver, unless priority should be denied them by reason of the fact that they did not accrue within the six months next preceding the receiver's appointment.

When a court appoints a receiver of the property of a railway company, and makes an order directing him to pay claims of its operatives for services rendered prior to the appointment, it would seem proper to prescribe a period of time within which the debts to be so paid should have accrued. But we think such an order should be only provisional, and that it could not properly be held conclusive against any one not a party to the suit at the time the order was made. In this case, the court, in accordance with the more general practice, fixed that limit as to time at six months before the receiver's appointment. Such a limit is purely arbitrary, but as long as it is simply provisional it is proper. The court seems to have been of opinion that the time fixed in the order of appointment should govern throughout the case. The rule laid down by

the court is, that the holders of claims for operating expenses have a right to the current revenue superior to that of the mortgage creditors, and that it continues until it is lost by such delay in the prosecution of their claims as should be sufficient to bar their equity. The period of time necessary for this purpose depends upon the circumstances of each particular case. That the period and the right are not dependent upon the implied consent of the bond-holders to the order of the court which appoints the receiver, and directs the payment of claims of certain classes which have accrued within a fixed period of time prior to the order, is shown by the case of the *Union Trust Company v. Illinois etc. R'y Co.*, 117 U. S. 434, in which the mortgagees were not parties to the suit at the time the receiver was appointed and the order was made.

The limitation of not longer than six months has been the rule in the trial courts, but in the supreme court of the United States claims have been allowed which accrued for a much longer period before the receiver's appointment. In *Hale v. Frost*, 99 U. S. 389, the claim of Hale, Ayer, & Co., which was allowed priority, was for supplies to the machinery department furnished nearly two years before the receiver took possession.

In *Burnham v. Bowen*, 111 U. S. 777, it did not appear that the debt accrued within six months before the appointment. In the following cases, also, that limit appears to have been disregarded: *Douglass v. Cline*, 12 Bush, 608; *Williamson v. Washington City etc. R. R. Co.*, 33 Gratt. 624; *Skiddy v. Atlantic etc. R. R. Co.*, 3 Hughes, 320; *Atkins v. Petersburg R. R. Co.*, 3 Hughes, 307. In *Blair v. Railroad Co.*, 17 Am. & Eng. R'y Cas. 387, the court recognized liens accruing under the statutes of Missouri, and gave to similar claims from other states, when there was no statute allowing such liens, an equal dignity. If it was meant to place them upon the same footing merely as to the time of their accrual, the principle would seem sound. Equity follows the law, and if there be no law directly applicable it will follow the analogy of the law. The creditors whose claims are now under consideration had a lien given by law upon the railroad and its equipments. Let it be conceded that it was subsidiary to the mortgages. They nevertheless had a lien against the railway company, and a right to enforce it against the equity of redemption in the property. The twelve months during which that right continued to exist had not elapsed when the court took control of the assets of the

company. We are of opinion that they should not be held guilty of laches in prosecuting their claims until their liens were lost by delay, and that the mere lapse of more than six months between the time in which the claim accrued and the appointment of a receiver does not afford a sufficient reason for denying a priority to which they would otherwise be entitled.

To some of these claims there are more specific objections. It is urged that the claims embraced in exhibit B of the master's report were not for labor furnished upon the railway. The report of the master is, that "exhibit B is a list of claims for board alleged to have been furnished either by interveners or by others, and the claims therefor assigned to interveners, to mechanics, laborers, and operatives employed by said railway company in the construction, maintenance, and operation of its railway or its equipments." It appears that it was the understanding between the company, the laborers, and the boarding-house keepers that the company should retain a sufficient amount of the wages of the laborers to pay their board, and that the wages so retained should be paid to the keepers of the boarding-house in discharge of the board. In contemplation of law, the transaction is the same as if the laborers, after the wages were due, had in settlement of their board given orders upon the company for an amount sufficient to pay it, and the company had accepted them. In equity, at least, it is a valid assignment of the debts due for wages.

So, also, there was an arrangement between the company, the laborers, boarding-house keepers, and the grocers who furnished supplies to the latter, to the effect that of the money retained from the wages of the laborers for the benefit of the boarding-house keepers the company should hold and pay to the grocers an amount sufficient to discharge their claims for the supplies so furnished. In pursuance of these agreements, the company credited the boarding-house keepers with the wages of the laborers retained, and also credited the grocers with the amounts of their bills. The claims so accruing in the hands of the boarding-house keepers and in the hands of the grocers were properly treated as claims originally due laborers, etc., and duly assigned to the holders. That a right to priority attaching to a claim of this character is not destroyed by assignment is settled by the cases of *Burnham v. Bowen*, 111 U. S. 777, and *Union Trust Co. v. Walker*, 107 U. S. 596. This court has held that when a vendor sells land upon

a credit, and the vendee executes a note for the purchase-money payable to a third party, the payee has a lien upon the land for its payment: *Pinchain v. Collard*, 13 Tex. 833. If the lien of the vendor passes to the payee in that case, we see no reason why the principle should not apply to these claims. In some instances, where a number of these debts due for wages had become the property of one person, the company gave the assignee a promissory note for the aggregate amount. This merely changed the evidence of the indebtedness, and did not change the character of the debts.

Appellee Jacob Binz was the holder of many of these claims, for some of which he took the notes of the company indorsed by Paul Bremond. It is insisted that this was a waiver of his lien, if any he had. The claim for priority is held not to be a lien, and hence the law of liens is not applicable. But the special master found in relation to these claims, as a matter of fact, that in taking the indorsement there was no intention to waive a lien against the company. In this state, we hold, as to vendors' liens at least, that the taking of an independent security of any character is *prima facie* a waiver of lien, but that in every case it is a matter of intention to be determined by the evidence.

It is also assigned that the court erred in giving priority to the claim of the Dixon Manufacturing Company. It is not objected that their claims were not for operating expenses, and, as originally incurred, would not have been payable under the court's order made when it appointed the receiver. The objection is, that the claim consisted in part of two promissory notes made by the company and indorsed by Bremond. The special master found that there was no intention to waive any lien in taking Bremond's indorsement. What we have previously said is sufficient to dispose of this question.

The appellant the Union Trust Company also complains that the court erred in adjudging that a claim of appellee Binz, consisting of three promissory notes which purported to be secured by a pledge of three fourths of the gross earnings of the railway, were "entitled to priority *pari passu* with the claims for operating expenses." These notes were given for money borrowed to pay interest on the bonds, and each contained a stipulation as follows: "Three quarters of the gross earnings of the road from date is pledged in liquidation of this note." We are unable to see how a mere stipulation of this character can have any legal effect. If the company had placed the

road in the hands of the payee, or of some third person to be operated until from three fourths of the gross income the notes would have been paid, the contract, except as to the rights of third parties, would have been valid. So, also, perhaps, if it had been made the duty of some one who had accepted the trust to receive and apply the income. In *Jones on Liens*, it is said that "the rule that an equitable assignment can be effected only by a surrender of control over the funds or property assigned is one that is strictly held to. A mere promise that the goods shall be held in trust for the benefit of another, and that the proceeds shall be paid to him, does not amount to an equitable assignment of the goods or a specific lien upon them; for in such case the owner retains control of the goods, and may appropriate them or their proceeds to the payment of other creditors, and the holder of such promise cannot follow the goods any more than he can follow the proceeds. He has no lien either upon the goods or their proceeds. The owner violated his promise, and for this he is personally responsible." The text is supported by the case cited: *Gibson v. Stone*, 43 Barb. 285. A mortgage upon a stock of goods with a right expressly or impliedly reserved to the mortgagor to remain in possession, and to continue to sell them in ordinary course of trade, is void,—if for no other reason, because the reservation of the right to sell is inconsistent with the idea of a lien. Moreover, if a mortgagee's right to the net earnings of a railway is not effected until he takes possession either by himself or through a receiver in pursuance of the terms of the mortgage, as was held in *Gilman v. Illinois etc. Tel. Co.*, 91 U. S. 603, we do not see how the appellee Binz has acquired any claim upon the gross earnings in this case. We think the court erred in giving these claims priority over the bonded debt.

This disposes of all assignments of error presented by brief, except that of appellees Milby and Dow. They intervened for the establishment of two claims against the railway company, which were for coal furnished for the purpose of operating its road. One accrued in December, 1884, and the other in January, 1885,—the one a little more and the other a little less than six months prior to the appointment of the receiver. Priority in payment was allowed to the junior claim, but was denied to the older. We see no sufficient reason for the distinction, and it seems to us arbitrary. There was no circumstance disclosed by the report of the master or the evidence upon the trial to show laches as to the one claim more than as

to the other. In the case of *Burnham v. Bowen*, 111 U. S. 777, priority was allowed to a claim for the price of coal furnished to the railway company, although it did not appear that the claim accrued within six months before the receiver's appointment. It is evident from the opinion that the period of six months was treated as a matter of no importance. We think the court should have held both the claims of these appellees as entitled to payment prior to the mortgage bonds.

So much of the decree of the lower court as awards priority of payment over the mortgage debt to the claim of appellee Binz, consisting of three promissory notes, and amounting at the date of the decree to the sum of \$2,390.25, principal and interest, and so much of the decree as refuses such priority to the claim of appellees Milby and Dow, for \$541.65, is reversed, and a decree will be here rendered directing that the said claim of appellee Binz be classed and paid *pro rata* with the general creditors, and that the claim of Milby and Dow be classed and paid prior to the mortgage bonds. In all other respects the judgment is affirmed.

The Houston East and West Texas Railway Company will pay all costs of the appeal. The heirs of Mary Bremond and S. K. McIlhenny, administrator, of Paul Bremond, will pay all costs incurred by reason of their cross-appeal. The Union Trust Company will recover of appellee Binz one fiftieth of the costs of its appeal, and will be adjudged to pay all other costs by it incurred.

Reversed in part and rendered.

ATTORNEY AND CLIENT — RIGHT TO QUESTION ATTORNEY'S POWER TO APPEAR. — An attorney once admitted to represent a party is the authorized attorney so long as his name appears on the record: *Walton v. Sugg*, Phill. (N. C.) 98; 93 Am. Dec. 580, and note; *Board of Commissioners v. Younger*, 29 Cal. 147; 87 Am. Dec. 164, and note 169, on when client may change attorney.

RECEIVERS — POWER OF COURT OVER SALES BY. — A sale under execution of property in the custody of a receiver is void unless authorized by the court: *Walling v. Miller*, 108 N. Y. 173; 2 Am. St. Rep. 400, and note.

CORPORATIONS — RECORDS OF, AS EVIDENCE. — The minutes of the meeting of a corporation, if identified, are *prima facie* evidence of the statements contained therein, and the burden of proof is on him who undertakes to rebut this presumption: *Semple v. Glenn*, 91 Ala. 245; 24 Am. St. Rep. 894, and note.

INTERVENTION — APPLICATION — SUFFICIENCY OF: See note to *Brown v. Saul*, 16 Am. Dec. 180; note to *Lacroix v. Menard*, 15 Am. Dec. 162.

ELLIS v. BONNER.

[80 TEXAS, 196.]

TITLE TO MATERIAL FOR BUILDING TO BE ERECTED ON LAND OF PURCHASER VESTS, WHEN. — The rule in relation to acts necessary to pass title to the purchaser of goods ordered to be manufactured is applicable only to contracts relating to personal property in the possession of the manufacturer, but is not applicable to contracts for the construction of houses upon land owned or controlled by the purchaser. If a party contracts, out of his own material, to construct a house upon the lot of another, the legal title to the material will remain in the contractor, and will be liable to seizure and sale for his debts, subject to such equities as may exist in favor of others; but if he contracts to sell to the owner of the lot the material for the house, and also to construct the house, intending that the property in the material shall be in the owner and at his risk until the house is completed, the legal title to the material will vest in the owner of the lot upon its delivery.

PURCHASER WHO MAKES PART PAYMENT ACQUIRES INTEREST ENTITLED TO PROTECTION. — Where, under a contract with a building company for the construction of houses upon the land of a purchaser, the company delivers material upon the ground, upon which the purchaser makes a part payment, and the material so furnished is seized and sold under an attachment as the property of the building company, the purchaser at the sale made under the attachment cannot take the material out of the possession of the owner of the lot without paying to him the amount of money he paid on his contract, with interest. In such case, the levy should be made by notice, and not by taking possession.

EXEMPLARY DAMAGES NOT ALLOWED WHERE NO ELEMENT OF FRAUD OR OPPRESSION. — In an action to recover damages for a wrongful attachment, exemplary damages are not recoverable, if the plaintiff in the attachment believed that the property attached was subject to the payment of his debt, and there is no element of oppression or malice.

Brady and Ring, for the appellant.

H. F. Fisher, and Jones and Garnett, for the appellee.

HENRY, A. J. The Houston Building Company was a corporation engaged in the manufacture and sale of portable houses.

Bonner contracted with an agent of the company for the purchase and erection of two portable houses upon a designated lot in the city of Houston of which he had control. The price agreed to be paid for the houses when erected was \$1,638. It seems that the building company only had in stock at the time of the agreement the material for two portable houses, together with a lot of material or fragments left over from other sales. The evidence tends to show that on account of financial difficulties the business had about come to a close.

While the evidence refers to the transaction with Bonner as

a sale of "two houses," it appears that the material for their construction was not quite complete, and that the agent of the building company agreed to supply the deficiency by purchasing the necessary material elsewhere, and that it would cost about two hundred dollars. The agent of the building company delivered the material on hand upon the lot designated by Bonner, preparatory to its being there put together, upon which Bonner paid to him \$1,038 of contract price. Subsequent to such delivery and payment, appellant caused a writ of attachment against the building company to be levied upon the material, which was subsequently sold in pursuance of the levy as the property of the building company, and purchased by Ellia.

Bonner instituted this suit to recover actual and exemplary damages, resulting in a verdict and judgment in his favor for two thousand dollars actual and two thousand dollars exemplary damages.

Appellant requested the court to charge the jury to find for the defendant, and assigned as error the refusal of the court to give the charge. In support of the assignment, appellant in his brief refers to the case of *Gammage v. Alexander*, 14 Tex. 414, and quotes from the opinion as follows:—

"The rule in relation to acts necessary to pass property to the purchaser of any goods ordered to be manufactured is that stated by Story in his treatise on sales, viz.: 'Where the contract of sale is executory, and for an article which is not in existence at the time of sale, but is to be manufactured or made, or is to be grown, no property passes therein to the vendee until the thing is not only finished, but is either actually delivered to him or at least set aside and appropriated to him and accepted by him.' Nor does it make any difference that the price is advanced, or that the time and mode of paying are agreed upon, or that the dimensions of the contract are stated." And further, in the same case, the court says: "Goods when manufactured to order must not only be set apart, but they must be delivered by the mechanic, or they must be accepted or approved by the vendee before they can become his property or at his risk."

We do not think that the rule here invoked is applicable to the facts of this case. Contracts with regard to the purchase of manufactured articles, to which the authorities referred to apply, relate to personal property in the possession of the

manufacturer, and not to constructing a dwelling-house upon land owned or controlled by the purchaser.

It was within the power of the parties to contract either that the title to the material should vest in Bonner when it was delivered upon the lots, or that it should remain in the building company until the construction of the houses was complete, and should then vest in Bonner.

Evidence upon the point was introduced. It is not necessary or proper for us to express an opinion as to the weight or result of the evidence, further than to say that some of it was evidently merely an expression of the opinion of the witnesses. Upon another trial it will be proper for the witnesses to state what the contract with regard to the purchase was, and also what acts were done under it, without giving their own conclusions as to the legal effect of the contract.

If the contract was that the building company should construct the houses out of its own material, then the legal title in the material would remain in it, and would be liable to seizure and sale for its debts, subject to such equities as might exist in favor of others.

It would be different if the agreement of the company was to sell to Bonner the material for the houses and also to construct the houses, intending that the property in the material should be in him and at his risk until the construction of the houses should be completed. What the contract was in these respects is a question of fact for the jury to find, considering all that was said and done by the parties before the levy of the writ of attachment.

If the contract was intended to be a sale of the material, the delivery of it upon a lot controlled by Bonner would be sufficient to make the title pass to him in the material so delivered. But if the agreement was that the building company should deliver to Bonner completed houses, and not that the title in the material to be used should vest in him before it was used in the buildings, then the mere delivery of the lumber upon the designated lot, and a partial payment for it, would not, as between the building company and Bonner, vest the title in the material in the latter before the completion of the houses: Benjamin on Sales, sec. 340.

Under our statute with regard to mechanics' liens, we think the rule would be different where third parties furnish material for the building. But if, under a proper construction of the contract, the title to the material remained in the building

company before being put into the building, and was therefore subject to levy for its debts, it does not follow that Bonner had not acquired in it an interest which should be protected.

If it be conceded that the title to the material remained in the building company, still it had delivered the lumber to Bonner and received money from him as a payment upon it under circumstances that justified him in believing, and sufficient to at least show an implied contract, that the very material should be used in the construction of the houses. Under such circumstances, the building association would not have been allowed to take the property from Bonner's possession, and deprive him of it as a security for the money paid by him.

The plaintiff in attachment knew the facts and could not acquire a greater right than the building company had. If the title remained in the building company, Ellis, by its seizure, sale, and conversion, made himself liable to pay to Bonner the amount of money he had paid upon his contract, with interest. In that state of case, the defendant in execution would not have the right of possession, and while his interest would be subject to sale, the levy should have been made by notice, and not by taking possession: Rev. Stats., art. 2292.

The court did not err in refusing to charge the jury to find for the defendant.

The suing out of the attachment is not an issue in this cause. The only question is with regard to its levy.

Notwithstanding his knowledge of the facts, Ellis believed that the property was subject to the payment of his debt. We can see in the case no element of oppression or malice.

We do not think that the court should, under the evidence, have submitted to the jury the issue of exemplary damages, and if that had been proper, still the evidence does not justify the verdict in that respect. We do not mean to intimate an opinion as to the sufficiency of the evidence to sustain the verdict for the amount recovered as actual damages, if upon the issue of title the plaintiff shall be found entitled to recover the value of the material seized.

There is nothing in the record showing that there was any error committed by not deducting from the amount of plaintiff's recovery the amount for which the goods were sold under the attachment.

The judgment is reversed, and the cause is remanded.

CONTRACTS FOR CONSTRUCTION — WHEN TITLE PASSES. — A contract to furnish materials and construct a vessel does not pass title until the vessel is delivered, and it does not matter that installments of the price are paid from time to time: *Andrews v. Durant*, 11 N. Y. 35; 62 Am. Dec. 55, and extended note.

FIXTURES. — An unfinished house placed on land and intended to remain there is a fixture: *Butler v. Page*, 7 Met. 40; 39 Am. Dec. 757, and note; so is the lumber in a house destroyed by a cyclone: *Rogers v. Gilling*, 30 Pa. St. 185; 72 Am. Dec. 694, and note.

DAMAGES FOR SUING OUT WRONGFUL ATTACHMENT. — Where an attachment has been wrongfully issued, the party whose property has been attached can recover only actual damages: *Dickinson v. Maynard*, 20 La. Ann. 66; 96 Am. Dec. 379, and note; but where the case is a malicious abuse of the attachment process, he may recover exemplary damages: *Alexander v. Harrison*, 38 Mo. 258; 90 Am. Dec. 431, and note; *Reed v. Samuels*, 22 Tex. 114; 73 Am. Dec. 253, and note; *Townsend v. Fontenot*, 42 La. Ann. 890; *Kirke v. Provier*, 78 Tex. 353.

ALLEN v. LONG.

[80 TEXAS, 261.]

JOINT-STOCK COMPANY DEFINED. — A joint-stock company is an association of individuals for the purpose of profit, possessing a common capital contributed by the members composing it, such capital being commonly divided into shares, of which each member possesses one or more, and which are transferable by the owner, the business of the association being under the control of certain selected individuals called directors. It is a *quasi* partnership, whereof the capital is divided, or agreed to be, into shares, so as to be transferable without the express consent of all the co-partners.

DE FACTO CORPORATION, WHEN BODY REGARDED AS. — A body is regarded as a *de facto* corporation only where there has been an effort to conform to the forms of law in establishing a corporation, and some formal defect exists merely as to the mode of complying with the law, and the body is dealt with and acts as a corporation.

JOINT-STOCK ASSOCIATION NOT A CORPORATION, WHEN. — An association of individuals for the purpose of profit, having a capital divided into shares, and controlled by a board of directors, but not incorporated under the laws of the state, is not a corporation, but an unincorporated joint-stock company, which is governed by the general principles of law applicable to partnerships.

JOINT-STOCK COMPANY, WHEN NEW COMPANY, ALTHOUGH ORGANIZED UNDER OLD NAME. — Where a joint-stock company ceases operations, and eight years afterwards the person who was the last president publishes in a newspaper a notice calling a meeting for the alleged purpose of re-organizing the company, and at the meeting so called a part of the old stockholders, with many new members, form an association under the old name, which new association incurs debts, and for the purpose of paying them sells the land of the old association, the new association is a new company, and not a mere continuation of the old; such new com-

pany has no legal right to take charge of and dispose of the land of the old company to pay the debts incurred solely by the new concern, especially without the consent of all of the stockholders; and a sale of the land of the old company, made by the officers of the new company, is null and void.

BURDEN OF PROVING RIGHT TO RECOVER POSSESSION OF LAND ON PLAINTIFF.

— In an action of trespass to try title to land, the burden of showing a right to recover is upon the plaintiff, and if neither he nor the defendant shows a right to the possession, judgment must be rendered in favor of the defendant.

MEMBERS OF JOINT-STOCK COMPANY TENANTS IN COMMON, WHEN. — When an unincorporated joint-stock association owning land but owing no debts becomes *functus officio*, its members hold the land as tenants in common.

TENANT IN COMMON CANNOT SUE HIS CO-TENANT FOR POSSESSION, WHEN. —

One tenant in common cannot maintain against his co-tenant a suit for the recovery of possession of land, when the latter's possession is not adverse to his own interest, nor to the title under which they must both claim. To authorize such a suit, there must be an actual ouster, and the ouster and adverse holding must be of such a character as will put the statute of limitations in motion.

TRESPASS to try title. The defendant's amended answer consisted of a general denial and plea of not guilty, and also a cross-bill in which he sought affirmative relief. The other facts are stated in the opinion.

Hale and Hale, for the appellant.

E. D. Scales, for the appellee.

MARR, J. We make the following extracts from the conclusions of fact found by the court, as we find them in the transcript, in order to present the points at issue: —

"1. Some time in 1868, the Lamar County Agricultural and Mechanical Association was organized as a joint-stock company for the purpose of holding fairs in said county, and consisted of a large number of members who took shares in said association, and to whom certificates of stock to the amount of their respective shares were issued. All of the shares of the capital stock agreed upon were taken, and assessments were then made on the members thereof until the whole stock thus taken was paid up. Said association acted and transacted its business through a president and directors annually elected by the members. It acquired the land in controversy, and used it for the purpose of holding fairs thereon until about 1875. 'Said association' in that year 'ceased to hold fairs, and never did elect any president or other officers after that time, or perform any other act or do any other business in pursuance of the purpose for which it was organized.'

"2. About the year 1888, a meeting was called, by notice in a newspaper, by the person who was the last president of the said association, for the purpose of reorganizing the said association, but no actual notice was given to a number of the members of the original association [of] the purpose to reorganize the old association, and a number of them, among whom was the defendant, had no notice. Some of [the] old members, together with a large number of persons who had never been members of the association, which ceased to do business about 1875, met and organized a joint-stock company under the name of 'The Lamar County Agricultural and Mechanical Association'; elected a president, directors, and other officers; issued a large amount of stock, which was sold; bought, sold, and improved, at great expense, another and different tract of land, and thereby became largely indebted; that to pay such indebtedness said association last organized, by its authorized agent, sold and conveyed the land in controversy to W. T. Gunn, under whom plaintiff claims; that the organization of the last association, the receiving of new members, issuing and selling of new capital stock, the contracting of said indebtedness, and the sale of the land in controversy was all done without the assent or knowledge of a number of [the] members of the first association, one of whom was the defendant; that he owned twenty-three shares of paid-up stock in the original association, and was in possession of the land in controversy at the time it was so sold, and had been for several years.

"3. The court finds as a matter of fact that the two organizations or joint-stock companies above mentioned were not the same.

"4. The court finds against plaintiff's plea of estoppel."

Upon the above conclusions or findings of facts the court concluded as a matter of law that the two associations were not the same; that the last one had no right to convey the land, and that no title, legal or equitable, passed by the sale and deed to Gunn, unless it might be the individual members of the old association who joined the new; that the land in controversy belonged to the members of the old association as tenants in common, and if the interest of the members who belonged to both the old and the new association did pass by the deed to plaintiff's vendor, the plaintiff is only a tenant in common with defendant G. E. Long, and cannot maintain this action, and for these reasons gave judgment for defendant George E. Long.

The assignments of error may be summarized and stated in the following propositions: 1. That the court erred in holding the association to be a joint-stock company instead of a corporation. Appellant contends that it was at least a *de facto* corporation. 2. In holding that the association of 1883 was a new and distinct company from the original one of 1868, appellant contending that the former was but a reorganization and continuation of the latter. 3. In holding that plaintiff could not recover upon the possessory title of the association of 1883 (claimed to be identical with that of 1868) against the defendant Long, whom appellant contends is a mere trespasser on the land. 4. In holding that defendant is a tenant in common with plaintiff and the other stockholders of the original association in the land in dispute, and that therefore plaintiff cannot maintain the suit. 5. In not sustaining the plea of estoppel and ratification interposed by Gunn and the Lamar County Agricultural and Mechanical Association (new).

In addition to the facts already enumerated by us in the preceding synopsis, as well as those found by the court below, another may be recited in this connection. The association of 1883 appears to have consolidated or connected itself with a race-track company, and continued the connection until May, 1884, when it severed its relation with that company. This was a feature unknown to the original organization, and the connection was without the consent of a number of the stockholders who objected to this arrangement. Some of them refused to join the new association on this account. It does not appear how long the original association was to continue. The articles of agreement are not found in the record. So far as the record shows, there was no incorporation or attempt at incorporation under the forms of law.

1 and 2. We think that the evidence taken as contained in appellant's brief amply sustains the conclusions of the court below, in which it finds as a matter of fact that the associations of 1868 and 1883 were distinct, and not identical. Most material changes had been made without the consent of "a number of the stockholders" of the original concern. In fact, all of the findings are supported, except perhaps the one that the defendant did not have notice of the new organization. He admits that he was present thereat, but as a mere spectator. We do not, however, deem it important to determine the legal effect of his notice *vel non* in the disposition we shall make of the case. An accurate lexicographer of law defines a

joint-stock company to be "an association of individuals for the purpose of profit, possessing a common capital contributed by the members composing it, such capital being commonly divided into shares, of which each member possesses one or more, and which are transferable by the owner. The business of the association is under the control of certain selected individuals called directors; . . . a *quasi* partnership, whereof the capital is divided, or agreed to be, into shares, so as to be transferable without the express consent of all the copartners": 2 Bouv. Law Dict. 9. If incorporated, it seems that in this country it is to be regarded as at least a *quasi* corporation: *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566. But here there was no incorporation, etc., as we have seen. It is only where there has been an effort to conform to the forms of law in establishing a corporation, and some formal defect exists merely as to the mode of complying with the law, and the body is dealt with and acts as a corporation, that it is regarded as one *de facto*: 4 Am. & Eng. Ency. of Law, 197, 198, and notes; Parsons on Partnership, 544. Here one indispensable element of a corporation is lacking, *viz.*, succession, or, as sometimes called, perpetuity, which had not been extended by the government, and which of course in this state could only be granted for a term of years. We think that the association was an unincorporated joint-stock company, which is governed by the general principles of law applicable to partnerships: Parsons on Partnership, 541. But we do not see that appellant's position as to the validity of the deed to Gunn, etc., would be any stronger should we regard the association originally organized as a *de facto* corporation, and as such not dissolved or terminated by mere non-user: Morawetz on Corporations, secs. 51-54, 230, 239, 662; *Waterbury & Co. v. Laredo*, 60 Tex. 519; *Pearce v. Madison etc. R. R. Co.*, 21 How. 441; Morawetz on Corporations, secs. 635-637.

We think that the association of 1883 was, as found by the court below, a new company, and not merely a continuation of the old, with all of its rights and property: Parsons on Partnership, 406 et seq., 408, 546, 547; Story on Partnership, secs. 125, 213; Parsons on Partnership, 384; Morawetz on Corporations, sec. 239. While it may be true that the mere transfer of his stock by a member of a joint-stock company to an outsider would not work a dissolution or termination of the concern (Parsons on Partnership, 545, 546), still a great deal more than that was done, as we have attempted to

show. Besides, the old association had been allowed to expire by disuse. There remained nothing to do but to wind up the concern and divide the assets among the stockholders, there being no debts. From 1875 to 1883 it had ceased to hold meetings, elect officers, or to operate its business: *Parsons on Partnership*, 347. It had thus, to all practical purposes, abandoned its venture and fallen into a state of "innocuous desuetude,"—if not entirely "collapsed," as contended by appellee: *Lea v. Hernandez*, 10 Tex. 138. If it were in fact still a living body at the reorganization of 1883, it presents a remarkable case of suspended animation. This new association could not, as we think, legally take charge of and dispose of the land of the old company, especially without the consent of all of the stockholders, and to pay the debts incurred solely by the new concern: *Parsons on Partnership*, 168, 408.

The associations being distinct, the last could no more seize, appropriate, and dispose of the property of the first than B could in law assume to transfer that belonging to A. Professor Parsons, speaking of the effect of changes in the condition of a partnership, says *inter alia*: "One firm succeeds the other, and if the latter firm chooses to adopt the name of the earlier, this does not make them one and the same. And if one member of the old firm comes into the new firm, this does not make them one; and if all remain but one, or all remain and a new one is added, here also is a new firm, which can no more have the effects of the old nor be liable for the debts without a new and distinct agreement between all parties interested therein than if the change were entire and the name also: *Parsons on Partnership*, 408. In the present instance, the change was almost entire in every respect, and a great many members were admitted into the new association who were not members of the old, and a considerable number of the stockholders of the original company refused to join or participate in the new one organized in 1883. We conclude that the deed made by the officers of the new association to Gunn was null and void, and conferred no right or title upon him that he could convey to plaintiff in the land in controversy. Being absolutely void, it could not be ratified so as to pass title, had there been any ratification in fact, which there was not: *Moody's Heirs v. Moeller*, 72 Tex. 635; 13 Am. St. Rep. 839; *Franco-Tezan Land Co. v. Laigle*, 59 Tex. 339. See also, as to the conveyance of the interest of those officers, *Alexander v. Kennedy*, 19 Tex. 493; 70 Am. Dec. 358.

3. From what has been already said in reference to the deed to Gunn, it is clear that if the original association had actual possession of the premises that appellant was not connected therewith in such way as would enable him to maintain the action, even if defendant should be regarded as a mere trespasser. But it does not appear that he was a trespasser against the rights of the original association or stockholders thereof to whom the land belongs. He claims, and his testimony without contradiction shows, that he is holding the land for himself and the other stockholders of the original association. The new association is not shown to have had possession of this land, and after 1875 the original association occupied it only by inclosure. The defendant took possession in 1880, apparently without any lawful authority except that of being a stockholder. Gunn conveyed the land to plaintiff in 1886. It may be conceded that prior actual possession with which the plaintiff is connected, or which he has himself, is sufficient against a mere trespasser on the premises: *Caplen v. Drew*, 54 Tex. 496; but here both of these facts are wanting. The defendant's right to the possession of the premises is, to say the least, as strong as that of the plaintiff or Gunn, under whom the plaintiff claims. If neither of them have any right to the possession, then the legal sequence is, that the decision must be rendered for the defendant, as was done; nor would this conclusion be altered by defendant having asked for affirmative relief in addition to the plea of not guilty. This did not have the effect of relieving the plaintiff of the burden of showing a right to recover in himself.

4. The court below held that if plaintiff had acquired (which it did not decide) the right or title to the land of such of the stockholders of both the old and new associations as had consented to the conveyance of the land by the latter association to Gunn, then the original parties to the suit would only be tenants in common of the land, and that consequently plaintiff could not maintain the suit under the facts of the case. The first proposition is presumably based on the hypothesis that in such case the defendant would in effect derive whatever right or title he might have through the members of the original, not the subsequent, association. In neither proposition do we find any error of law. The first association was, as we have endeavored to prove, *functus officio*, and practically at an end. There were no creditors with claims upon its assets, etc. The land had been conveyed to this association as

firm or partnership property, to be used by it as such for the benefit of the concern, — to constitute its fair-grounds. Speaking of a partnership as a body, and of its relation to its members, creditors, and property, the same learned author we have quoted above says: "After this relation is exhausted, or after this work is done, there is a resolution of this body into its elements. . . . If the joint debts have been so paid in full, there are no joint creditors, and they who were partners own the remaining property, free from all encumbrance except each other's rights, and they share this remainder between them": *Parsons on Partnership*, 347. If land is conveyed to partners in fact as a partnership, . . . they will hold as tenants in common: *Parsons on Partnership*, 375.

The court below does not assign its reasons for deciding that the plaintiff could not maintain the suit against defendant as a co-tenant, but this was evidently because the court did not regard the claim or possession of the defendant as adverse to the original association, or any one claiming under it, nor as amounting to an ouster of the old association or of its stockholders, or of the plaintiff if he can be regarded as claiming any interest in the land under the original association or any of its members. We have seen that the court was justified by the record in these conclusions. While one tenant in common may sue another in case of actual ouster, he cannot when the possession of his co-tenant is not adverse to his own interest, nor to the title under which they must both claim if at all. To authorize the suit for recovery of possession (not partition), the ouster and adverse holding must be of such character as would put the statute of limitation in motion: *Portis v. Hill*, 3 Tex. 273; *Alexander v. Kennedy*, 19 Tex. 493; 70 Am. Dec. 358.

5. There were no facts to support the plea of estoppel against the defendant. He did not mislead nor deceive the plaintiff nor his vendor, nor induce them to buy the land.

We think the judgment ought to be affirmed, but without prejudice to the right, if any, of the members of the new association who were also stockholders in the old, or to the interest, if any, of the plaintiff in the land acquired from any of the members of the original company under the deed to Gunn, or to the rights of the other stockholders of that company, etc. The suit not being for settlement nor partition, and the proper parties not being before the court, we are not called upon to and do not decide these questions.

Affirmed.

CORPORATION DE FACTO — WHEN EXISTS. — A corporation *de facto* exists when, from some irregularity or defect in its organization, a corporation *de jure* is not created: *Snider v. Troy*, 91 Ala. 224; 24 Am. St. Rep. 887, and note; note to *Hildreth v. McIntire*, 19 Am. Dec. 67.

JOINT-STOCK COMPANIES — WHAT ARE. — See *Oliver's Estate*, 136 Pa. St. 43; 20 Am. St. Rep. 894, and note.

TRESPASS TO TRY TITLE — BURDEN ON WHOM. — The plaintiff has the burden in such an action, and in order to recover he must have the legal title at the commencement of the suit: *Bank of South Carolina v. S. C. M. Co.*, 3 Strob. 190; 49 Am. Dec. 640, and note. A plaintiff in ejectment must show a better title than the defendant: *L'Engle v. Reed*, 27 Fla. 345; *Grayson v. Schlamm*, 126 Ind. 142; *O'Brien v. Bugbee*, 46 Kan. 1.

CO-TENANCY — ADVERSE POSSESSION OF ONE CO-TENANT — EFFECT OF. — A tenant in common can only make his possession adverse to his co-tenants by actual ouster: *Page v. Branch*, 97 N. C. 97; 2 Am. St. Rep. 281, and note; *Morrill v. Morrill*, 20 Or. 96; 23 Am. St. Rep. 95; note to *Warfield v. Lindell*, 90 Am. Dec. 454.

AMERICAN SALT COMPANY v. HEIDENHEIMER.

[80 TEXAS, 344.]

CORPORATION DE FACTO, WHAT IS. — A corporation *de facto* is a corporation organized and operated under color of the law, but not legally constituted. The statute of Texas requires that at least two of the subscribers to the charter of an intended incorporation must be citizens of the state. Where, therefore, articles of incorporation filed in the office of the secretary of state are signed by persons none of whom are citizens of the state, the corporation is not legally constituted, but until the pretended charter is vacated it is a corporation *de facto*.

STOCKHOLDERS OF DE FACTO CORPORATION NOT LIABLE TO ITS CREDITORS AS PARTNERS. — Persons who, after the organization of a corporation has been apparently effected, and the secretary of state has returned its charter, with a certificate that it has been filed in his office as the statute requires, become stockholders in such corporation, under the belief that a legal corporation exists, and without any notice of any vice in the charter of such corporation, cannot be held liable as partners for its debts.

STATUTE OF LIMITATIONS, ACTION AGAINST STOCKHOLDERS OF CORPORATION FOR WITHDRAWING ITS ASSETS WITHOUT PAYING ITS DEBTS BARRED BY. — A cause of action set up in a petition, that the defendants, as stockholders of a corporation, had withdrawn its assets, leaving the debt due to the plaintiff unpaid, is one that is barred by the statute of limitations after five years.

JUDGMENT BY DEFAULT AGAINST DEFENDANT FAILING TO ANSWER RENDERED IN SUPREME COURT. — Where one of several defendants in the court below fails to answer the plaintiff's petition, which states a good cause of action, and the others having made successful defenses, judgment is rendered in favor of all the defendants, the supreme court will reverse the judgment as to the one who failed to answer, and will render judgment against him.

Wool and Walker, for the appellant.

M. E. Kleberg, and Davidson and Minor, for the appellees.

GAINES, A. J. On August 18, 1881, there was filed in the office of the secretary of state what purported to be a charter of a private corporation to be known as the Texas Salt Company. It was in all respects regular upon its face. It was signed by three corporators, two of whom appeared in the body of the instrument to be residents of the state of Texas. In point of fact, neither of the three were citizens of the state at the time the pretended charter was filed; and because of that fact, on the twenty-first day of November, 1889, it was adjudged void, at the suit of the state, by the district court of Galveston County. In March, 1882, appellees Heidenheimer, Kempner, and Marx each bought stock in the alleged corporation, but neither were ever directors or officers in it. Neither of them participated in any manner in the organization of the company. In May, 1884, they sold their stock. But during the time that they were stockholders, a contract was entered into between that company and the appellant corporation, by which the latter agreed to sell to the former fifty thousand sacks of salt at a stipulated price per sack, delivered within twelve months in car-load lots, at intervals to suit the trade. All salt delivered up to July, 1884, was paid for. But during that and the succeeding month, salt was delivered under the contract for which no payment was ever made. There was also a debt contracted by the Texas Salt Company for the rent of a house leased to it by appellant.

On the eleventh day of March, 1886, the appellant brought this suit against appellees Heidenheimer, Marx, and Kempner, and against one Ranger, whom the evidence shows to have been one of the original stockholders of the pretended corporation. The petition alleged that the defendants were partners doing business under the name of the Texas Salt Company, and sought a recovery against each of them as such for the salt which had been delivered under the contract above mentioned, and for which payment had not been made, and also for the rent alleged to be due. On the sixteenth day of January, 1889, an amended petition was filed, which was not materially different from the original petition. It contains a denial that the Texas Salt Company was legally incorporated, — an allegation not contained in the original petition. The defendants Heidenheimer, Marx, and Kempner, having an-

swered, alleging that the company was a corporation, and that therefore they were not liable for its debts. On the thirteenth day of March, 1889, the plaintiff filed a supplemental petition, alleging, among other things, that in 1884, the defendants withdrew the capital stock of the company and divided it among themselves, and that they thereby rendered themselves liable to pay the plaintiff's debt. To this petition all the defendants except Ranger pleaded the statute of limitations. The case was tried by the judge without a jury, and judgment was given for the defendants.

The determination of two questions is decisive of the case upon this appeal: 1. Were the defendants liable as partners? and 2. Was the cause of action, if it be one, set up in the supplemental petition barred by the statute of limitations?

We are of the opinion that the evidence shows that the Texas Salt Company was not legally incorporated, but that until the pretended charter was vacated it was a corporation *de facto*. The vice in the articles of incorporation filed in the office of the secretary of state was that neither of the persons who signed the charter were citizens of the state of Texas: Rev. Stats., art. 568. The article cited provides that at least two of the subscribers to the charter of the intended incorporation must be citizens of the state; but it does not prescribe the officer by whom nor the means by which the fact of citizenship is to be determined. It would seem, however, that it is the duty of the secretary of state to inquire into the question, and that if he finds no two of the subscribers are citizens of the state, he should decline to file the charter. It would also seem that if he decides wrongfully, and declines to file a legal charter, he may be compelled to do so by a writ of *mandamus*. But the matter which concerns us in this case is, that the statute does not require that the citizenship of the subscribers to the charter shall appear upon the face of the instrument. The pretended charter in this case alleges that two of the subscribers are residents of the state of Texas, but does not allege that either of them is a citizen. Such being the facts, we think there can be no question that we have a case of a corporation *de facto*, — that is to say, not a corporation legally constituted, but a corporation organized and operated under color of the law. In addition to this, there was evidence which authorized, if it does not compel, the court to conclude as a matter of fact that the defendants Heidenheimer, Marx, and Kempner became stockholders in the alleged corporation

without any notice of the vice in its charter. The question, then, we have is: Can they be held liable as partners solely upon the ground that the corporation was not legally organized? Upon the question there is an apparent conflict in the decisions of the courts; but in our opinion, the weight of authority is in favor of the proposition that they cannot be held liable.

Persons who combine their capital for the prosecuting of a business venture are liable as partners for the debts of the concern, unless they be protected from such liability by an incorporation under the law. Hence there is force in the argument that in order to shield themselves from responsibility they must show that the association has been legally incorporated. But on the other hand, where there is a law which authorizes the creation of a corporation for a particular purpose, where the charter is required to be prepared and signed by the incorporators and filed with an officer of the state, and where all this has been done, and the officer has received it and returned it with a certificate that it has been filed in his office as the statute required he should do, and when the business has been carried on without action on the part of the state to annul the pretended franchise, it would seem but reasonable and just that as between the association of the stockholders and third persons dealing with it, it should be held a corporation, although there may have been some illegality or irregularity in the manner of its organization. It is well settled that persons who deal with such a corporation *de facto*, and become indebted to it, are estopped from denying its existence as a legal corporation; and there is authority for holding that its creditors are also estopped from claiming against the stockholders as partners: *Snider's Sons Co. v. Troy*, 91 Ala. 224; 24 Am. St. Rep. 887, and authorities cited. Whether that rule ought to be applied in a case in which the incorporators have knowingly and intentionally violated the law in procuring a charter under a general law we need not decide; but we are clearly of the opinion that it is not a proper rule to be applied in a case like the present, in which it appears that stockholders who are sought to be held liable as partners bought their stock after the organization had been effected, and under the belief that a legal corporation existed. That under such circumstances the stockholders of the alleged corporation cannot be held liable as partners is substantially held in the following cases: *Merchants' etc. Bank v. Stone*, 38 Mich.

779; *Fay v. Noble*, 7 Cush. 188; *Planters' etc. Bank v. Padgett*, 69 Ga. 164; *Humphreys v. Mooney*, 5 Col. 282; *Central etc. Bank v. Walker*, 66 N. Y. 424; *Gartside Coal Co. v. Maxwell*, 22 Fed. Rep. 197; *Methodist etc. Church v. Pickett*, 19 N. Y. 482.

In several jurisdictions it has been held that a compliance with the requirement in a general incorporation law that the charter or article of incorporation shall be filed in the office of the secretary of state or other office is a condition precedent to the establishment of a corporation *de jure*, and that without such compliance the association is without color of authority, and cannot be treated as a corporation *de facto*. Most of the cases relied upon in support of the proposition that the share-holders in a *de facto* corporation are liable as partners for its debts are cases of this character. *Bigelow v. Gregory*, 73 Ill. 197, arose under a statute of Wisconsin which expressly prohibited the proposed corporation from doing business until the articles of association had been published in two newspapers, and a certificate filed in the office of the secretary of state. These acts had not been done when the indebtedness was contracted. In *Abbott v. Omaha Smelting Co.*, 4 Neb. 416, the defendants were held liable because they had never filed their articles of incorporation with the county clerk, as the law required. The opinion seems to concede that if that act had been done there would have been a *de facto* corporation, and the defendants could not have been treated as partners. *Ferris v. Thaw*, 72 Mo. 446, and *Coleman v. Coleman*, 78 Ind. 344, were similar cases. *Garnett v. Richardson*, 35 Ark. 144, merely holds that for debts contracted before the company's articles are filed, the members are liable as partners. In *Ridenour v. Mayo*, 40 Ohio St. 9, the defendants were authorized by law to carry on a savings bank in which the depositors were stockholders, but carried on instead under the corporate name a general banking business upon wholly different principles. They were held liable as partners. Not one of these decisions is inconsistent with the views we have expressed upon the law as applicable to the case before us, and when properly considered, we hardly think that they are authority for the proposition that the share-holders in a *de facto* corporation are responsible for its debts.

It follows that in our opinion the appellees cannot be held liable as partners. We come then to the question whether the cause of action, if any, set up in the supplemental petition

is barred by limitation. We are of the opinion that that inquiry must be resolved in the affirmative. In the original and amended petitions, the plaintiff sought to recover upon the ground that there was no incorporation. In the supplemental petition, a judgment was asked upon the ground that if there was a corporation, the defendants had withdrawn its assets, leaving the plaintiff's debt unpaid. In the former, the plaintiff says, in substance: You are liable, because, being partners, you promised to pay; in the latter, it says: You are liable, not because you promised to pay, but because you appropriated the property to which I had a right to look for payment. The former is an action upon a contract, and the latter an action for a tort. They are not only distinct, but inconsistent causes of action, in the sense that if one exists, the other does not. We do not mean to intimate that they cannot be joined in the same suit; we think that under our system they can. But this does not alter the fact that they are distinct causes of action, and dependent in part upon a wholly different state of facts. The supplemental petition, in so far as it sought a recovery for an abstraction of the assets of the alleged corporation, set up a new cause of action, and not having been filed until more than five years from the time the alleged liability accrued was barred by limitation.

This renders it unnecessary to inquire whether the facts alleged in the supplemental petition in reference to the withdrawal of the assets of the pretended corporation were such as authorized a direct action in favor of a creditor against the defendants or not.

Ranger was served with a citation issued to Galveston County, but did not answer. The amended petition he was cited to answer shows a cause of action, and judgment should have been rendered against him by default. For the failure of the court to do so, the judgment will be reversed as to him, and here rendered in favor of appellant against him. As to the other appellees, the judgment is affirmed. The appellant will recover its costs against Ranger. The other appellees will recover their costs against appellant.

Affirmed, save as to Ranger. Reversed and rendered as to Ranger.

CORPORATION DE FACTO—WHEN EXISTS.—A body is regarded as a *de facto* corporation only where there has been an effort to conform to the forms of law in its organization, and some formal defect exists as to the mode of complying with the law: *Allen v. Long*, 80 Tex. 231; *ante*, p. 725, and note.

CORPORATIONS DE FACTO—LIABILITY OF STOCKHOLDERS AS PARTNERS.—A creditor who has contracted with a *de facto* corporation in its corporate capacity, and within the scope of its assumed powers, cannot deny its corporate existence and charge its stockholders with its debt: *Saider v. Troy*, 91 Ala. 224; 24 Am. St. Rep. 887, and note; extended note to *Freeland v. McCutcheon*, 43 Am. Dec. 694.

LIMITATION OF ACTIONS TO ENFORCE STOCKHOLDERS' LIABILITY: See *Hymms v. Coleman*, 82 Cal. 650; 16 Am. St. Rep. 178, and note.

GULF, COLORADO, AND SANTA FE R'Y CO. v. REED.

[90 TEXAS, 382.]

MASTER NOT LIABLE IN EXEMPLARY DAMAGES FOR TORT OF SERVANT UNLESS AUTHORIZED OR RATIFIED.—A master is not liable in exemplary or punitive damages for the tort of his servant, unless he authorized it, or, with knowledge of the wrong and its nature, adopted or ratified it so as to make it his act in fact.

RATIFICATION BY RAILWAY COMPANY OF ITS SERVANT'S TORT, WHAT NECESSARY TO CONSTITUTE.—To prove the ratification by a railway company of the wrongful act of its servant, the adoption or confirmation of such act must be shown to be by some chief officer, vice-principal, or *alter ego* of the company, who must be proved to possess under and for the company sufficient authority and discretion to act and speak for the company as if it were bodily present in the persons of its managers, speaking and acting for itself and on its own responsibility.

LOCAL AGENT OF RAILWAY COMPANY NOT PRESUMED TO HAVE AUTHORITY TO RATIFY TORT OF ITS SERVANT.—A local agent or subordinate employee of a railway company is not presumed to have authority to ratify the torts of its servants, in the absence of proof to that effect.

RAILWAY COMPANY LIABLE FOR ACTUAL, BUT NOT EXEMPLARY, DAMAGES, WHEN.—Where the yard-master of a railway company throws carcasses of dead cattle into a bayou near the plaintiff's residence, thereby polluting the water and atmosphere, the railway company will be liable to the plaintiff for the actual damages sustained by him by reason of the wrongful act of its yard-master, but not for exemplary damages, in the absence of proof of authority or ratification.

CRIME OF SERVANT PRESUMED NOT TO BE AUTHORIZED OR SANCTIONED BY MASTER.—Where the act of a servant amounts to a crime, or is of a willful and malicious character, the law *prima facie* presumes that the perpetrator was not authorized before nor sanctioned afterward by the master, and this presumption continues until repelled by proof to the contrary.

J. W. Terry, for the plaintiff in error.

Burke and Kirlicks, and Henry F. Fisher, for the defendant in error.

MARR, J. There was a verdict and judgment in the court below against the plaintiff in error for fifty dollars as actual, and four hundred and fifty dollars as exemplary, damages.

We concur with counsel for the defendant in error, that "all of the assignments relied on and urged by the plaintiff in error contend for but the one proposition, to wit, 'that the verdict and judgment for exemplary damages is unauthorized.'"

The defendant in error, Charles Reed, plaintiff in the court below, in September, 1889, was living in Harris County with his family, ten persons in all, on seven acres of land near the city of Houston, which land bordered on and took in part of Bray's Bayou, a small creek or bayou in said county. Immediately on the water's edge of said bayou, and on the seven acres owned by Charles Reed, was a spring. It supplied his family and his stock with its clear waters; he had no well or cistern on his place. The track and roadway of the Gulf, Colorado, and Sante Fé railway crossed Bray's Bayou at a point near and above the land of Charles Reed, and south of same. The natural flow of the water of Bray's Bayou was from the point where the railway crossed it toward Charles Reed's seven acres and spring. The Gulf, Colorado, and Santa Fé Railway Company started out to make Bray's Bayou, at the point where its bridge and track crossed it, and within a stone's throw of Reed's house (forty-four feet), a "dumping" place for dead hogs and cattle; established and used by servants of the defendant on two or three occasions without the consent of the plaintiff, Reed, but against his wishes. He brought this action against the defendant to recover both actual and exemplary damages for the acts of its servants in "dumping" dead cattle in said bayou on two different occasions in the month of September, 1889, whereby it is alleged the water of the stream and of the spring used by the plaintiff and his family was polluted and rendered unfit for use, in consequence of which he and his family became sick, etc., and his horses died from drinking the foul waters, etc. He also charged that the acts of the servant or servants were committed willfully and maliciously, and by order of the defendant, and that he had notified the defendant of the acts of its servants, and requested it to remove the carrion from the bayou, but this it refused and failed to do, but in every particular encouraged the servants in the acts, and fully confirmed and ratified the same. The fact is not disputed on this appeal that an agent of the company, one Potter, the yard-master of the defendant at Houston, did put the dead cattle into the bayou, as alleged by plaintiff, and as above stated. Assuming, after verdict, the truth of plaintiff's evidence, it appears that

in September, 1889, that Potter, as servant of defendant, placed the carcasses of dead cattle in the bayou. On the first occasion he put a dead cow in there, near plaintiff's residence, and within two or three days thereafter three more dead cows. When the first of these animals was put into the stream, plaintiff went to the office of the defendant in Houston, and made complaint of the fact to a person there who was pointed out to him as defendant's agent, and who "acted as if he had control and management of the office and those in it. There were three other men there besides him. I thought he was the same man who paid me the ten dollars in the office when the hogs had been thrown there before." Elsewhere: "I do not know the name of the man," etc. (testimony of plaintiff). Plaintiff requested this party to have the cow removed, but this was never done. In fact, none of the cattle were removed, but were allowed to decay where deposited. He replied to plaintiff: "It might be the section boss put them there." These cattle had died or been killed in transportation on defendant's road. Over a year before the acts complained of in this suit had occurred, a servant of defendant had thrown a car-load of dead hogs in the same place, for which, on demand, the company voluntarily paid plaintiff damages in the sum of ten dollars, but this act of depositing the lately deceased swine was not performed by Potter, but by another servant of the company. He had but recently began working for the company at Houston when he placed the cattle in Bray's Bayou, though he had been working for the defendant at other places.

We believe that the foregoing statement is a fair summary of all the facts bearing upon the point at issue, and in view of which we feel constrained to hold that the verdict and judgment rendered in the court below against the plaintiff in error for exemplary damages is manifestly against the law and the evidence. The rule of law that the master is not liable in exemplary or punitive damages for the torts of the servant unless he authorized the same, or with knowledge of the wrong and its nature has adopted or ratified it so as to make it his act in fact, is too well settled in this state to be now questioned. In case of railway corporations the rule is, that to amount to ratification, the adoption or confirmation of the wrongful act of the servant must be shown to be by some chief officer, vice-principal, or *alter ego* (as he is sometimes called) of the company, who must be proved to possess under and for the company sufficient authority and discretion to act and speak for the

company as if it were, figuratively speaking, bodily present in the persons of its managers, speaking and acting for itself and on its own responsibility. No such authority is possessed by a local agent or subordinate employee as a general rule, or at least we are not authorized to presume the existence of the authority upon their part, in the absence of proof to that effect: *International etc. R'y Co. v. McDonald*, 75 Tex. 46; *Dillingham v. Russell*, 73 Tex. 47; 15 Am. St. Rep. 753; *International etc. R. R. Co. v. Garcia*, 70 Tex. 207.

Neither the yard-master who committed the torts nor the agent to whom the complaint of the last trespass was made by the plaintiff is shown to have been a chief officer, vice-principal, or independent representative of the company in the matter complained of; consequently, under the law, the corporation cannot be held liable for punitive damages on account of the willful act of the one in committing the tort, or for the conduct of the other in adopting or approving it, even if his conduct can be said to have that effect.

For the acts of Potter, presumably done in the line of his employment, or in the interest of and on behalf of the company (as there is no issue raised on that point), the defendant is liable only for actual damages, even conceding that his conduct in the premises was both willful and wrongful, since the company neither authorized nor commanded him, so far as the proof shows, to commit the trespass, nor ratified his illegal acts afterward.

There is no evidence that the company was informed of the trespass made the basis of the present action, nor is this issue presented, except so far as it may be by the information given to the local agent at Houston, to which we have already referred. It was not proved, if such was the fact, that the office of the company at Houston is its principal office, and whether that would have altered the case we do not decide. Mere silence, unless required to speak and act, or even satisfaction at the commission of the wrong, unaccompanied by some act of adoption, will not amount to ratification: *Cooley on Torts*, 127. Nor will the retention of the guilty servant of itself render the principal liable for the original tort on the ground of ratification, — certainly in the absence of proof of his incompetency, or that his continual employment by the company has reference to and is connected with "the acts of the servant in the matter about which complaint is made": *International*

etc. R'y Co. v. McDonald, 75 Tex. 41; *Dillingham v. Russell*, 73 Tex. 47; 15 Am. St. Rep. 753.

In this case, however, it may be observed that the petition does not make, by direct allegations, the retention of Potter in the service of the company a ground of ratification. The counsel for defendant in error contend that it was incumbent, in the court below, on the plaintiff in error to have shown (if such was the case) that the employees of the company we have referred to were merely its servants, — not chief officers or vice-principals. On the contrary, if these employees were not in fact proved to be mere servants, we think nevertheless that the burden was on the plaintiff to allege and establish by proof such state of facts as would warrant the recovery of exemplary damages: *International etc. R. R. Co. v. Garcia*, 70 Tex. 207; *St. Louis etc. R'y Co. v. Burns*, 71 Tex. 479. Where the act of a servant amounts to a crime, or is of a willful and malicious character, the law *prima facie* presumes that the perpetrator of the wrong was not authorized before nor sanctioned afterward by the principal, and this presumption continues until repelled by proof to the contrary: *Dillingham v. Russell*, 73 Tex. 47; 15 Am. St. Rep. 753.

Article 390 of our Revised Penal Code declares that "if any person shall in any wise pollute or obstruct any watercourse, lake, pond, or marsh, etc., or continue such obstruction or pollution so as to render the same unwholesome or offensive to the inhabitants of the county or neighborhood thereabout, he shall be fined in a sum not exceeding five hundred dollars." Comment is unnecessary. The servant, under the facts affirmed by the verdict, would be liable both civilly and criminally, but the company only civilly, and for actual damages, etc. If the jury had returned their verdict for the five hundred dollars found by them for the plaintiff simply and solely as actual damages, then, assuming the sufficiency of the petition, a very different case would be presented to us for consideration. The charge of the court below was a concise presentation of the measure of actual damages, and is not complained of, and is without error, yet the court did not call the attention of the jury to such matters or items as may constitute actual damages without proof of the expenditure of money by the plaintiff. This the court was not bound to do without a request to that effect, and then only to the extent which the allegations of the petition would justify. The jury very likely understood that the law only allowed actual damages for the

amount of money expended and the destruction of plaintiff's property (if any), etc. If it be true, as contended by counsel for the defendant in error in their brief (and there is much evidence supporting the contention), "that the remains" of the dead animals which the servant had unlawfully deposited near plaintiff's spring and residence "were permitted to fester and putrify; that the water became polluted, the atmosphere foul; that Reed's family got sick from the poisonous odors, his horses died, his family had to be almost hermetically sealed up in their home, or breathe the pestilential fumes with which the surrounding atmosphere was laden," and that all these things resulted from the acts or culpable omission of defendant's servants, then while it would seem that all of these things might, under appropriate allegations and proof, be taken into consideration by the jury as elements of actual damages, as well as money he expended or property destroyed (if any), in assessing the amount thereof sustained by the plaintiff (Field on Damages, secs. 742, 747-749; *Cooper v. Randall*, 53 Ill. 24; 2 Wood on Nuisances, c. 13; *Vedder v. Vedder*, 1 Denio, 257; 2 Wood on Nuisances, secs. 579, 586; 2 Wood's Railway Law, 1878, 1879; *Jung v. Neras*, 71 Tex. 396), still these circumstances of aggravation, resulting alone from the acts of the servants, could not have the effect to enlarge the well-settled rules of law (which we have attempted to indicate), so as to render the company liable for exemplary damages, when otherwise under the facts of the case it would not be liable for that character of damages.

Because the verdict of the jury is not supported by the evidence as to exemplary damages, and is against the charge of the court on that subject, we conclude that the judgment ought to be reversed and the cause remanded.

MASTER AND SERVANT — LIABILITY OF MASTER FOR SERVANTS' TORTS. — A railway company is liable for the torts of its employees, both on its trains and around its office: *Savannah etc. R. R. Co. v. Bryan*, 86 Ga. 312; 22 Am. St. Rep. 464, and note; extended note to *Kansas City etc. R. R. Co. v. Kelly*, 59 Am. Rep. 601; extended note to *Ware v. Barataria etc. Canal Co.*, 35 Am. Dec. 192, in which the liability of the master for the servant's torts are discussed. A railroad company is not liable for a tort of its superintendent, committed without its authority: *Henry v. Pittsburg etc. R'y Co.*, 139 Pa. St. 289.

DAMAGES — EXEMPLARY, WHEN ALLOWED AGAINST MASTER. — Punitive damages will not be allowed against a master for the tort of a servant, unless he expressly authorized it or approved it: *Hagan v. Providence etc. R. R. Co.*, 3 R. I. 88; 62 Am. Dec. 377, and extended note.

MASTER AND SERVANT — RATIFICATION OF SERVANT'S TORTS BY MASTER — WHAT CONSTITUTES. — A mere retention in service by a master will not amount to a ratification of a servant's tort; *Dillingham v. Russell*, 73 Tex. 47; 15 Am. St. Rep. 753, and note; *Williams v. Pullman etc. Co.*, 40 La. Ann. 87; 8 Am. St. Rep. 512, and note.

MASTER AND SERVANT — LIABILITY OF MASTER FOR CRIMES OF SERVANT. — A master is not responsible criminally for the act of his servant or agent, unless he has in some way participated in or countenanced it; *Commonwealth v. Stevens*, 153 Mass. 421; 25 Am. St. Rep. 647, and note; *Commonwealth v. Nichols*, 10 Met. 259; 43 Am. Dec. 432, and note; *Candiff v. Louisville etc. Ry Co.*, 42 La. Ann. 477.

DELZ v. WINFREE.

[80 TEXAS, 400.]

CONSPIRACY, TEST TO DETERMINE WHETHER ACTION LIES FOR. — At common law, a conspiracy cannot be made the subject of a civil action, although damages result, unless something is done which without the conspiracy would give a right of action. The true test as to whether such action will lie is whether or not the act accomplished after the conspiracy has been formed is itself actionable.

RIGHT TO REFUSE TO HAVE BUSINESS RELATIONS WITH ANOTHER LIMITED TO INDIVIDUAL ACTION. — The absolute right of a person to refuse to have business relations with any person whomsoever, whether the refusal is based upon reason or is the result of whim, caprice, prejudice, or malice, must be limited to the individual action of the party who asserts the right. It is not equally true that one person may from such motives influence another person to do the same thing.

CONSPIRACY TO INDUCE THIRD PERSON NOT TO SELL TO PLAINTIFF, ACTIONABLE WHEN. — A petition filed by a butcher, which, in addition to charging that the defendants, who were cattle dealers, conspired together to refuse to sell cattle to him, charges that they also induced third persons not to sell to him, it not appearing that their interference with his business was to serve any legitimate purpose of their own, but that it was done wantonly and maliciously, causing, as was intended, pecuniary injury to him, states a cause of action, and a demurrer thereto should not be sustained.

L. E. Trezevant, for the plaintiff in error.

Forster Ross, for the defendants in error.

HENRY, A. J. This suit was brought to recover damages by Bernard Delz against the members of the firm of Winfree, Norman, and Pearson, and the members of the firm of Borden and Borden.

Plaintiff's petition stated his cause of action as follows: That he was pursuing the occupation of a butcher in the city of Galveston, and was making and would have continued to make large profits and gains in the business but for the griev-

ances committed by the defendants as alleged; that in the prosecution of his business he had opened and was conducting two butcher-shops in said city for the sale of different kinds of fresh meat; that it became necessary that he should buy live animals suitable and fit to be slaughtered for the purposes of his business as a butcher, and for a long time before and at the time of the commission by defendants of the grievances herein stated, he was engaged in the business of buying live animals suitable and fit to be slaughtered and sold as fresh butcher's meat, and which he slaughtered and sold as such at his said two butcher-shops; that the persons from whom plaintiff bought said live animals were engaged in the business of transporting to Galveston and receiving for sale live animals suitable and fit to be slaughtered and sold as butcher's meat, and in selling such live animals for such purposes to whomsoever would buy; that long before and at the time of the commission by defendants of the wrongs herein charged, the defendants were engaged, and are now engaged, as separate firms in said business of receiving and selling live animals, for the purposes aforesaid, on Galveston Island, and were and are now the only persons or association of persons so engaged in said business in Galveston County; that without justifiable cause and unlawfully, and with the malicious intent to molest, obstruct, hinder, and prevent plaintiff from carrying on his said business, and making a living thereby, the said Winfree, Norman, and Pearson, on or about the first day of July, 1889, and at divers times thereafter, and until the filing of this petition, did combine, confederate, and conspire with said firm of Borden and Borden, and with one Gerhard Barbour, a butcher, not to sell to petitioner for cash any live animals or slaughtered meat for the purposes or for the prosecution of his said business; that the said Winfree, Norman, and Pearson solicited and procured from said Borden and Borden an agreement not to sell any live animals to plaintiff, and did so induce said Gerhard Barbour and others, to plaintiff unknown, not to sell to him slaughtered meat for the purposes of his said business.

The petition charges that in pursuance of said combination, each of said firms subsequently refused to sell plaintiff live animals when he applied to them to purchase them at their own price in money which he then offered to pay them, and that said Gerhard Barbour likewise refused to sell him slaughtered meat; that by reason of such unlawful combination and

malicious interference with his business, plaintiff was compelled to close up and discontinue his business in one of his two shops, and in order to continue it at the other one of his shops, he has been and is now forced to buy slaughtered meat at a great disadvantage, and at higher prices than he would have had to pay but for the aforesaid unlawful combination and malicious interference with and hindrance of his business by defendants.

The court sustained a general demurrer to the petition.

Appellant's assignment of error brings before us the correctness of this ruling.

The appellee contends that at common law "a conspiracy cannot be made the subject of a civil action, although damages result, unless something is done which without the conspiracy would give a right of action. In other words, an act which if done by one alone constitutes no ground of action, cannot be made the ground of such action by alleging it to have been done by and through a conspiracy of several; that the true test as to whether such action will lie is whether or not the act accomplished after the conspiracy has been formed is itself actionable."

We think that the proposition here asserted is well sustained by the authorities, and the first question to be determined is, whether, on account of the acts charged by plaintiff against the defendants, he would have had a cause of action against either of them if no conspiracy had been charged.

If he would have had, then he may maintain his action for a conspiracy. If he could not have sustained a separate action against either of the defendants on account of the matters complained of, the additional charge of a conspiracy will not give it: *Cooley on Torts*, 125; *Kimball v. Harman*, 84 Md. 407; 6 Am. Rep. 340; *Lavery v. Vanarsdale*, 65 Pa. St. 507.

The appellee also asserts the following proposition, which may be conceded to be correct: "A person has an absolute right to refuse to have business relations with any person whomsoever, whether the refusal is based upon reason or is the result of whim, caprice, prejudice, or malice, and there is no law which forces a man to part with his title to his property."

The privilege here asserted must be limited, however, to the individual action of the party who asserts the right. It is not equally true that one person may from such motives influence another person to do the same thing. If, without such motive,

the cause of one person's interference with the property or privileges of another is to serve some legitimate right or interest of his own, he may do acts himself, or cause other persons to do them, that injuriously affect a third party, so long as no definite legal right of such third party is violated.

In the case of *Walker v. Cronin*, 107 Mass. 562, it was recognized to be a general principle, that "in all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case, to be repaired in damages. The intentional causing of such loss to another, without justifiable cause, and with the malicious purpose to inflict it, is of itself a wrong.

"There are, indeed, many authorities which appear to hold that to constitute an actionable wrong there must be a violation of some definite legal right of the plaintiff. But those are cases, for the most part at least, where the defendants were themselves acting in the lawful exercise of some distinct right, which furnished the defense of a justifiable cause for their acts, except so far as they were in violation of a superior right in another.

"Thus every one has an equal right to employ workmen in his business or service; and if, by the exercise of this right in such manner as he may see fit, persons are induced to leave their employment elsewhere, no wrong is done to him whose employment they leave, unless a contract exists by which such other person has a legal right to the further continuance of their services. If such a contract exists, one who knowingly and intentionally procures it to be violated may be held liable for the wrong, although he did it for the purpose of promoting his own business.

"Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition; but he has a right to be free from a malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing."

Plaintiff's petition goes further than to charge that each of the defendants refused to sell to him. It charges that they

not only did that, but that they induced a third person to refuse to sell to him. It does not appear from the petition that their interference with the business of plaintiff was done to serve some legitimate purpose of their own, but that it was done wantonly and maliciously, and that it caused, as they intended it should, pecuniary loss to him.

We think the petition stated a cause of action, and that the demurrer should have been overruled.

The judgment is reversed, and the cause is remanded.

CONSPIRACY. — An action lies for a conspiracy to injure a person in his business: *Wildes v. McKee*, 111 Pa. St. 335; 56 Am. Rep. 271; *Mapstrick v. Range*, 9 Neb. 390; 31 Am. Rep. 415; *Kimball v. Harman*, 34 Md. 407; 6 Am. Rep. 340; extended note to *State v. Stewart*, 59 Am. Rep. 720; *Van Horn v. Van Horn*, 52 N. J. L. 284.

WESTERN UNION TELEGRAPH CO. v. HOFFMAN.

[80 TEXAS, 420.]

CONTRIBUTORY NEGLIGENCE OF PARENT BARS HIS RECOVERY, BUT NOT HIS MINOR CHILD'S, WHEN. — Where, through the negligence of a telegraph company in failing to deliver a message sent to a physician informing him that a boy fifteen years old had dislocated his elbow, and asking him to come on the first train, the physician, who could have reset and saved the arm, is prevented from coming to the boy's aid, and the boy's parent sends no further message nor seeks any other surgical aid for nine days, when, in the physician's opinion, it would have been dangerous to attempt to reset the dislocation, and the arm in consequence becomes stiff and permanently disabled, in an action against the company to recover for the injury, the contributory negligence of the parent, in failing to send another message or to secure assistance from some other physician, will bar a recovery by him; but such contributory negligence on the part of the parent cannot be interposed as a defense to bar a recovery for the benefit of the minor. The contributory negligence that precludes the minor's recovery must be that of himself, and whether it existed or not is a question for the jury to decide, taking into consideration the age and situation of the minor, and all other circumstances connected with the case.

Stewart and Stewart, for the appellant.

W. P. McComb, for the appellees.

HENRY, A. J. This suit was brought by August Hoffman for himself, and as next friend of his minor son Kelly Hoffman, to recover damages caused by the neglect of the defendant to deliver the following telegraphic message: —

"SPRING, TEXAS, August 6, 1889.

"To DOCTOR DUTTON, Conroe, Texas.

"Come on first train; Kelly Hoffman broke his arm.

[Signed]

"HENRY HUGHES."

The father of Kelly was away from home when his son was hurt, and the message was sent by direction of his wife, the mother of the boy. The message was received at Conroe, where Dr. Dutton lived, on the day that it was sent, but was not delivered to him until he inquired for it of the agent of the defendant on the 15th of the same month. No excuse for the failure to deliver it was offered.

Kelly was fifteen years old when he was hurt. His injury was a dislocation of his arm at the elbow. Dr. Dutton was the physician of plaintiff's family, and testified that if the dispatch had been delivered to him he would have responded to it within twenty-four hours, and would have reset and saved the arm. The testimony shows that the same thing could have been done at any time within a few days after the injury occurred.

No other dispatch was sent, and no further effort was made to procure the aid of Dr. Dutton or any other physician. Nothing seems to have been done to remedy the dislocation, and the result followed that when the wound healed it left the arm stiff and permanently disabled.

On the fifteenth day of August, or nine days after the injury occurred, Dr. Dutton happened to be passing by the residence of the parents of the youth, and was seen and called in. He then examined the arm, but did not undertake to treat it. He testified that it was then too late to reset it, and that the attempt to do so would have been attended with great danger to the patient. He was corroborated in this particular by the evidence of another physician who saw the patient at the same time that he did; but his opinion was disputed by several physicians who testified as experts, and who stated that the dislocation, in their opinion, could have been remedied at the date of the visit of Dr. Dutton, and that it should have been then attempted.

The defendant pleaded contributory negligence.

Upon the verdict of a jury, judgment was rendered in favor of the father for \$900, and in favor of his son for \$4,125. No question was made with reference to the joinder of the two causes of action.

The charges and other rulings of the court, except upon its motion for a new trial, were favorable to the defendant.

The only question that we deem it necessary to consider is whether the defense of contributory negligence was made out. Upon that issue, we think it sufficient to say, with regard to the contention that the arm could have been reset and cured nine days after it was injured, when Dr. Dutton first saw the patient, that the evidence was conflicting, and it was a question for the jury to consider and decide.

Upon the other question, viz., the failure to send another message to Dr. Dutton or procure other medical assistance, which would naturally have suggested itself to any person of ordinary prudence and intelligence, we think the evidence clearly shows that the permanent character of the injury must be attributed to a want of proper care upon the part of the parents of the injured boy. The evidence shows that proper care upon their part, after it became evident that Dr. Dutton from some cause would not respond to the message to him, would have either procured his attendance or the assistance of another physician, and we find in the record no evidence whatever, proper to be considered, to excuse the want of diligence of the parents.

Because of such contributory negligence, no verdict should have been rendered in favor of the father of the minor for his own benefit, and the one so rendered should have been set aside upon defendant's motion: *Gulf etc. R'y Co. v. Coon*, 69 Tex. 730; *Texas etc. R. R. Co. v. Young*, 60 Tex. 201; *Beach on Contributory Negligence*, 137.

But the negligence of his parents cannot be interposed as a defense to bar a recovery for the benefit of the minor: *Williams v. Texas etc. R. R. Co.*, 60 Tex. 205; *Galveston etc. R. R. Co. v. Moore*, 59 Tex. 64; 46 Am. Rep. 265; *Beach on Contributory Negligence*, secs. 43, 44. The contributory negligence that precludes him from a recovery must be that of the minor himself, and whether it existed or not was a question for the jury to decide, taking into their consideration the age and situation of the minor, and all other circumstances connected with the case: *Evansich v. Gulf etc. R'y Co.*, 57 Tex. 126; 44 Am. Rep. 586; *Gulf etc. R'y Co. v. McWhirter*, 77 Tex. 356; 19 Am. St. Rep. 755; *Cook v. Houston Direct Nav. Co.*, 76 Tex. 353; 18 Am. St. Rep. 52.

In the case of *Plumly v. Birge*, 124 Mass. 57, 26 Am. Rep. 645, which was an action of tort by a minor thirteen years old

for an injury done him by a dog which he caused to bite him by striking him, the supreme court of Massachusetts said: "It was necessary that the plaintiff, though a boy, should prove that he was in the exercise of due care. But due care on his part did not require the judgment and thoughtfulness which would be expected of an adult under the same circumstances. It is that degree of care which could reasonably be expected from a boy of his age and capacity. If the court had ruled that if the plaintiff was old enough to know that striking the dog would be likely to incite him to bite he could not recover, it would have been erroneous. This is not the true test. It entirely disregards the thoughtlessness and heedlessness natural to boyhood. The plaintiff may have been old enough to know, if he stopped to reflect, that striking a dog would be likely to provoke him to bite, and yet in striking him he may have been acting as a boy of his age would ordinarily act under the same circumstances."

In the case before us, it may be well doubted whether a child fifteen years old had sufficient experience or discretion to correctly estimate the consequences of the failure to have his injured arm properly treated, especially when his mental and physical condition caused by the injury are considered. The evidence shows that his wound required the treatment of a skillful physician. The employment of one involved an obligation, by a contract express or implied, to pay for his services. If it be conceded that the circumstances were such that he could have procured the required attention at the expense of his father, it still cannot be maintained that his failure to do so was such negligence as should be held to preclude his recovery, and absolve the defendant from liability for its undisputed negligence.

We think the judgment should be affirmed as to the minor, Kelly Hoffman, and reversed and the cause be remanded as to the individual judgment in favor of August Hoffman, and it will be so ordered.

PARENT AND CHILD—EFFECT OF PARENTS' CONTRIBUTORY NEGLIGENCE ON ACTION FOR INJURY TO CHILD. — A parent's contributory negligence may bar his right to recover for injuries to a minor child, but in an action by the child such negligence will not be imputed to it: *Westbrook v. Mobile etc. R. R. Co.*, 66 Miss. 560; 14 Am. St. Rep. 587, and extended note; *Erie City etc. R'y Co. v. Schuster*, 113 Pa. St. 412; 57 Am. Rep. 471, and extended note; *Wymore v. Mahaska County*, 78 Iowa, 396; 16 Am. St. Rep. 449; *Winters v. Kansas City etc. R'y Co.*, 99 Mo. 509; 17 Am. St. Rep. 591; *Shippey v. Au Sable*, 85 Mich. 280; *Westerfield v. Levi*, 43 La. Ann. 63. *Contra*, see *Wall v. Dry Dock etc. R. R. Co.*, 119 N. Y. 147.

CITY OF SAN ANTONIO v. FRENCH.

[80 TEXAS, 575.]

LANDLORD AND TENANT — RULE THAT TENANT HOLDING OVER IS DEEMED TO HOLD UNDER TERMS OF PRIOR LEASE NOT APPLICABLE TO CITY.

— A tenant who holds over after the end of his term, with the consent of his landlord, is deemed to be in possession upon the terms of his prior lease, upon the ground that the parties are presumed to have tacitly renewed the former agreement. But this rule is not applicable where the tenant is a municipal corporation, because the law will not imply a contract as against it. Such corporation is, however, bound to pay for the premises for the time its officers have occupied them.

Oscar Bergstrom, and McLeary and King, for the appellant.

William Aubrey and C. Upson, for the appellee.

GAINES, A. J. This was an action brought by the appellee to recover of the city of San Antonio the rent of certain rooms for the term of one year, beginning on the first day of May, 1885. The facts which gave rise to the litigation are as follows: On the sixth day of May, 1879, the city council of the city of San Antonio passed an ordinance authorizing the mayor of the city to enter into contract with the plaintiff for the lease of certain rooms in a house known as the French Building, for the use of the city for the term of one year, at a rental of ninety dollars per month, payable in quarterly installments. In pursuance of the authority so conferred, the mayor on behalf of the city, and the plaintiff for himself and as agent of his wife, executed a written contract for the lease of the rooms from May 1, 1879, to April 30, 1880, upon the terms recited in the ordinance. The contract as executed also contains a stipulation that the city should, at the expiration of the lease, have the right of renewal. The city took possession of the rooms, and its officers continued to occupy and use them until the month of May, 1885, and during the greater part, if not the whole, of that month. The rent appears to have been paid for the occupancy of the premises for the year ending April 30, 1885, as well as for previous years. About the 1st of June, 1885, in pursuance of the formal action of its council, the city vacated the rooms, and some time thereafter the plaintiff took possession; but at the time he did so he gave the city written notice that he took possession merely for the purpose of preserving the property, and not to interfere with its use under the lease, which he claimed to be in force until April 30, 1886. Subsequently the plaintiff let

some of the rooms, and received as rent on the same during the alleged term the sum of \$315. Upon the trial he recovered a judgment for the full year's rent, less this sum. There was no conflict in the evidence, and the foregoing statement suggests the meritorious question presented by the appeal.

The appellee contends that by reason of the city's holding over after April 30, 1885, it became bound as a tenant for the next ensuing year, subject to the terms of the original contract. That a natural person, under the circumstances, would have been so bound, and therefore liable to pay the rent for the entire year, we think is not to be denied. We understand the doctrine in the courts of this country to be, that if the tenant hold over after the termination of his lease, the landlord has his election to dispossess him, or to treat him as a tenant for the next succeeding year under the provisions of the expired lease, so far as they are compatible with a yearly holding.

The English doctrine is stated as follows by an eminent text-writer: "But though at the end of the lease if the tenant holds over he holds as a tenant at sufferance, still if, when the period for the payment of the rent becomes due, he pay the landlord the rent reserved by the expired lease, he becomes a tenant from year to year, the payment of such rent by him and the receipt of it by his landlord being considered indicative of their mutual intention to create a yearly tenancy. . . . And it is very remarkable that the yearly tenancy thus raised is governed, not by the simple rules which govern yearly tenancies in the absence of express stipulation, but by the provisions of the expired lease, so far as they are consistent and compatible with a yearly holding": *Smith on Landlord and Tenant*, 219.

Chancellor Kent lays down the doctrine as follows: "If the tenant holds over by consent given either expressly or constructively after the determination of a lease for years, it is held to be evidence of a new contract without any definite period, and is construed to be a tenancy from year to year."

In *Dorrill v. Stephens*, 4 McCord, 59, the supreme court of South Carolina say: "When a tenant holds over after the expiration of the lease with the express or tacit consent of the landlord, the law implies an agreement on part of the landlord that he will let, and on the part of the tenant that he will hold, on the terms of the expired lease, thus substituting the con-

tract with respect to the terms which is past for that which is to come, not merely in form, but in its effect and substance."

In *Diller v. Roberts*, 13 Serg. & R. 63, 15 Am. Dec. 578, Chief Justice Tighlman says: "The general rule undoubtedly is, that the law implied an agreement that he [the former lessee] should pay the same rent at the same time which he agreed to pay the first year."

In *Ellis v. Paige*, 1 Pick. 43, the supreme court of Massachusetts say: "If there be a lease for a year, and the tenant continues in possession afterward, the law implies a tacit renovation of the contract."

In *Schuyler v. Smith*, 51 N. Y. 309, 10 Am. Rep. 609, it is said: "The law is too well settled to be disputed, that when a tenant holds over after the expiration of his term the law will imply an agreement to hold for a year upon terms of the prior lease."

With a view to the determination of the main question in the case, we have deemed it important to ascertain the underlying principle upon which the doctrine we have had under discussion is based. For this purpose, we have quoted freely from the authorities, and we think these quotations sufficient to show that the tenant who holds over with the consent of his landlord is deemed to be in possession upon the terms of his prior lease, upon the ground that the parties are presumed to have tacitly renewed the former agreement.

This brings us to the question, Will the law imply a contract as against a municipal corporation? Let us state the question in a different form: Will a contract be implied on part of a city by reason of the acts of its officers, there being no formal agreement by the city council or by its authority, upon which body alone the power of contracting is conferred by the charter? We think the question must be answered in the negative. There are important reasons why the powers granted to a municipal corporation should be exercised only by the agencies designated by the legislature for that purpose. The officers upon whom the authority to make contracts for the city are conferred should be presumed to be chosen with reference to the duties to be performed and to act in conformity to the law which confers the power. When the authority is conferred upon a body of officers such as a city council, they must act together in formal meeting, so as to secure proper discussion and deliberation upon the measures which are brought before them. To imply a contract from the informal action of indi-

vidual members of the body or other officers of the corporation would be not only to recognize an authority not conferred by law, and to thwart the will of the legislature, but also to break down a safeguard erected for the protection of the city and its inhabitants against the inconsiderate action of its officers. It may be that when a municipal corporation has received the benefit of a contract which it had the power to make, but which was not legally entered into, it may be compelled to do justice and to pay the consideration, or at least to pay for what it has received. In such cases, it is said that the law will imply a contract. But we think it contrary to sound principles to imply a contract in any other case. As said by Mr. Justice Field in the case of *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453: "Where the contract is executory, the corporation cannot be held bound unless the contract is made in pursuance of the provisions of its charter; but where the contract is executed, and the corporation has enjoyed the benefit of the consideration, an implied *assumpsit* arises against it."

In *City of Bryan v. Page*, 51 Tex. 534, 32 Am. Rep. 637, this court decided that a contract could not be implied as against the city to pay counsel for a legal opinion contracted for by the mayor, although the council had availed themselves of the services rendered by the plaintiffs under the agreement with the mayor. In the opinion the court announce broadly the doctrine that a contract will not be implied on part of a municipal corporation. The case is a very strong one, and it is certainly authority for holding that a contract cannot be implied for a renewal of the lease in this case merely by reason of the officers having held possession after the termination of the lease. We think, however, the city is bound to pay for the rooms for the time its officers occupied them.

What we have said we think sufficient to dispose of the case, and we deem it unnecessary to consider the numerous assignments of error presented in the brief for the appellant.

The judgment is reversed and the cause remanded.

MUNICIPAL CORPORATIONS — LIABILITY ON IMPLIED CONTRACTS. — When a city charter provides for the employment of counsel in a certain manner, and that manner is not followed, the attorneys cannot recover for their services on an implied contract of employment with the city: *Bryan v. Page*, 51 Tex. 532; 32 Am. Rep. 637. The same doctrine is sustained in *McDonald v. Mayor*, 68 N. Y. 23; 23 Am. Rep. 144; *Zottman v. San Francisco*, 20 Cal. 96; 81 Am. Dec. 96, and extended note.

BOONE v. KNOX.

[80 TEXAS, 642.]

TENANT IN COMMON CANNOT RECOVER FOR HIS CO-TENANTS NOT PARTIES.

—Where, in an action of trespass to try title to land, the defendant establishes title to a part interest therein, the plaintiff is not entitled, as against the defendant, to recover for the benefit of other tenants in common who are not parties to the action.

WARRANTOR LIABLE FOR INTEREST WHEN. — Where rents are set off against improvements, the warrantor must pay interest for the time the rents were recovered.**PARTITION, ALL TENANTS IN COMMON SHOULD BE MADE PARTIES TO SUIT FOR.** — Before partition of land is ordered, all the tenants in common should be brought before the court.

TRESPASS to try title. The opinion states the case.

H. C. Ferguson, and Walton, Hill, and Walton, for the plaintiff in error.

Stark and Stark, for the defendants in error.

GAINES, A. J. This was an action of trespass to try title to a tract of land patented to the heirs of G. D. Spottswood. The plaintiffs claimed title as the heirs of the original patentees. There were several defendants, all of whom either disclaimed or declined to answer except J. W. Knox. He pleaded not guilty and the statute of limitations. He also answered specially that he bought the land in controversy from A. Harrell and W. Harrell, who conveyed it to him by deed with covenants of general warranty, and that they derived their title through a like deed from E. Boone. He prayed that the Harrells and Boone be vouched in to defend the title, and that in the event the plaintiffs recovered, he have a recovery over against them on their respective warranties.

The court found that the plaintiffs were the heirs of the original grantee of the certificate by virtue of which the land was patented, but that all of them were barred by limitation except three, of whom two were each entitled to an undivided one-twentieth interest in the land sued for, and the third to one seventieth. It was also found that there were five other persons who were together entitled to one seventieth of the land. The defendant Knox was found to have title against the other heirs by limitation. It was adjudged that the plaintiffs who were not barred should recover in their own right their respective interests as hereinbefore stated, and that they should also recover for their co-tenants who were not barred

by limitation and were not parties the one seventieth undivided interest of which they had been found to be the owners. The several interests recovered amounted to nine seventieths of the land. The defendant Knox recovered of the Harrells and of Boone, on their respective covenants of warranty, a like proportion of the purchase-money paid for the land.

The defendant Boone alone brings this writ of error, and complains that the court erred in adjudging a recovery in favor of the plaintiffs for the benefit of co-tenants who were not parties to the suit. The action of the court in the particular complained of is clearly erroneous. It is undoubtedly true that in this state one tenant in common may recover the whole land as against a stranger, and that the recovery will inure to the benefit of his co-tenants. The rule prevails in most of our states, but is not universal. In Massachusetts, Missouri, and Pennsylvania, it seems to be held that a tenant in common can recover only to the extent of his own interest, even as against a wrong-doer: *Dewey v. Brown*, 2 Pick. 387; *Gray v. Givens*, 26 Mo. 303; *Dawson v. Mills*, 32 Pa. St. 302. The supreme court of Massachusetts in *Dewey v. Brown*, 2 Pick. 387, say: "The tenant being in possession ought not to be disturbed except by those who have the right, *non constat* that the other co-heirs are not as willing that the tenant should occupy the land as that the demandant should." The true principle would seem, however, to be that each tenant in common is entitled to the enjoyment of the entire premises, undisturbed by any one except his co-tenants, and therefore it is proper that he should have the right to dispossess a stranger to the title. Because the adverse occupant is dispossessed, and because the possession of one tenant in common is ordinarily deemed the possession of all, one who is not a party to the suit receives the benefit of a recovery by another. It does not follow, however, that for the reason that he indirectly receives the benefit of the recovery, it is in any sense his suit, or that as between him and the defendant either of them is estopped by the judgment: *Stovall v. Carmichael*, 52 Tex. 383.

Besides, in this case, the defendant Knox showed title to an undivided interest of six sevenths of the land, and is not a mere trespasser. The plaintiffs who recovered had the right to have the extent of their own interest adjudicated as between them and the defendant Knox, and to be admitted to the possession of the land; but upon what principle they were ad-

judged to recover for the benefit of others not parties to the suit we are at a loss to know.

The effect of the judgment is, that there is a recovery of one-seventieth of the land more than ought to have been recovered; and a corresponding excess in the recovery of the defendant Knox against his co-defendant Boone on the latter's warranty.

The error is prejudicial, therefore, to the plaintiff in error, and requires a reversal of the judgment.

The defendant Knox, having been charged with rents as against his improvements, was entitled to interest on the part of the purchase-money recovered by him on the warranty: *Brown v. Hearon*, 66 Tex. 64.

It would seem that a proper adjustment of this controversy requires that all the tenants in common in the land be brought before the court. In partition the defendant Knox's improvements might be set apart to him without detriment to his co-tenants. If this were done, then Knox would not lose the benefit of his use of the land, and would not be entitled to the interest on the purchase-money received by his warrantors. If this cannot be done, and if he should again show himself a possessor in good faith, he should be secured the value of the interest in his improvements lost by him, according to the rule laid down in the statute (Rev. Stats., arts. 4813 et seq.), and will be entitled to interest on his recovery against his co-defendants.

The judgment is reversed and the cause remanded.

CO-TENANCY — PARTIES TO SUITS. — One tenant in common may maintain an action against a trespasser for recovery of the whole property, and the judgment will inure to the benefit of all: *Newman v. Bank of California*, 60 Cal. 268; 13 Am. St. Rep. 169, and note; *Gentry v. Gentry*, 1 Sneed, 97; 60 Am. Dec. 187, and note. All tenants in common may unite for the recovery of common property, or one may sue for his undivided portion: *Bullion Mining Co. v. Orzenus etc. Mining Co.*, 2 Nev. 168; 90 Am. Dec. 528, and note; *Hillhouse v. Mix*, 1 Root, 246; 1 Am. Dec. 41; *Voss v. King*, 33 W. Va. 236.

PARTITION, as to who may compel, see extended note to *Nichols v. Nichols*, 67 Am. Dec. 703.

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KIRKWOOD v. DOMNAU.

[80 TEXAS, 645.]

HOMESTEAD OF DIVORCED PARTIES, POWER OF COURT IN DECREE TO PROTECT WIFE IN ITS USE. — A court decreeing a divorce has power to make such a decree with regard to the use of the homestead of the parties as will properly protect the wife in its use, and may also provide for its protection and use by the minor children of the marriage, subject only to the prohibiting clause of the statute that the decree shall not have the effect in form or in substance of divesting the husband of his title to one half, where the homestead is community property. But the husband's interest in the property can be so charged only in the divorce suit, and as a part of the decree of divorce.

PARTITION OF HOMESTEAD AFTER DIVORCE MAY BE MADE WHEN. — Where a husband and wife owning a homestead are divorced, without any mention or disposition of their property, they become tenants in common of the property, subject to all the rules and regulations of strangers bearing to each other that relation; and the property may be partitioned, although the wife has a homestead interest in it, which is protected from forced sale. And if it is incapable of being equitably partitioned without being sold, it may be sold, and the homestead exemption will then attach to the wife's half of the money.

COSTS OF PARTITION SALE OF HOMESTEAD NOT PAYABLE OUT OF PROCEEDS OF SALE WHEN. — Where a partition sale is made of property in which a divorced husband and wife are tenants in common, and in which the wife has a homestead interest, it is error to decree that her portion of the costs of the partition suit shall be paid out of the proceeds of the sale. But a personal judgment may be rendered against her for such costs.

Herring and Kelly, for the plaintiffs in error.

S. L. Samuels, for the defendants in error.

HENRY, J. This suit was brought by the defendants in error for partition of a house and lot in the city of Waco. Bettie Kirkwood was once the wife of G. W. Allen. The property in controversy was purchased during the existence of her marriage with Allen, and was their community property. They had some minor children, and resided upon the property as their homestead. In the year 1882 they were divorced, without any mention or disposition of their property. The divorced wife continued to reside upon the property, and maintain their minor children without assistance from her former husband. In the year 1885, Allen, the divorced husband, executed a deed of trust upon the property to secure a debt that he owed the defendants in error, under which the property was sold and conveyed to defendants in error. The divorced wife was still residing upon the property at the date of these

transactions. Shortly after the execution of the deed of trust, she married Kirkwood, and continued to reside on the land. It was agreed that the land could not be equitably partitioned, and that if the court found in favor of the plaintiffs, that it should be sold without the intervention of commissioners for the purpose of partition. The cause was tried without a jury, and a decree was rendered directing a sale of the land, and a division of the proceeds of the sale equally between plaintiffs and the defendant Bettie Kirkwood, "and that each party pay the costs by him incurred, to be deducted from the share in said proceeds belonging to such party."

It is contended for plaintiffs in error that the homestead privilege of the wife survived the divorce, and consequently that the deed of trust executed by the former husband, and all of the proceedings thereunder, were prohibited by our constitution and laws.

It is provided by our statutes that "the court pronouncing a decree of divorce from the bonds of matrimony shall also decree and order a division of the estate of the parties in such a way as to the court shall seem just and right, having due regard to the rights of each party and their children, if any; provided, however, that nothing herein contained shall be construed to compel either party to divest him or herself of the title to real estate": Rev. Stats., art. 2864.

Allen and his wife, while their marriage subsisted, each owned an undivided one-half interest in the property in controversy. It was in the power of the court that decreed the divorce under the statute not only to make such a decree with regard to the use of the homestead as would properly protect the wife in its use, but it might also have provided for its protection and use by the minor children of the marriage, subject only to the prohibiting clause that the decree should not have the effect, in form or in substance, of divesting the husband of his title to one half. We think, however, that the husband's interest in the property can be so charged only in the divorce suit, and as a part of the decree of divorce. It not having been then done, the former husband and wife stood toward each other after the decree of divorce as if they had never borne that relation to each other. They then owned the property as tenants in common, and subject to all the rules and regulations of strangers bearing to each other that relation: *Whetstone v. Coffey*, 48 Tex. 269.

Bettie Kirkwood having a family had a homestead interest

in the one undivided half of the property that was owned by her, and that interest was protected from forced sale. But she had no more than any other tenant in common the right to hold or occupy her co-tenant's share, or to prevent its being partitioned. As it could not be partitioned without being sold, it was not within the meaning of the provision of the constitution that forbids a forced sale of a homestead. To so hold would require that the constitution should be construed to forbid a partition of land owned by tenants in common when it is resided upon by one of the co-tenants who happens to be entitled to the homestead exemption, and it is incapable of being equitably partitioned without being sold: *Clements v. Lucy*, 51 Tex. 150. In such a case, the exempt interest in the land must be converted into money, and the exemption will then attach to that.

The constitution exempts the homestead from forced sale, "except for the purchase-money thereof, or a part of such purchase-money, the taxes due thereon, or for work and material used in constructing improvements thereon." If, when the land is sold for partition, the costs of the suit are deducted from the purchase-money, it is equivalent to a forced sale for the payment of the costs of a partition suit, a purpose not found among those enumerated in the constitution. The fact that the costs are an incident to the suit for partition does not necessarily control the question. They may be adjudged and collected as a personal demand, and as costs usually are.

We do not think that there was any error in the proceedings except in directing that the costs adjudged against the defendants be deducted from Bettie Kirkwood's share of the money proceeding from the sale of the land. We think that there was error in that part of the decree, and it will therefore be reversed and here rendered, corresponding in all respects with the decree appealed from, except that the costs adjudged against the defendants shall be a personal charge against them, and not against the proceeds of the sale of the land.

Reversed and rendered.

HOMESTEAD — RIGHT OF DIVORCED WIFE IN. — A divorced wife cannot assert homestead rights in the homestead of her husband, but she may, as the guardian of their minor children, enforce their rights in the father's homestead: *Hall v. Fields*, 81 Tex. 552.

HENRIETTA NATIONAL BANK v. STATE NATIONAL BANK.

[FORTHAN, 645.]

PROMISE TO ACCEPT CHECK, WHEN SUFFICIENTLY DEFINITE TO SUPPORT ACTION FOR REFUSAL TO PAY IT. — Where the cashier of a bank telegraphs to another bank, "Will you pay E. F. and W. S. Ikard's check for eighteen hundred dollars on presentation?" and the cashier of the latter bank, on the same day, telegraphs in reply, "Yes; will pay the Ikard check," and the first-named bank thereupon discounts the check, the promise contained in the reply is sufficiently definite to support an action brought by the bank that received it against the bank that made it, for its failure or refusal to pay the check.

ACCEPTANCE, DIFFERENCE BETWEEN ACTION UPON, AND ONE UPON PROMISE TO ACCEPT. — The difference between an action upon an acceptance and one upon a promise to accept is, that the former may be brought by the holder of the bill, while the latter can be maintained only by the party to whom the promise is made.

ACCIDENTAL ERASURE ON CHECK NOT EXCUSE FOR REFUSAL TO PAY, WHEN. — Where, on a check drawn for eighteen hundred dollars, and having the figures \$1,800 in the margin, a line appears drawn along the top of the word "hundred," and it is shown that the check was intended to be drawn for eighteen hundred dollars, the apparent erasure will not excuse a refusal by the drawee to pay the check, although it may justify a delay for a reasonable time to make inquiry.

A. K. Swan, for the appellant.

Hunter, Stewart, and Dunklin, for the appellee.

GAINES, A. J. This suit was brought by the appellee to recover of the Henrietta National Bank and Frank Brown, as its receiver, the amount of a check drawn upon it by E. F. and W. S. Ikard.

On the 22d of July, 1887, E. F. and W. S. Ikard drew a check on the defendant bank in favor of one T. F. West for eighteen hundred dollars. West indorsed and delivered it to one Atkinson, who on the next day presented it to the cashier of the plaintiff bank at Fort Worth, with the request that he cash it. The cashier immediately telegraphed the defendant bank as follows: "Will you pay E. F. and W. S. Ikard's check for eighteen hundred dollars on presentation?" The cashier of the defendant bank, on the same day, replied by telegram: "Yes; will pay the Ikard check." Upon the receipt of this telegram the plaintiff discounted the paper, and the holder transferred it to the bank by indorsement and delivery. The check was immediately sent by mail to the defendant bank, with a request to remit the amount to the plaintiff. The letter reached Henrietta on Sunday, and on Monday before bank-

ing hours the directors of the defendant bank determined to suspend payment, and thereafter its doors were not opened for regular business.

The court having given judgment for the plaintiff for the full amount of the check and interest, and the defendants having appealed, they now complain in effect that the correspondence by telegraph between the two banks did not sufficiently describe the check so as to make the promise of the defendant bank an acceptance. The authority mainly relied upon by appellants' counsel in support of their contention is the case of *Coolidge v. Payson*, 2 Wheat. 66. In that case Chief Justice Marshall says: "Upon a review of the cases which are reported, this court is of opinion that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterward takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise." The doctrine was reaffirmed in the same court in the cases of *Schimmelpennich v. Bayard*, 1 Pet. 234, and *Boyce v. Edwards*, 4 Pet. 111, and has been frequently followed in other courts. Whether, according to the rules laid down, the correspondence should show any more than the amount and character of the bill as to the time of payment we need not here inquire, though it would seem that such a description ought to be sufficient according to the most rigid rule recognized by any court.

The rule, however, applies only to a case in which it is sought to charge the defendant as the acceptor of the bill. Cases may arise in which the party who has promised to accept may be held liable upon the promise, although such promise may not be deemed equivalent to a formal acceptance. A practical difference between an action upon an acceptance and one upon a promise to accept is, that the former may be brought by the holder of the bill, while the latter suit can only be maintained by the party to whom the promise is made. In this case the promise to pay the bill was made directly to the plaintiff, and it was upon the faith of that promise that the check was discounted. The suit is not brought upon an alleged acceptance. The petition states the facts in detail, and seeks a recovery for the breach of the promise to pay the check. In *Boyce v. Edwards*, 4 Pet. 111, the supreme court of the United States says: "The distinction between an action on a bill as an accepted bill and one founded on a breach of promise to accept

seems not to have been adverted to. But the evidence to support the one or the other is materially different. To maintain the former, as has already been shown, the promise must be applied to the particular bill alleged in the declaration to have been accepted. In the latter, the evidence may be of a more general character, and the authority to draw may be collected from circumstances and extended to all bills coming fairly within the scope of the promise." It is clear that the promise in the case before us was sufficiently definite to support an action for a failure or refusal to pay the check described in the petition, if not sufficiently specific to authorize its being treated as an acceptance.

The check offered in evidence contained the character and figures "\$1800.00," but in the body a line appeared to have been drawn through the word "hundred." If the word was intended to be erased, it was a check for eighteen dollars only; if not, it was a check for eighteen hundred dollars. The line appears to have been drawn along the top of the word, rather than through it, and it is not at all clear that even without explanation it should be held to be an erasure. The member of the firm who drew the check testified that it was intended to be a check for eighteen hundred dollars, and that he thought the line was upon the blank when the check was written. The circumstances attending the whole transaction leave no doubt that the purpose was to draw a check for the amount claimed by the plaintiff, and that the line was either upon the paper when the check was drawn and was not discovered, or that it was subsequently placed there by some accident. That it was competent to prove that a mark of this character was not intended as an erasure, especially when the figures in the margin tend to show the same fact, we have no doubt: Sharswood's Starkie on Evidence, 500. The defendants introduced testimony tending to show that a prudent banker would not have paid the check, at least without inquiry as to the intention of the drawers in executing it. This may be true, but, so far as this case is concerned, it is a fact of no importance. It was, nevertheless, the duty of the defendant bank to pay the check. An inquiry would have shown beyond doubt that it was a check for eighteen hundred dollars, and though the apparent erasure may have justified a delay of a reasonable time to make inquiry, it did not justify a final refusal to pay.

We find no error in the judgment, and it is affirmed.

CHECKS — CONTRACT OF ACCEPTANCE — SUFFICIENCY OF. — A promise by a bank to pay a check, drawn by a person to pay for certain articles, communicated by the purchaser to the seller, and relied upon by the seller, will support an action for the breach of a promise to accept: *Nelson v. First Nat. Bank*, 48 Hl. 36; 95 Am. Dec. 510, and notes; note to *Carr v. National etc. Bank*, 9 Am. Rep. 9; note to *Credit Co. v. House Machines Co.*, 1 Am. St. Rep. 134.

NEGOTIABLE INSTRUMENTS — ALTERATION OF. — For a full discussion of this subject, see notes to *Draper v. Wood*, 17 Am. Rep. 97-106, and *Fay v. Smith*, 79 Am. Dec. 754. The addition of the letters "Fr." to the signature of the drawer of the check does not qualify his personal liability: *Barclay v. Paraley*, 110 Pa. St. 12.

TEXAS TRUNK RAILWAY COMPANY v. LEWIS.

[1 TEXAS, 1.]

RECEIVERS — LEVY ON PROPERTY IN CUSTODIA LEGIS NOT AFFECTED BY PRIOR LEVY. — Where, before the dismissal of a suit in which a receiver was appointed, the court assumed the custody of the same property in another suit by appointing another receiver, and confirmed a sale of the property ordered to be made by him, the validity of such sale is not affected by an attachment levied on the property while in the custody of the first receiver, and before the dismissal of the first suit.

RECEIVERS — SALE BY — RIGHTS OF PURCHASER. — As against the purchaser at a valid receiver's sale, no lien can be made to attach to the property which did not rest upon it at the time of the institution of the suit under which the sale was made.

RECEIVERS — PROPERTY UNDER CONTROL OF, NOT SUBJECT TO ATTACHMENT. — After the appointment of a receiver, the property to which the receivership relates is in the custody of the law, even before he qualifies, so as to exempt it from the levy of an attachment; and such levy can confer no right on the attachment creditor or on those claiming under him.

SURVIVAL OF ACTION. — **SUIT PENDING AGAINST RAILWAY COMPANY** when its franchises and other property are sold may be continued against its directors or managers.

INJUNCTION AGAINST EXECUTION SALE OF PROPERTY ATTACHED WHILE IN CUSTODIA LEGIS. — Property in the hands of a receiver is not subject to attachment, and as the sale of property so attached would be a cloud on the title of the purchaser at receiver's sale, he may have the sale under the attachment enjoined.

Fitzhugh and Wozencraft, and Bassett and Muse, for the appellant.

Sawnie Robertson, for the appellees.

STAYTON, C. J. On December 5, 1881, W. F. Thompson instituted an action against the Texas Trunk Railway Company in the district court for Dallas County, to recover a debt due him by the company, and to secure it he sued out and caused to be levied at 12 o'clock, M., of same day a writ of attachment

on the "road, road-bed, track, right of way, chartered rights, franchises, and privileges" of the company.

The claim of Thompson having been transferred to John Wolston and Charles Vidor, a judgment was rendered in their favor against the company on March 15, 1887, with foreclosure of attachment lien, under which an order of sale issued, and this the sheriff was proceeding to execute by a sale of the attached property when this suit was brought by the Texas Trunk Railway Company to enjoin the sale of the property in obedience to the suit.

On November 5, 1881, W. K. Snow and others brought a suit against the railway company in the district court for Kaufman County, to enforce claims for labor and material alleged to have been furnished by them, to secure which they asserted liens and sought the appointment of a receiver.

Before noon on December 5, 1881, the district court for Kaufman County appointed Thomas M. Simpson receiver of the property of the company, but he had not qualified or taken possession of the property at the time the attachment sued out by Thompson was levied, though he subsequently did.

Some time during the year 1880 the railway company had borrowed money to construct its road, and had issued bonds therefor, secured by mortgage on the property levied upon under the attachment sued out by Thompson, which were duly recorded in the counties of Dallas and Kaufman as early as June 2, 1880.

This mortgage seems to have covered all the property seized under attachment, and to have provided that in default of payment of interest as it fell due, the right of the mortgagee to enforce it for the entire principal and interest due should exist, and the entire sum secured by the mortgage be deemed due. Default was made on interest due May 1, 1882, and subsequently, and thereupon the mortgagee elected to declare the principal on the bonds to be due. The mortgage for the benefit of the bond-holders seems to have been made to the International Trust Company as trustee.

At the June term of the district court for Kaufman County for the year 1882, Charles Stepath and other holders of the bonds of the company sought to intervene in the suit filed in that court by Snow and others, but that court refused to permit this to be done, whereupon they filed in that court their petition in intervention, as well as their petition and bond to remove the cause to the circuit court of the United States for

the northern district of Texas, after which they filed in that court a transcript of the proceedings in the cause pending in the district court for Kaufman County.

At the December term of the circuit court of the United States, Snow and others moved that court to remand the cause to the state court, but the motion was overruled, and the cause remained in that court until its January term, 1885, when it was dismissed at the costs of plaintiffs therein.

After that suit was removed to the circuit court of the United States, the district court for Kaufman County seems to have exercised jurisdiction therein; but what disposition, if any, that court ever made of the case does not appear, though the record before us tends to show that the demands of Snow and the other plaintiffs therein may have been settled in proceedings in the circuit court of the United States now to be referred to.

On September 20, 1882, Charles Stepath and others holding bonds of the railway company, for themselves and all other bond-holders, filed a bill in the circuit court of the United States, to which the case before referred to had been removed, praying the foreclosure of mortgage given to secure the bonds held by them, the appointing of a receiver, and the sale of the mortgaged property, and to this suit the International Trust Company, the trustee, made itself a party.

On January 5, 1883, the circuit court of the United States appointed a receiver, who took possession of the property, and operated it until it was sold under a decree of that court entered on January 31, 1883, foreclosing the mortgage to secure bond-holders, but that decree required persons holding liens for labor to be notified to present their claims before the master for adjudication, with a view to their settlement out of the proceeds of sale.

The sale was made as directed by the court, and a report thereof made, which was confirmed, but the decree of confirmation gave protection to claims of such lien-holders as had not theretofore presented their claims and had them acted upon by the master; and under this the inference is, that the claims of Snow and others who instituted the suit in Kaufman County were settled.

After the sale of the railway and other property covered by the mortgage, the purchasers at that sale reorganized the company, and incurred indebtedness to raise funds with which to complete such additional road as was necessary to preserve

the charter, but failed to pay the money thus borrowed when it became due, and therefore judgment was obtained against the company, and the property was again sold to satisfy an execution issued on that judgment.

After that sale, the purchasers thereat reorganized the company, and were conducting its business, when the order of sale now sought to be enjoined was issued and placed in the hands of the sheriff, who was proceeding to execute it when this suit was brought to restrain him.

Neither Thompson nor Wolston and Vidor were made parties to the suit removed to the circuit court of the United States, nor to the suit instituted in that court, and it is conceded that the sale appellees were about to have made in foreclosure of attachment lien adjudged to them would cloud the title of appellant if made.

It is conceded that the mortgage under which foreclosure was had in the circuit court of the United States was to secure legal demands, and that the lien thus given was prior to any that could have been obtained through levy of attachment in the action brought by Thompson; but in the view taken of the case, it becomes unnecessary to inquire what would be the rights of the respective parties growing out of the fact that neither Thompson nor Wolston and Vidor were made parties to the suit in the circuit court of the United States.

In the disposition of the case, it must be assumed that the circuit court of the United States had jurisdiction to render the judgment directing the foreclosure of the mortgage, sale of the property covered by it, and to confirm that sale; and it must further be assumed that the sale thus made passed title to the property as against the railway company, and freed it from the claims of all creditors of that company who did not hold valid liens at the time the suit was instituted under which the sale was made.

It is contended by appellant that at the time Thompson caused a writ of attachment to be levied the property was *in custodia legis*, and therefore the levy inoperative; while, on the other hand, it is contended that the levy of the writ of attachment after the receiver was appointed but before he qualified was not void; and it seems to be contended that if the levy of the writ was inoperative when made, that it became operative when the suit instituted by Snow and others was dismissed in the circuit court of the United States. These propositions will be considered in their inverse order.

After the suit instituted by Snow and others was removed to the circuit court of the United States, it must be assumed that that court had jurisdiction of the cause and full control of the matter of receivership. It could discharge the receiver, appoint another, or discontinue the receivership; and we find that as early as January 5, 1883, that court appointed a receiver other than the one appointed by the district court of Kaufman County, and so far as the record shows, that receivership was continued until confirmation of the sale of the property, which was at some time in June, 1883, but the suit instituted by Snow and others was not finally disposed of until January, 1885.

If there could be a validation of a levy made on property while in custody of the law, by a subsequent dismissal of the suit through which that custody was invoked and granted,—a proposition which we do not wish to be understood to assert,—this would not under the facts sustain appellees' claim; for before the suit in which the receiver was originally appointed was dismissed, the court had assumed the custody of the property, appointed another receiver, and had caused the property to be sold, and had confirmed that sale. The rights of purchasers at that sale had attached, and no lien could be made to attach to the property after their purchase which did not rest upon it at the time the suit was instituted under which they bought.

The other propositions involve the inquiries, When came the property into the custody of the law in the suit in which receivership was sought and granted? and what was the effect of that custody upon the right of a creditor of the railway company to cause it to be seized under a writ of attachment?

Cases may be found in which the proposition has been asserted that the court in which a bill is filed, stating sufficient grounds for and asking the appointment of a receiver, thereby acquires jurisdiction not only of the controversy, but also of the property over which the receivership is asked that will exclude the jurisdiction of all other courts of co-ordinate jurisdiction: *Union Trust Co. v. Rockford etc. R. R. Co.*, 6 Biss. 198; *Gaylord v. Fort Wayne etc. R. R. Co.*, 6 Biss. 286. In these cases it was held that possession of the property was not essential to the right of the court to control it, and that the possession of a receiver appointed by another court prior to the appointment of a receiver by the court in which suit was first filed must give up the possession.

These cases go far toward holding that property over which a receivership is sought is in custody of the law from the time a bill, even defective, is filed presenting a controversy over which the court has jurisdiction, and asking the court to assume custody of the property. There is a manifest propriety, if not necessity, for holding that the court which first acquires jurisdiction over a controversy should maintain it undisturbed by the interference of any other court of co-ordinate jurisdiction, and there is much force in the proposition that its jurisdiction over the *res* to which the controversy relates should not be interfered with in any case in which the custody of the thing is necessary to the full adjustment of the rights of the parties to the controversy; but in this case we are not called upon to decide whether in any case property can be said to be in custody of the law until the court in which the controversy is pending has, in some manner, not only adjudged that a case is presented in which a receiver may be appointed, but has adjudged that one is or will be appointed, or until custody has been actually taken.

Upon these questions there is some conflict of authority. In the case before us, it appears not only that the suit in Kaufman County was instituted before the attachment sued out by Thompson was levied, but that the court had appointed a receiver before that was done, who, however, did not qualify until after the levy was made.

We understand the courts to hold, almost without dissent, that after the appointment of a receiver the property to which the receivership relates is to be deemed in the custody of the law, and this seems to us the correct rule: *Storm v. Waddell*, 2 Sand. Ch. 505; *Van Alstyne v. Cook*, 25 N. Y. 496; *Skinner v. Maxwell*, 68 N. C. 400; *Rutter v. Tallis*, 5 Sand. 610; *Maynard v. Bond*, 67 Mo. 815. In the case last cited, the court, adopting the language of *Steele v. Sturges*, 5 Abb. Pr. 442, said: "The counsel for the sheriff only objects that he was prior in right to the receiver, because his levy was made before the receiver had executed and filed the bond to be given by him. When the court in such cases appoints a receiver, it is because the court has first adjudged that the property is no longer to be under the control of the parties to the suit, but is thenceforth to be and is in the custody of the court. The receiver then becomes merely an agent through whom the court acts, and whether he be forthwith appointed by the court, as in this case, or a reference be made to a master or referee to appoint

one, in either case the effect is the same; the title of the receiver is of the date at which it is ordered that a receiver be appointed. Then the title of the parties to control dies, and then the title of the court and of its agent and officer immediately succeeds. . . . The order of the court either impliedly or expressly takes the title from the parties and rests it in the receiver from that moment. It is enough, however, if it took it from the parties; after that no execution against them could be levied upon it." Some of the expressions here used may not be strictly accurate, but the general rule announced is believed to be correct.

Many other cases to the same effect are cited by elementary writers (Beach on Receivers, 200, 201), and any other rule would in effect be a holding that the existence of a qualified agent was necessary to legal custody of the law or court.

The property on which the attachment was levied, being then in the custody of the law, the levy conferred no right on Thompson or those claiming under him: *Wiswall v. Sampson*, 14 How. 52; *Edwards v. Norton*, 55 Tex. 410; *Hackley v. Swigert*, 5 B. Mon. 86; 41 Am. Dec. 256; *Robinson v. Atlantic etc. R'y Co.*, 66 Pa. St. 160; *Freeman on Executions*, 129; *Drake on Attachment*, 251.

The judgment on which appellees rely was rendered against the Texas Trunk Railway Company after the sale made under decree of the circuit court of the United States, and the suit instituted by Thompson seems to have been prosecuted to final judgment against the company as it existed when that suit was first instituted. The statute contemplates that a suit pending against a railway corporation when its franchise and other property is sold may be continued against the directors or managers of the sold-out company, and with a view to that end, provides that "no suit pending for or against any railway company, at the time that the sale may be made of its road-bed, track, franchise, and chartered privileges, shall abate, but the same shall be continued in the name of the trustees of the sold-out company": Rev. Stats., arts. 4263, 4264.

It is insisted that the judgment rendered in favor of appellees was void, because rendered against a corporation that had ceased to exist, when to give it any validity it should have been prosecuted to final judgment against the trustees of the sold-out company; but in view of the other questions already considered, which we deem conclusive of the rights of the parties, it is not necessary to decide the questions thus presented.

We think it evident that appellees have no right to have the property sold under the decree foreclosing the attachment lien which Thompson sought to acquire while the property was in custody of the law; and as it is conceded that such a sale would cloud appellant's title, the judgment of the court below will be reversed, and judgment here rendered enjoining the sale of the property described in plaintiff's petition under any process issued or to be issued on the judgment rendered in favor of Wolston and Vidor against the Texas Trunk Railway Company by the district court for Dallas County, on March 15, 1887, same described in plaintiff's petition.

It is so ordered.

ATTACHMENT OF PROPERTY IN CUSTODIA LEGIS: See note to *Dunsmoor v. Furstenfeldt*, 22 Am. St. Rep. 336.

RECEIVERS — ATTACHMENT OF PROPERTY UNDER CONTROL OF. — A fund in the hands of a receiver is not attachable, being subject to the order of the court and in custody of the law: *Adams v. Haskell*, 6 Cal. 113; 65 Am. Dec. 491, and note; *Hagedorn v. Bank of Wisconsin*, 1 Pinney, 61; 39 Am. Dec. 275.

RADAM v. CAPITAL MICROBE DESTROYER COMPANY.

[81 TEXAS, 122.]

PLEADINGS — AMENDMENT. — It is not error for the court to grant leave to either party to amend his pleadings after exceptions thereto have been sustained, and after the parties have announced that they are ready for trial, if justice requires such amendment, even though, under the strict construction of a rule of court, the amendment could not be allowed.

EXPERT EVIDENCE IS RESORTED TO for the purpose of informing the court or jury upon subjects not commonly understood, but where the nature of the inquiry appeals to the common understanding and ordinary intelligence of mankind, such evidence is not admissible.

TRADE-MARKS — EXPERT EVIDENCE. — Where, in an action involving the question of an infringement of a trade-mark, the marks, labels, jugs, and packages of the contestants, as presented for sale in the market, are before the court trying the case without a jury, it is within the province of the court to decide what impression would be made by them upon persons of ordinary intelligence and care, and expert evidence is inadmissible to decide the question.

TRADE-MARKS — WORDS "MICROBE KILLER," employed in their ordinary sense, do not constitute a trade-mark, nor does their employment by a manufacturer of a patent medicine give him any proprietary right to their exclusive use.

TRADE-MARKS — INFRINGEMENT. — When there is no intent to defraud, and the labels, trade-mark, and packages are not so similar as to make them, one and all, calculated to deceive purchasers of ordinary caution, there can be no infringement of a trade-mark by one manufacturing goods similar to those for which the trade-mark is claimed.

TRADE-MARK.—HEARSAY EVIDENCE is inadmissible to prove that purchasers have been deceived by an alleged infringement of a trade-mark. If they have been so deceived, they must be called to testify to that fact.

TRADE-MARKS—DAMAGES—EVIDENCE.—In an action for infringement of a trade-mark, evidence of loss by sales of a rival medicine is inadmissible, in the absence of proof of an infringement.

TRADE-MARKS—INFRINGEMENT.—**GENERAL CLAIM FOR DAMAGES** is properly stricken out in an action for infringement of a trade-mark, especially when the proof shows that there was no infringement upon which damages, if specially alleged, could have been predicated.

TRADE-MARKS—INFRINGEMENT.—**EVIDENCE** of the identity of medicines is inadmissible to prove an alleged infringement of trade-mark, unless it is also shown that the similarity in the trade-marks created the reputation of identity in the medicines.

John Dowell, and McLeary and King, for the appellant.

Robertson and Williams, and Sheeks and Sheeks, for the appellees.

COLLARD, J., Section A. This is a suit by William Radam, the appellant, against J. J. Tobin and others, partners doing business under the firm name of the Capital Microbe Destroyer Company. Plaintiff alleged that he had discovered a valuable medicine possessing great curative properties, was manufacturing and selling it at large profits, and had given it the name of "Microbe Killer," and as such, with the trade-mark, labels, devices, and symbols adopted by plaintiff, it had become widely known; that defendants, with intent to defraud plaintiff and to deceive the public, have prepared for sale a medicine inferior to plaintiff's, similar in appearance, and put up in similar packages, with label, devices, and trade-mark in imitation of plaintiff's, which are calculated to deceive and do deceive the public into the belief that the same is the medicine of plaintiff; that defendants are selling their medicine by such counterfeiting, to plaintiff's damage twenty-nine thousand dollars. Prayer for temporary injunction, to be perpetuated on final hearing, and for judgment for alleged damages.

The answer of defendants denied all the allegations of the petition, and set up that Tobin had prepared a medicine for sale which he called the "Microbe Destroyer," a superior and different medicine to that of plaintiff, was selling the same under the firm name of the "Microbe Destroyer Company," but that plaintiff had no right to the exclusive use of the words "microbe killer"; that defendants' trade-mark is not in imitation of plaintiff's, and that there was no infringement as alleged.

On final hearing, the trial judge, who tried the case without a jury, denied the injunction, and gave judgment for defendant.

The first assignment of error is, that "the court erred in permitting defendants to file an amended original answer in the case, and substituting the same for the answers in the case as it was called for trial, and exceptions of plaintiff to the answers had been sustained."

The second assignment is, that "the court erred in overruling the motion of plaintiff to strike out the amended original answer, as the same was not filed in due order of pleading."

The case was regularly called for trial on the seventh day of May, 1888, the day set for trial, when plaintiff's demurrers were presented to the court. A portion of them (we here adopt appellant's statement under these assignments) "were sustained and parts of the answer stricken out. The court then permitted appellees to file an amended original answer to these pleadings, over the objection of appellant."

The motion to strike out the amended answer was upon the following ground: "The same is not filed in the due order of pleading; the case being now called for trial, and the demurrers of plaintiff being sustained to the answers of defendants, the said defendants could be permitted to file only a trial amendment, and not a first original answer." This motion was filed on the 8th of May, and on the same day another motion was filed to strike out that part of the amended answer, denying the alleged partnership, and declaring that Tobin alone was the proprietor of the medicine and trade-mark set up by defendants, and that he alone constituted the Microbe Destroyer Company; and also to strike out that portion of Tobin's answer setting up that the two medical preparations of plaintiff and defendant were composed of different chemicals; that plaintiff's medicine was a well-known mixture, and had been used as a medicine long before plaintiff attempted to appropriate it; that he (defendant) used the words "microbe destroyer" to indicate the real character of his medicine, and not to imitate the name adopted by plaintiff; that he has used in the sale of his medicine jugs of all sizes and colors, because jugs are suited to the medicine and are cheaper than other vessels; that he has never represented to the public or any person that he was manufacturing or selling plaintiff's medicine, or a medicine in imitation of it, or authorized any other person to do so, but on the contrary, has always represented it

to be different in all respects, and that he has carefully avoided any imitation of plaintiff's labels, devices, and methods of selling, and denies that he has encroached upon any privilege plaintiff may have. The grounds relied on in the motion to strike out the foregoing parts of the answer are that they set up new matter not before pleaded. The motion was overruled.

After sustaining certain exceptions to the answer, a trial amendment was the proper technical pleading in order: Rule 27 for District Court. But the rule is not absolute where no injury is done the other side. The court has the power to relax the rule in the interest of justice. The Revised Statutes provide that pleadings may be amended under leave of the court before the parties announce ready for trial, "and not thereafter": Rev. Stats., art. 1192. Yet it has been held that after such announcement the court may allow amendments that may seem necessary to the ends of justice: *Parker v. Spencer*, 61 Tex. 164; *Whitehead v. Foley*, 28 Tex. 10. The due order of pleading indicated in the motion to strike out the amendment referred to the time and order of filing a trial amendment, and the objection to the amendment on the ground that it was not filed in due order went only to the power of the court to permit a general amendment of the answer after exceptions were sustained to parts of original answers. The court had the power to grant leave to amend, and under the circumstances, plaintiff not being injured thereby, the failure to strictly enforce the rule was not error. If new matter had been set up that plaintiff was not prepared to meet by pleading or evidence, he could have amended also, and even continued the case if necessary. No such condition of things existed, no injury was done to plaintiff, and there was no reversible error in the action of the court.

The fourth, fifth, and nineteenth assignments of error are of the same character, and can be conveniently considered together. The fourth is, that the court erred in refusing to permit the plaintiff to testify that the labels attached as exhibit B to plaintiff's petition and the label attached as exhibit A were so alike that they were calculated to deceive a person of ordinary intelligence and care into taking one for the other. The fifth is to the effect that the same witness should have been permitted to testify that the jugs as filled and the labels as used thereon by each of the parties were, in the opinion of the witness, so alike as to be calculated to deceive a person of

ordinary care and intelligence. The nineteenth is to the same effect as the fourth assignment.

Plaintiff's trade-mark and label is described in the first part of the opinion in the case of *Alf & Co. v. Radam*, 77 Tex. 530; 19 Am. St. Rep. 792. Tobin's trade-mark is the words "Microbe Destroyer," and there is no symbol, picture, or illustration on the label. On the label used by Radam at the top are written the words: "Wm. Radam's Microbe Killer," in large letters, and under this the words "Germ, bacteria, or fungus destroyer." In the center of the label is the symbol or illustration, in the top of which is printed in capital letters "Wm. Radam's Microbe Killer," and in the lower part of it "Trade-mark." Under the picture are the words "Registered December 13, 1887," and below this a caution is printed: "The genuineness of every jug is secured by trade-mark as above, and my name must be written on each label in that form." The name "Wm. Radam" is then written or printed below. On the left of the symbol, in a column about the size of an ordinary newspaper column, is printed "This is the invention of Wm. Radam, Austin, Texas." "It is the only microbe killer in the world," — all in capital letters. Then in the same column is further information about the medicine and its cures, and a warning to persons not to use the label or trade-mark. On the right side of the symbol, in a similar column, are printed instructions about how to use the medicine in different diseases, all signed by "Wm. Radam, Austin, Texas, U. S. A.," in printed capital letters.

Exhibit B attached to plaintiff's petition shows no device or picture on the label used by the Microbe Destroyer Company. The printed matter on the label is not divided into columns, but appears as follows: —

MICROBE DESTROYER.

An unfailing remedy for consumption, catarrh, bronchitis, etc., etc., and all diseases arising from impurities of the blood. Dose: Wineglassful three times a day, before eating, in a tumblerful of water. Price \$2.50 per gallon.

PREPARED BY THE

CAPITAL MICROBE DESTROYER CO., AUSTIN, TEXAS.

Registered December 28, 1887.

[Signed]

DR. J. J. TOBIN, State Agent.

Another copy is given of the label on exhibit B as used by

the Microbe Destroyer Company, exactly like the above, except that it ends with the words "Austin, Texas." These labels used by the Microbe Destroyer Company were of different colors, — blue, yellow, etc. Both parties put up their medicine in gray or brown one-gallon jugs, similar in appearance and bought in the market, and their respective labels and trade-marks were placed on the jugs.

Plaintiff's proprietorship in his trade-mark, labels, and style of packages was prior to any right of defendant to use the alleged imitations.

It does not appear from the bills of exceptions that Radam was offered as an expert, or that his opinion was to be that of an expert. His evidence was objected to because it would be only his opinion, but the bills show that it was not offered as an opinion, but as a fact.

We doubt the propriety of taking the opinion of an expert in such a case. He was called on for his opinion as to whether persons of ordinary intelligence and care would be deceived by the trade-marks of the parties, or the packages and the trade-marks, into the belief that they were the same. We do not see how the evidence of an expert could aid the court in determining this question, or how there could be an expert in such a matter. What ordinary intelligence might think of facts before the eye, it seems to the writer, should be left to the judgment of ordinary intelligence, with at least as much confidence as to one calling himself an expert. Such evidence has, however, been admitted and approved: *Williams v. Brooks*, 50 Conn. 278; 47 Am. Rep. 642.

In *McLean v. Fleming*, 96 U. S. 245, it is said that "witnesses in great numbers were called by the complainant, who testified that exhibits L and K of the respondent were calculated to deceive purchasers"; but in that case there was no objection to the evidence. In Abbott's Trial Evidence it is said that "probability of deception is generally shown by resemblance, and by the opinions of experts. Resemblance, as shown by inspection, is, however, the primary test and criterion, and proof by experts is seldom resorted to." Identity of design might require an expert's testimony, — an expert in designs, — but that is not the question here. Expert testimony is resorted to for the purpose of informing the court or jury upon subjects not commonly understood; but where the nature of the inquiry appeals to the common understanding and ordinary intelligence of mankind, it would be improper to admit

opinions of experts or other persons: *Shelley v. City of Austin*, 74 Tex. 612. This witness was not called as an expert, and his opinion was not admissible, nor would it have been in our judgment if he had been an expert. All the facts were before the court, — the trade-marks, the labels, the jugs, and the packages, as presented for sale in the market; it was his province to decide what impression would be made by them upon persons of ordinary intelligence and care. In such a case, an expert should not be allowed to decide for him: *Ceoper v. State*, 23 Tex. 331; *Turner v. Strange*, 56 Tex. 142; *Houston etc. R. R. Co. v. McGhee*, 49 Tex. 481; *McKay v. Overton*, 65 Tex. 85; *Shelley v. City of Austin*, 74 Tex. 612; 1 Wharton on Evidence, 436. Similar testimony was offered by plaintiff by other witnesses, which was met by the same ruling. The assignments of error involve the same principles that have been above disposed of. It is useless for us to repeat them or the reasons in favor of the court's ruling. All such testimony was inadmissible, and there was no error in rejecting it.

The main question in the case, Was there an infringement as alleged by plaintiff? is raised by many assignments of error on the conclusions of the court upon the facts and the law, but they may all be considered under one head.

The conclusions of the court were, "that there is a general similarity in shape and color of the jugs and those portions of the labels which indicate the properties and uses of the medicine between the goods of appellant and appellees as the same are offered for sale, but that the differences in the same are so readily perceptible and marked that a man of ordinary intelligence and care should not be misled thereby"; and "that appellees did not designedly or fraudulently adopt the use of gallon jugs, or imitate the trade-mark and labels, etc., of appellant." The court also added the following to his findings as the law of the case: "1. That the appellant has the right to the exclusive use of his trade-mark, labels, symbols, etc.; 2. That there is no such imitation thereof by appellees as is calculated to deceive the public; 3. That there is no intentional wrong nor fraud on appellees' part; 4. That appellant take nothing by his suit, and that the injunction be denied; 5. That this is without prejudice to appellant's right to the exclusive right to make the preparation known as 'Microbe Killer,' if he has such right, which is not in any way involved in this suit."

These findings embrace the merits of the case, and appel-

lant attacks all of them by various assignments of error. We do not think it necessary to notice all these assignments, nor is it convenient or necessary to discuss all the questions raised by them. They principally tend to the one object, — that is, to show error in the main findings of the court as above set out.

The questions involved are not difficult or subtle; they are simple, and may be easily and briefly disposed of. It has already been decided by the commission of appeals "that the words 'microbe killer,' as used by the complainant, do not constitute a trade-mark"; that they were words in common use, employed by complainant in their ordinary sense, and that he had not acquired any proprietary right to their exclusive use; and it was also decided in the same case that the labels used by him and the defendant (in that case) respectively were so entirely dissimilar that no person of ordinary prudence and caution could be deceived thereby: *Alff & Co. v. Radam*, 77 Tex. 540, 541; 19 Am. St. Rep. 792. After an able brief in support of a motion for a rehearing before the supreme court by one of the attorneys for the appellant in this case, in which numerous authorities and precedents were cited, that court refused to qualify the former opinion in any respect. We have again carefully examined the question as to whether appellant can appropriate "microbe killer" as a trade-mark, and are satisfied that the opinion in *Alff & Co. v. Radam*, 77 Tex. 540, 541, 19 Am. St. Rep. 792, is correct. The symbol of appellant in this case, as in the former, registered with the words "microbe killer" as his trade-mark, was not used by the Microbe Destroyer Company at all. It had no symbol of any kind, and there is no pretense that it was taken or infringed. We have no hesitancy in following the case formerly decided by the commission. For generic names held not to be trade-marks, see *Browne on Trade-marks*, sec. 134.

We see no error in the court's finding that there was no such similarity in the trade-mark, labels, or packages used by appellee to those of appellant as would be calculated to deceive the public. Both parties put up their medicine in gray or brown jugs with their labels pasted on them, and there may have been in the general appearance a similarity, but only, in our opinion, because of the jugs. Taking the labels, the printed matter upon them, its arrangement and form, their color, — one with bright red border around it and an attractive

red symbol or figure in the center, with printed matter in columns on each side of it, the other of yellow or blue paper with no symbol at all and no columns in print, and taking the entire packages in jugs so labeled, — we do not see how an ordinary purchaser, or even a casual observer, could mistake one for the other. If the labels, trade-mark, and packages, one or all combined, were not calculated to deceive an ordinary purchaser, there is no infringement: *Caire's Appeal*, Am. Trade-mark Cases, 116; *Bell v. Locke*, 8 Paige, 75; *Cox's Trade-mark Cases*, Nos. 72, 91, 123, 138, 157, 217; *Conrad v. Joseph Uhring Brewing Co.*, 8 Mo. App. 277.

A text-writer on the law of trade-marks says that to constitute an infringement, "it is enough that the representations employed bear such resemblance to the genuine as to be calculated to mislead the public generally who are purchasers of the article, and to make it pass for the genuine": Browne on Trade-marks, sec. 385. He copies in the text the doctrine announced by the New York court of appeals in the case of *Popham v. Cole*, 66 N. Y. 69, where it was held that the resemblance "must be such as to deceive a purchaser of ordinary caution." We think this is the correct rule in cases where there is no intention to defraud: *Alff & Co. v. Radam*, 77 Tex. 540; 19 Am. St. Rep. 792. But it has been held "that the resemblance need not be such as would deceive persons seeing the two trade-marks side by side, or as would deceive experts": *Liggett etc. Tobacco Co. v. Hynes*, 20 Fed. Rep. 883. In the last case, the right to a recovery is made to depend upon such a similarity of the trade-marks as "would deceive the ordinary purchaser purchasing as such persons ordinarily do." We need not proceed further with the examination of authorities; there are many of them, and some of great respectability, that hold if the similarity of trade-marks, packages, color, etc., is such as to "deceive careless and unwary purchasers who buy goods with but little examination, but not such as to deceive purchasers who read the trade-mark and label," an injunction would lie: *Williams v. Brooks*, 50 Conn. 278; 47 Am. Rep. 642, and authorities cited.

There was evidence before the court that some persons were deceived by the similarity of the two trade-marks, labels, etc., but, under all the facts, the court decided the question in favor of appellee, as we think he should have done under the law.

The court also concluded from the evidence that there was no fraudulent design or intentional wrong on the part of ap-

pellets in adopting their trade-mark, labels, and packages. It was the province of the court trying the case without a jury to solve this question according to the evidence. The evidence supports his finding, and we see no reason why we should set it aside.

It is assigned as error that the court should have permitted William Radam to answer the question, "Has any one applied to you for information regarding the Microbe Destroyer medicine?" which question the witness would have answered in the affirmative had he been permitted to answer. The question and answer were inadmissible. The object of the evidence, as stated in the bill of exceptions, was "to show that persons had been deceived in seeking to buy one medicine for the other." This was not the proper way to prove the fact. If persons were deceived, they should have been called to speak to the fact. To allow Radam to state the facts, or to state facts from which such a conclusion might have been inferred, would have been hearsay. The court refused to allow Radam to state, while on the stand, how much he lost by reason of defendants having offered and sold their medicine in Houston. If there was error in this ruling as assigned, it has become wholly immaterial, plaintiff having failed to show any interference with his rights as alleged, and the court having so found.

Plaintiff set up the grounds upon which he claimed his trade-mark and labels were infringed, and that the infringement was fraudulent and wrongful, but he did not specify any loss occasioned to him in his sales or otherwise because of the interference. He laid his damages generally at twenty-nine thousand dollars. The court below sustained a special exception to the claim for damages, but held that a good cause of action was stated for injunction. There is an assignment of error that such ruling striking out the claim for damages is error. We think it unnecessary to consider the question raised, because it was correctly decided by the court that there was no infringement, fraudulent or otherwise, upon which damages, if specifically alleged, could have been predicated.

The court refused to allow proof of the reputation of the identity of the two medicines. There was no error in this, because,—1. The identity of the medicines was not the issue, but only the similarity of the trade-marks, labels, and packages; 2. The evidence of the identity of the medicines would

be inadmissible to prove the alleged infringement of trade-mark, etc., unless it were also shown that the similarity in trade-marks created the reputation.

The court refused to allow E. W. Baker to answer the question, What representations, if any, Mrs. Reagan, as agent of Dr. Tobin, made at Kyle, Texas, as to the similarity of the two medicines? This ruling is complained of by assignment of error. Again we have to say that the similarity or identity of the medicines was not the question before the court. Besides this, the bill of exceptions does not disclose the answer that would have been made to the question, and for this reason we cannot consider the assignment.

Having considered all the important questions raised by the assignments of error, and finding no error, we conclude the judgment of the lower court should be affirmed.

WITNESSES—EXPERT—WHEN MAY NOT TESTIFY.—It does not require an expert to give testimony concerning the sufferings of another: *Heddlis v. Chicago etc. Ry Co.*, 77 Wis. 228; 20 Am. St. Rep. 106. Expert testimony is not admissible upon a question which the court or jury can decide upon the facts: *Stonore v. Shaw*, 68 Md. 11; 6 Am. St. Rep. 412; *Graham v. Pennsylvania Co.*, 139 Pa. St. 149. See also extended note to *Hammond v. Woodman*, 66 Am. Dec. 228-246.

TRADE-MARKS—USE OF CERTAIN WORDS OF WELL-KNOWN SIGNIFICANCE.—The words "*fabric tobacco*" are of common use in the tobacco trade, and, standing alone, are not the subject of a trade-mark: *Solis Cigar Co. v. Pomo*, 18 Cal. 358, and note. The words "microbe killer," used in their ordinary sense, cannot constitute a trade-mark: *Alf & Co. v. Radam*, 77 Tex. 530; 19 Am. St. Rep. 792, and note. The words "gold medal" on a manufactured article cannot be protected as a trade-mark: *Taylor v. Gillies*, 59 N. Y. 331; 17 Am. Rep. 333. The term "Moline," on a plow, is generic. Moline, being the name of the place where the plow is manufactured, is not susceptible of exclusive use as a trade-mark: *Candee v. Deere*, 54 Ill. 439; 5 Am. Rep. 125. The name "Antiquarian Book Store" cannot be appropriated as a trade-mark: *Choyne's v. Cowen*, 39 Cal. 501; 2 Am. Rep. 476. See extended note to *Partridge v. Menck*, 47 Am. Dec. 284-299. There can be no trade-mark right in a word or symbol which merely indicates the name or quality of the article: *Appeal of Loughman*, 123 Pa. St. 1.

TRADE-MARKS—INFRINGEMENT OF—INTENT TO DEFAUD.—When a trade-mark is calculated to deceive, an intention to deceive will be presumed, and an injunction to prevent its use will be granted: *El Modelo etc. Co. v. Gato*, 25 Fla. 866; 23 Am. St. Rep. 537, and note; *Pratt's Appeal*, 117 Pa. St. 401; 2 Am. St. Rep. 676, and note; *Heins v. Bruckmann*, 134 Pa. St. 495; *Sperry v. Percival Milling Co.*, 81 Cal. 252. See *Liggett etc. Tobacco Co. v. Reid Tobacco Co.*, 104 Mo. 53; 24 Am. St. Rep. 313, and note.

SMITH v. PERKINS.

[81 TEXAS, 152.]

EXECUTION SALES. — Purchase of land at public auction by a justice of the peace who issued the execution under which it was sold will not make the sale void.

EXECUTION SALES — ANNULMENT. — **JUSTICE OF PEACE HAS NO JURISDICTION** to entertain a motion or original suit to set aside a regular or voidable execution sale of land for fraud, irregularity, or gross inadequacy of price, after the sale has been completed and a deed delivered to the purchaser under process from his court. In such cases, resort must be had to the district court of the county in which the land is situated.

EXECUTION FOR COSTS is properly issued in the names of the parties to the suit, instead of the names of the officers in whose favor the costs are adjudged.

EXECUTION SALES. — **GROSS INADEQUACY OF PRICE** is insufficient by itself to vacate an execution sale, even on direct attack, though it may be regarded as strongly indicative of fraud.

EXECUTION SALES — COLLATERAL ATTACK. — In an action of trespass to try title, by a plaintiff who claims under the purchaser at execution sale, a plea in reconvention by defendant in possession, who claims under the defendant in such execution, seeking to avoid such sale for gross inadequacy of price, without making either the execution plaintiff or the purchaser thereunder parties, is a collateral attack, and will be disregarded by the court.

EXECUTION SALES — JUDGMENTS — ATTACK — PERIOD OF LIMITATION. — Ten years are allowed in which to make a direct attack upon proceedings subsequent to judgment, in selling land, but an attack upon the judgment itself must be made within two years from the time it was rendered.

LACHES OR STALE DEMAND must be pleaded in the lower court to be available on appeal.

Stephens and Herbert, and Sparks and Smith, for the appellants.

Jameson and Chambers, and Davis and Harris, for the appellees.

MARR, J., Section A. On March 14, 1887, appellants, Fannie B. Smith and W. McB. Smith, filed this suit in the district court of Montague County to recover of appellees, J. S. and Martha Perkins, 220 acres of land out of the S. & M. G. Railway Company Survey No. 1, situated in Montague County, Texas, and for \$1,000 damage. The appellees pleaded not guilty, and in reconvention that they were in possession and owners of the land sued for by a regular chain of title from the heirs of E. J. Jones, deceased, to appellee M. C. Perkins, the wife of J. S. Perkins; that appellants had

a fraudulent, void, and pretended claim to the land, and that plaintiffs claimed the land under judgment rendered in a justice court of Clay County, Texas, by J. K. Bass, justice of the peace, October 24, 1877, in favor of William Watson v. E. J. Jones, for \$32.70, and costs; that execution issued upon said judgment, and was levied upon 440 acres of land, of which the land in controversy is a part; that sale was made thereunder the first Tuesday in May, 1878, when said 440 acres was bid in by J. K. Bass for the sum of \$5; that at date of sale the land in controversy was worth \$500; that the execution under which sale was made was void, because issued by Bass for his own and other costs and for payment of the principal judgment; and further, because said land levied on was pointed out and purchased by Bass while he acted as justice of the peace; that appellants, through their chain of title, had notice of such facts; that Jones, under whom both parties claim, died intestate in the year 1879. The appellees pleaded further, that said execution was void, because issued in name of plaintiff in said suit instead of in name of officers of the court, praying for affirmative judgment against appellants and removing cloud from title. They also tendered in court the amount of Bass's bid (\$5), with interest. Appellants and appellees both claimed the land in controversy through E. J. Jones as common source. The case was tried before the court, a jury being waived, which resulted in a judgment against appellants in favor of appellees for all costs incurred in the prosecution of the suit, and judgment in favor of appellees for recovery of the land in controversy, canceling sale of the 440 acres of land sold by the sheriff to Bass, and the deed made to Bass by the sheriff, from which judgment the appellants, by appeal, bring said cause to this court for review.

The matters of fact set forth in the above plea in reconvention of the defendants were proved, and the court below held the execution sale and sheriff's deed to be void, but upon what precise ground does not appear, as there are no conclusions of law and fact in the record. The defendant also pleaded that the execution and sale were irregular and void, because the writ of execution was issued to the county of Montague before any had been issued to Clay County, where the judgment was rendered.

But if this is of any importance under the circumstances in which the question is now raised and presented, we are of the

opinion that the point is not sustained by the record. As we understand from the statement of facts, an execution was issued to Clay County November 10, 1877, "returned no property," and thereafter, on March 18, 1878, another writ was issued to the sheriff of Montague County, under which the land was sold on the first Tuesday in May of that year. Were it otherwise, we are of the opinion that it would have been at most but an irregularity insufficient to render the sale void. It was admitted that the appellants purchased the land sued for and a part of the land sold at said sheriff's sale from the purchaser thereat, J. K. Bass, and that the sheriff's deeds and the deeds to appellants were duly recorded prior to any right or title to the land acquired by appellees. It was also admitted that appellees claim title to the land by deeds executed October 12, 1885, from the sole surviving heirs at law of said E. J. Jones, the defendant in the execution, and that the appellees "were in possession of the land in controversy at the date of the filing of this suit." It was further conceded that plaintiff's vendor, J. K. Bass, the justice of the peace who rendered the original judgment and issued the execution, was identical with the J. K. Bass who purchased the land under the execution at the sheriff's sale, but there is no admission that plaintiffs were actually advised or cognizant of that fact. In the view we take of the case, it is unimportant to determine whether the similarity of the name in all of the proceedings in plaintiffs' chain of title was sufficient to give them notice of the identity of the person. The appellants' assignments of error present the following propositions, so far as need be noticed, viz.: 1. That the court erred in holding that the execution sale and sheriff's deed thereunder were void, or even voidable; 2. That if voidable only, the defendants should not have been allowed to impeach them in this suit, because the attack upon them is not made in any direct mode recognized by law, but is collateral only, and because no attack thereupon was made by any party at interest within the time allowed by law. It does not appear that E. J. Jones, or any one else, ever instituted any proceedings whatever to vacate or set aside the execution, the sale of the land, or the sheriff's deed thereunder, or objected to the same in any court before the plaintiffs instituted this suit. The first attack, therefore, upon these proceedings was made by the appellees in their above plea in reconvention, which was filed on the second day of October, 1888, more than ten years, in fact, after the sale of the land by

the sheriff of Montague County to J. K. Bass, Esq. It is apparent from the statement of the case that if the execution and sale of the land to said Bass are void, the judgment below should be affirmed, because in that contingency these proceedings would be ineffectual to pass the legal title, which would of course have remained in the execution debtor, C. J. Jones, and at his death descended to his heirs at law, and as a consequence, the defendants, having acquired that title, and there being no such adverse possession as would sustain limitation, could not only attack these proceedings collaterally, but would be entitled to the land on account of the inherent strength of their own title. But we are unable to perceive any reason for holding these proceedings absolutely null and void. If the court below so held because Bass was the purchaser at the execution sale, then we think the court erred in that respect. Nay, more: we doubt if that fact would even render the proceedings voidable. We have been unable to find any provision of law, nor has any been cited, that forbids a justice of the peace from purchasing property sold at public vendue on an execution issued by him in a suit tried by him. There is manifest indelicacy and impropriety in the act, yet we cannot find that it is in contravention of any law. If that officer had been required by law to make the sale, or to see to its regularity, or to confirm it afterward, the case might and probably would be very different, as, for example, a purchase by a probate judge at an administrator's sale ordered by him: *Livingston v. Cochran*, 83 Ark. 294. But none of these duties were imposed by law upon the justice of the peace. After the judgment rendered by him became final by the lapse of the time in which he could grant a new trial, the matter was no longer under his control. The subsequent acts of issuing execution and taxing costs, etc., were purely ministerial. By virtue of his office he had no control over the sale or the terms thereof. When the sale is completed and the deed delivered by the sheriff, the title to the land ordinarily in such cases vests in the purchaser, independent of and without any further act of the justice of the peace or of his court.

But it is contended that a motion to set aside the sale for fraud or irregularities could have been made in his court, and that he thus disqualified himself from sitting in the trial of the motion. If this view is correct, we do not know that this would have made the sale void, but we do not believe that

the position can be successfully maintained that a court of a justice of the peace has jurisdiction to entertain a motion and set aside an execution sale of land after it has been completed and deed delivered to the purchaser. We have already said that the effect of such sale is to vest the title to the land in the purchaser if the sale is regular or only voidable. A proceeding having for its object the destruction of all the evidences of that title as well as the annulment of the title itself would be practically a suit to try title to land or remove cloud therefrom, or at least, when the ground of the motion is fraud and gross inadequacy of price, would be an appeal to the equity powers and jurisdiction of the court. Of such proceedings, whether by motion or original suit, we do not believe that justice courts have jurisdiction. They have never been regarded as "high courts of chancery," nor allowed in this state to try title to land or remove cloud from title thereto. In such cases, resort must be had to the district court of the county where the land is situated: Const. 1875, art. 5, sec. 8; art. 1198, sec. 18; *Hickman v. Stewart*, 69 Tex. 255, and authorities cited.

We conclude that the sale of the land to J. K. Bass was not void for that reason, nor is there any other sufficient reason shown that would render it void. Was it even voidable? The only other irregularity alleged is, that the execution for costs was issued in the names of the parties to the suit instead of the names of the officers in whose favor the costs were adjudged. This was proper, and was not even an irregularity: *Freeman on Executions*, sec. 21; *Hudson v. Morriss*, 55 Tex. 604. It will be presumed that the execution was issued with the consent of the plaintiff unless the contrary is shown: *Hudson v. Morriss*, 55 Tex. 604. Nothing is therefore left the defendants to avoid the sale but the gross inadequacy of the price bid and paid by Bass for the land. That alone has been repeatedly held insufficient to vacate the sale, even on direct attack, though it may be regarded as strongly indicative of fraud: 12 Am. & Eng. Ency. of Law, 235-238; *Allen v. Pierson*, 60 Tex. 604; *Pearson v. Flanagan*, 52 Tex. 280, 352. But if we concede that the sale was voidable on the ground of fraud implied from gross inadequacy of price, etc., still we think the attack made upon it by the appellees in their plea in reconvention was collateral, and ought not to have been sustained in the court below. We cannot regard that plea as an original suit or

equitable proceeding instituted directly and for the sole purpose of vacating the execution sale and sheriff's deed on the ground of fraud, to which all of the parties in interest should be made parties to the suit, though expressions of opinion may be found to that effect in some of the cases reported. Such a proceeding would be a direct attack: *Freeman on Executions*, sec. 310. All those interested in the sale of the land, or to be affected by the vacating of the proceedings, were not made or asked to be made parties to the suit in defendants' cross-bill. Neither the plaintiff in the execution nor the purchaser Bass was impleaded, though the sale of the entire 440 acres was declared void: *Freeman on Executions*, secs. 305, 306. The plaintiffs had instituted this suit as one of ejectment or trespass to try title, and that is its real character. The defendants attempted, by their cross-bill (which is in effect an independent suit), to set aside and annul certain process and the proceedings thereunder emanating from another court. The plea of reconvention is therefore not only collateral to the present suit, but is also a collateral proceeding, in so far as it seeks to invalidate and set aside the proceedings taken in pursuance of the judgment and process of the justice court. The proper and direct remedy, supposing them to have the same right as Jones had, would have been by motion or original suit in the proper court having jurisdiction of such matters. Their actual possession of the land did not alter the case: *Haskins v. Wallet*, 63 Tex. 218; *Freeman on Executions*, sec. 310; *Owen v. Navasota*, 44 Tex. 517; *Wallet v. Haskins*, 68 Tex. 423; 2 Am. St. Rep. 501. In the case of *Haskins v. Wallet*, 63 Tex. 218, it is said that "if we regard the present action as an action at law merely (trespass to try title), then the plaintiff cannot recover unless the sheriff's deed under which the defendants claim is absolutely void. If it be merely voidable, the court will not disregard it in a collateral proceeding." This is a correct statement of the rule, though made in a case where the attack appears to have been direct: *Murchison v. White*, 54 Tex. 85; *Freeman on Executions*, secs. 29, 309, 310, 339, 351; *Ayres v. Duprey*, 27 Tex. 593; 86 Am. Dec. 657; *Boggess v. Howard*, 40 Tex. 158.

The judgment therefore rendered in the court below is incorrect, and should be reversed and rendered as requested by the appellants. This renders it unnecessary to make any authoritative ruling on the question of laches, which has been dis-

crossed by both parties, though it does not appear that the appellants interposed this defense in any way in the court below. This it seems they should have done in some mode to be entitled to the benefit of the plea of laches or of stale demand: *Hensel v. Kagans*, 79 Tex. 347; *Bullock v. Smith*, 72 Tex. 549. We are relieved also of deciding whether a proper proceeding to set aside a sale under execution and sheriff's deed to land, on the ground of irregularities and inadequacy of price, must be brought within two years, as contended by appellants, or within ten years, supposing of course that the subsequent purchaser has notice of the fraud and irregularities. It would seem that where the attack is not upon the judgment itself, but only upon the subsequent proceedings eventuating in the sale of the land, the longer period has been allowed for a direct proceeding in equity; otherwise if the judgment is sought to be reviewed and set aside, and, as a consequence, the subsequent proceedings thereunder: *Murchison v. White*, 54 Tex. 85; *Kleinecke v. Woodward*, 42 Tex. 311; *Walst v. Haskins*, 68 Tex. 418; 2 Am. St. Rep. 501. Deducting one year on account of the death of E. J. Jones in 1879 (there being no executor or administrator of his estate), less than ten years had intervened in legal contemplation between the date of the sale of the land and the filing of defendant's plea in reconvention: Rev. Stats., art. 3217.

For the other reasons assigned, we conclude that the judgment should be reversed and here rendered for the appellants, so as to allow them to recover of the appellees the 220 acres of land described in plaintiffs' petition, and all costs of this appeal, and those that have accrued in the district court.

EXECUTION SALES — INADEQUACY OF PRICE AS GROUND FOR SETTING ASIDE. — Gross inadequacy of price alone is not sufficient to set aside a sale under execution, unless the proceedings are tainted with fraud: *Smith v. Huntson*, 134 Ill. 24; 23 Am. St. Rep. 646; *Weaver v. Nugent*, 72 Tex. 272; 13 Am. St. Rep. 792, and note; *Squires v. Brotherline*, 41 Pa. St. 135; 80 Am. Dec. 601, and note; *Morisse v. Inglis*, 46 N. J. Eq. 306; *Collins v. Smith*, 75 Wis. 392.

EXECUTION SALES — COLLATERAL ATTACK ON. — An order confirming a judicial sale is not subject to collateral attack: *Wilcox v. Raben*, 24 Neb. 368; 8 Am. St. Rep. 207. A court of equity will not set aside a sheriff's deed in a collateral action commenced for that purpose. It must be attacked directly in the court where the judgment was rendered: *Boles v. Johnson*, 23 Cal. 226; 83 Am. Dec. 111, and note. An irregularity of process cannot be questioned collaterally by a stranger to a sale under execution: *Durham v. Heaton*, 23 Ill. 264; 81 Am. Dec. 275. A judgment creditor cannot attack a sale collaterally for irregularities: *Ribelin v. Pough*, 126 Ind. 216.

EXECUTION SALES — LACHES. — Several years' delay of a motion to set aside an execution sale because made at an under-value will bar relief, where the plaintiff had sufficient knowledge of the facts to put him on inquiry: *Daniel v. Modawell*, 22 Ala. 365; 58 Am. Dec. 260. Relief granted by courts of equity in avoiding execution sales is not limited to the period provided by statute for courts of law: *Blight v. Tobin*, 7 T. B. Mon. 612; 18 Am. Dec. 219.

WELSH v. MORRIS.

[31 TEXAS, 159.]

PARTNERSHIP — BREACH OF FIRM CONTRACT BY INDIVIDUAL MEMBER — EVIDENCE — DAMAGES. — An agreement by a partnership not to engage in business in the same town in opposition to its vendee is binding upon its members individually; and in an action against one of them for a breach of the contract, evidence of the amount of business done by him subsequently to the breach is admissible as a basis upon which to estimate damages.

PARTNERSHIP — BREACH OF FIRM CONTRACT BY INDIVIDUAL MEMBER — INJUNCTION. — The recovery of damages against a party for breach of a contract made by a partnership of which he was then a member is no ground for refusing an injunction against a subsequent breach of such contract.

Standifer and Mossley, for the appellants.

W. W. Wilkins and Maughs and Peck, for the appellee.

HENRY, A. J. This suit was brought by the appellee against M. Welsh, R. W. Welsh, and N. W. Welsh, to recover damages, and to enjoin them from conducting business as undertakers in the city of Denison. The cause was tried without a jury, and a judgment was rendered in favor of the defendants R. W. Welsh and N. W. Welsh, and for the plaintiff against the defendant M. Welsh for the sum of two hundred and fifty dollars, and enjoining him from engaging in the business of an undertaker in the said city while the plaintiff should there continue to conduct such business.

Plaintiff's cause of action was based upon the following written agreement: —

“DENISON CITY, TEXAS, March 13, 1885.

“*To all whom it may concern:*

“We have this day bargained and sold to S. B. Morris our entire stock of undertaker's goods for value received, including insurance and rent to April 1, 1885, and we further agree not to start the undertaking business in Denison City, Texas, so long as the said S. B. Morris is in the business. **WELSH BROS.”**

The judge filed conclusions of law and fact, which were accepted to by the defendant M. Welsh.

The record contains a statement of facts, from which it appears, in addition to the above agreement, that plaintiff commenced business in the city of Denison as an undertaker on the thirteenth day of March, 1885, he having then purchased the stock of Welsh Brothers, a firm composed of M. Welsh and R. W. Welsh, as shown by said written agreement; that after he sold out, defendant M. Welsh moved to Sedalia, Missouri, where he engaged in the same business until March, 1886, at which time he returned to Denison, bringing with him a third brother, N. W. Welsh, and that the said M. and N. W. Welsh had opened an undertaking business in said city, under the firm name of Welsh Brothers; that at first M. Welsh was a partner in said business, but shortly after this suit was brought he sold his interest in it to his brother, N. W. Welsh, and about that time the firm name was changed from "Welsh Brothers" to "N. W. Welsh"; that afterward M. Welsh conducted a small furniture business in the house in which his brother was conducting the undertaking business, and assisted his brother in conducting the undertaking business.

Plaintiff testified that he believed that the Welshes had done about three thousand dollars' worth of business since they reopened in Denison; that he, plaintiff, had cleared about twelve hundred or fifteen hundred dollars out of his business the first year after buying out Welsh Brothers, and had cleared about the same amount yearly after the Welshes resumed business in said city; that he thought M. and N. W. Welsh had cleared about fifteen hundred dollars after they resumed business.

The defendant objected to the admission of the testimony of plaintiff with regard to the value of the business transacted by the defendants, upon the ground that it was not "a proper measure of the damage sustained by the plaintiff."

We think the evidence was properly admitted. The facts stated were circumstances tending to show that plaintiff was damaged, and the amount of his damage. The fact that the parties included in their contract a stipulation that the Welsh Brothers should not conduct business while the plaintiff was engaged in it shows that they believed the conditions to be such as to make it of advantage to the plaintiff that the Welsh Brothers should desist from it. It is reasonable to conclude that the disadvantage to plaintiff of their conducting

such buisness bore some proportion to the volume and value of the business transacted by them.

It is contended that the court erred in finding as a fact that Welsh Brothers resumed business in the summer of 1885. It is true that that statement is included in the finding, and that it is contrary to the evidence on the point, which was that they did not so resume until the spring of 1886.

The appellant filed a motion for a new trial, and it would have been proper for him to have then called the attention of the court to the error in the date, so that it could have then corrected the amount of the recovery, if it was at all affected by the mistake as to the true date. No mention, however, was made in the motion for a new trial of the objection now urged. We think it is evident, however, that the mistake could not have exercised an influence upon the result in any way. The only predicate for the amount of the judgment, or for any judgment, is in the evidence of the amount of business transacted by the defendants, and the total profits realized by them from it. As will be seen in the statement we have given of the facts proved, that evidence had no reference to any dates, but related to such period of time only as the defendants had been actually engaged in the business. As the evidence only tended to prove the amount of business transacted and of profit made, the particular date of its beginning was of no importance, and the court doubtless so treated it, which was the cause of the discrepancy between the testimony and the conclusion.

We cannot agree with appellant in his contention that the obligation not to resume business bound the firm of Welsh Brothers only, and not its members as individuals. It operated upon them as individuals as well as a firm.

It is contended that the evidence did not show that plaintiff was damaged any, and if any, how much, and that there was no evidence to support a judgment for \$250. The only evidence upon the issue was that given by the plaintiff himself. If he overestimated the amount of business transacted by the defendants, or the profit realized from it by them, they seem to have been in a situation to make the evidence more exact, or to correct it if it was untrue, and no reason is apparent why they did not do so. There are other facts which would seem to have been susceptible of proof, which would have made the case clearer, and it would have been more satisfactory if they had been proved; but the entire omission to

offer other evidence by the defendants being unexplained indicates that a fuller development of the circumstances would not have helped them in the issues of the fact, and amount of plaintiff's damage. It is true that the evidence shows that the profits of the business of plaintiff were as great after appellant resumed business as they had been before, but that does not prove that his profits were not less by reason of the business done by appellant than they would otherwise have been. It was not necessary, in order to support the judgment rendered, to hold that the amount of the damage to plaintiff is the exact amount of profit gained by the appellant.

We are not informed by the record by what process the court reached the exact result shown by the judgment, but we are of the opinion that the judgment is not so contrary to or unsupported by the evidence as to make it our duty to set it aside. Plaintiff's recovery for damages already sustained, on account of the breach of contract, was not a reason for refusing him an injunction protecting him for the future.

The judgment is affirmed.

PARTNERSHIP—CONTRACTS OF, NOT AFFECTED BY ACTS OF INDIVIDUAL PARTNERS. — One member of a firm cannot, by his individual contract, vary or affect the joint obligations which have been already incurred. He can only bind himself thereby: *Detroit v. Robinson*, 42 Mich. 198.

HEILIGMANN v. ROSE.

[31 TEXAS, 222.]

EVIDENCE—DEGREE OF PROOF REQUIRED IN CIVIL ACTION INVOLVING CRIMINAL ACT. — In an action to recover damages for the malicious poisoning of dogs, the facts alleged need only be proved by a preponderance of the evidence, although they also involve a criminal act.

INSTRUCTIONS AS TO DAMAGES. — A submission to the jury of the question of actual and exemplary damages in one general charge is not reversible error, in the absence of a request and refusal of a special charge correcting the error.

JURY TRIAL—INSTRUCTIONS AS TO DAMAGES. — Where the verdict of the jury is for a less amount than could be properly assessed under the evidence and pleadings, an instruction that they could not return a verdict for more than a certain amount is a harmless error.

INSTRUCTIONS—VERDICT—DAMAGES. — When a jury is not charged separately as to actual and exemplary damages, a verdict for a gross sum, without specification as to whether it is actual or exemplary damages, is not reversible error.

DOGS AS PROPERTY—DAMAGES. — Dogs are property, and the owner may

recover damages against a trespasser injuring them, although they have no market value.

DOGS AS PROPERTY — VALUE HOW ESTIMATED. — The value of a dog may be either his market value, or some special or peculiar value to his owner, to be ascertained by reference to the usefulness and services of the dog.

DOGS — EVIDENCE OF VALUE. — In an action to recover for a malicious injury to dogs, evidence that they were useful and of special value to the owner will sustain a recovery, although they are not shown to have had any market value.

Oscar Bergstrom, for the appellant.

J. M. Copeland, for the appellees.

FISHER, J., Section B. This case originated in the justice court, and was tried on appeal in the district court of Bexar County at its February term, 1889, when judgment was rendered in appellees' favor against appellant for the sum of seventy-five dollars and costs of suit. No written pleadings are in the record, except a statement of appellees' demand, wherein they charge that appellant wickedly and maliciously poisoned five dogs, for which they ask a recovery of damages against appellant in the sum of twenty-five dollars for each of said dogs as actual damages, and seventy-five dollars exemplary damages.

Appellant assigns as error the refusal of the court to instruct the jury, upon his request: "You are further instructed that the claim of plaintiffs is based upon acts which if true would constitute a criminal offense, and before you can find for the plaintiffs, you must find from the evidence beyond a reasonable doubt that defendant poisoned the dogs sued for, and if there is any reasonable hypothesis upon which the poisoning can be explained except that the defendant did it, or that some other person than defendant might have poisoned them, then you will find for defendant."

We know of no decision, and none is cited, that would justify the court in giving this charge. There is no force in the position that because the facts of this case may involve a criminal act there should be a greater or more certain degree of proof than is required in other civil actions. A party holding the affirmative of an issue is only required to adduce such a preponderance of evidence as will satisfy the minds of the jury of the truth of the facts in issue. As said by the court in the case of *Sparks v. Dawson*, 47 Tex. 145, "to require the facts to be established by evidence with that absolute certainty which fixes in the mind of the jury a conviction that excludes

all reasonable doubt of their existence is a rule not applicable to this or any other civil case." The court did not err in refusing to give the charge.

The second assignment presented by appellant affirms that the court erred in the third subdivision of its charge, because the jury was authorized to find a verdict against defendant for exemplary damages, and suggests to them that the court believes the sum of seventy-five dollars is a proper amount therefor. The charge complained of reads: "If you find from the evidence that defendant intentionally and willfully poisoned the dogs of plaintiffs as charged, or any one of said dogs, you will find a verdict in favor of the plaintiffs for the actual market value of the dog or dogs so poisoned, and you will, in addition, find a verdict for such exemplary damages as you may deem adequate, not exceeding seventy-five dollars. If, however, you find the charge of plaintiffs not proved, you will find for the defendant."

In this connection, the court, at the request of appellant, gave the following charge: "In order for the plaintiffs to recover, you must find from the testimony that the defendant poisoned the dogs, and that they were the property of plaintiffs; that the dogs were of some pecuniary value,—either that they had some market value at which they would sell, or that the services or use of the dogs were of some pecuniary value. The simple opinion of a witness not based upon any facts as to market value or use of the dogs is not sufficient."

The court does not present the two elements of damages separately, but submits them in one general charge, and restricts the jury in their finding not exceeding a certain amount. In both particulars our courts have repeatedly deprecated this practice, but while this is true, the decisions uniformly hold, in the absence of a special charge correcting the error, that it alone is not sufficient cause for reversal: *Newman v. Dodson*, 61 Tex. 98; *Brunswick v. White*, 70 Tex. 512; *East Line etc. R. R. Co. v. Lee*, 71 Tex. 541; *Brooke v. Clerk*, 57 Tex. 109; *Belo v. Wren*, 63 Tex. 727; *Moehring v. Hall*, 66 Tex. 241.

If the verdict of the jury is for a less amount than they could properly find under the evidence and pleadings, an instruction that informs them that they cannot exceed a certain amount could result in no injury, and is harmless error: *East Line etc. R. R. Co. v. Lee*, 71 Tex. 541. The assignment is not well taken.

Appellant insists, by his fourth assignment of error, that the

verdict of the jury is insufficient to support the judgment, because it does not specify whether they find actual or exemplary damages, or both, or how much of either. If the rule that the court is not required to submit the issues of actual and exemplary damages separately is correct, unless requested so to do, it would be inconsistent to require the jury to make separate findings upon issues not submitted. This assignment is governed by the rule discussed under the one preceding.

The appellant's third assignment questions the sufficiency of the evidence to support the verdict of the jury, on the ground that the dogs poisoned were of no market or pecuniary value, or that their service or use was of no value to the owners. Considering the evidence under this assignment, we find that appellees lost their valuable dogs by poison. The evidence that connects the appellant with the killing of the dogs is partially circumstantial, but we think sufficient to show his guilty agency, and that the trespass was intentional and malicious. The dogs were of fine breed and well-trained, and one of the Newfoundland dogs was trained to signal the arrival of any person at appellee's, who could tell from his bark if the person was man, woman, or child. The dogs, so testifies appellee, were worth twenty-five dollars each, and she would not have taken double that sum. Her husband paid five dollars for one when young, and one was given in pay for professional services rendered by appellee, and she could have sold the dogs for five dollars each, but would not have taken fifty dollars each for them. Great pains was taken in raising them, and they were well trained.

The authorities well state that dogs are property, and that an owner has his action and remedy against a trespasser for the damages resulting from injuries inflicted upon them. Some authorities hold that dogs have no market value. This may be relatively true, but it is not a rule that will govern in all cases. It may be difficult in the majority of cases to ascertain the market value of a dog, but such a result may in some cases be accomplished. The special charge asked by appellant and given by the court substantially presents the true rule in determining the value of dogs. It may be either a market value, if the dog has any, or some special or pecuniary value to the owner, that may be ascertained by reference to the usefulness and services of the dog: *Ramsey v. Hurley*, 72 Tex. 200; *Brunswick v. White*, 70 Tex. 504; *Uhlein v. Cromack*, 109 Mass. 273; *Brent v. Kimball*, 60 Ill. 213; 14 Am.

Rep. 35; *Perry v. Phipps*, 10 Ired. 261; 51 Am. Dec. 387; *Parker v. Miss*, 27 Ala. 483; 62 Am. Dec. 776; *Harrington v. Miles*, 11 Kan. 483; 15 Am. Rep. 355; *Canling v. Hannibal etc. R. R. Co.*, 54 Mo. 386; 14 Am. Rep. 476; *Spray v. Ammerman*, 66 Ill. 813; *Stickney v. Allen*, 10 Gray, 355. The law recognizes a property in dogs, and for a trespass and infraction of this right the law gives the owner his remedy. The wrongdoer cannot escape the consequences of his acts by saying you have suffered no damages, for the law implies that some damages result from every illegal trespass or invasion of another's rights: *Parker v. Miss*, 27 Ala. 483; 62 Am. Dec. 776; *Brent v. Kimball*, 60 Ill. 213; 14 Am. Rep. 35; *Champion v. Vincent*, 20 Tex. 816. There is no evidence in this case that the dogs had a market value; but the evidence is ample showing the usefulness and services of the dogs, and that they were of special value to the owner. If the jury from the evidence should be satisfied that the dogs were serviceable and useful to the owner, they could infer their value when the owner by evidence fixes some amount upon which they could form a basis. We cannot say that the verdict in this case is not based upon actual damages, and when the evidence, as it does in this case, justifies a verdict for either actual and exemplary damages, or both, we will not presume that the finding of the jury was based on grounds not proper.

We find no error in the record, and report the case for affirmance.

EVIDENCE — DEGREE OF PROOF REQUIRED IN CIVIL ACTIONS INVOLVING CRIMINAL ACT. — In civil actions the mere preponderance of evidence should prevail, although it affirms the commission of a felony: *Mead v. Husted*, 52 Conn. 53; 52 Am. Rep. 554, and note; *Hills v. Goodyear*, 4 Lea, 233; 40 Am. Rep. 5, and note; *Jones v. Greaves*, 26 Ohio St. 2; 20 Am. Rep. 782, and note; *Catasquas Mfg. Co. v. Hopkins*, 141 Pa. St. 30; *Germania etc. Ins. Co. v. Klewer*, 129 Ill. 599. But other cases proceed upon the theory that in a civil action for damages for an act which is also indictable as a crime, the same degree of proof is required to establish the cause of action as would warrant a conviction: *Barton v. Thompson*, 46 Iowa, 30; 26 Am. Rep. 131, and note; *Riker v. Hooper*, 35 Vt. 457; 82 Am. Dec. 646. See *Sprague v. Dodge*, 48 Ill. 142; 95 Am. Dec. 523, and extended note; *Stclair v. Jackson*, 47 Me. 102; 74 Am. Dec. 476, and note.

ANIMALS — DOGS — PROPERTY IN. — The right of property in dogs has always been recognized by the common law, but it is of an inferior character to that in other domestic animals: *Woolf v. Chalker*, 31 Conn. 121; 31 Am. Dec. 175, and note. The property in dogs is such that the owner can maintain an action against one killing or injuring them: *Wheatley v. Harris*, 4 Sneed, 468; 70 Am. Dec. 258, and extended note; *Johnson v. McConnell*, 89 Cal. 545.

AVEY v. GALVESTON, HARRISBURG, AND SAN ANTONIO RAILWAY COMPANY.

[81 TEXAS, 243.]

INFANTS, CONTRIBUTORY NEGLIGENCE OF, QUESTION OF FACT. — The question whether or not the mind of a boy, ten years of age, is sufficiently mature to make him responsible for his contributory negligence is a question of fact for the jury, and should not be decided by the court on demurrer, even when the petition admits that he had sufficient intelligence to contract for his passage, and knew of the movements of the train on which he was a passenger.

NEGLECT TOWARD MINOR PASSENGER. — Where a child, ten years of age, is compelled, through the negligence of a railroad conductor, to jump from a train on which he is a passenger, or be carried past his destination, his contributory negligence in so jumping will not relieve the company of liability, unless he was of sufficient intelligence to be responsible for his own acts.

Nix, Story, and Story, and J. W. Campbell, for the appellant.

Thomas McNeal, for the appellee.

COLLARD, J., Section A. This suit was brought by John Avey as next friend of his son Silas John Avey, a minor, about ten years of age, against the Galveston, Harrisburg, and San Antonio Railway Company, for damages for personal injuries occasioned by alleged negligence of defendant's servants. The petition alleges, in substance, that on January 20, 1887, Silas John Avey, a minor, ten years of age, was, and prior thereto had been, living with his mother at section-house 185, on appellee's railway, two miles east of Converse, a station on said railway; that on said date said minor was at Converse, and about to walk home, but seeing a certain train of appellee's cars standing at said station heading in the direction of said section-house, and knowing that said train stopped at said section-house when signaled to do so, and well knowing that this train would be signaled to stop at this particular time and trip, said minor then and there approached the conductor in charge of said train, and entered into a contract with said conductor for appellee to transport him to said section-house, and then allow him to get off, and in good faith thereafter got upon said cars to make said trip; that relying on said agreement, said minor in good faith got on said train as a passenger; that in fact said train did sometimes carry passengers from one point to another on said line; that said minor had seen passengers get on and off said train at said

section-house, and had no reason to believe that said agreement to transport him was not a fair and *bona fide* transaction that would be carried out in good faith; that said train was run from Converse to said section-house while said minor was thereon as a passenger, and on its approach to said section-house was signaled to stop by the person in charge thereof, and the signal was seen by appellee's agent in due time to stop the same. But appellee, regardless of its agreement with said minor, recklessly and negligently disobeyed said signal to stop, and ran its train past and beyond said section-house at a high rate of speed, and willfully and recklessly failed and refused to stop and permit said minor to get off, but in violation of its agreement and duty imposed by law, passed said section-house, carrying said minor, notwithstanding his protest and entreaty, past and away from his home and friends; that such unlawful and outrageous conduct of appellee so frightened, embarrassed, and confused said minor (he being of tender age), that he frantically jumped from said train to the ground, seriously wounding and injuring him, etc., to his great damage, etc.

The injuries are described, and are alleged to be of a permanent character to the mind and body.

The court below sustained defendant's general demurrer to the petition, and the plaintiff declining to amend, the case was dismissed. Plaintiff has appealed and assigned errors, raising the question of the legal sufficiency of the petition.

The appellee contends that the petition shows that the minor had arrived at years of discretion sufficient to make the alleged contract with the conductor, and knew of the movements of the train, and therefore he would be responsible for his contributory negligence in jumping from the train.

Whether the mind of a boy ten years old is sufficiently mature to make him responsible for his own contributory negligence is a question of fact for the jury, and should not be decided by the court on demurrer to the petition: *Texas etc. R'y Co. v. White*, 57 Tex. 129; *Houston etc. R'y Co. v. Booser*, 70 Tex. 530; 8 Am. St. Rep. 615. We are not prepared to say that the facts alleged in the petition in this case, admitting sufficient intelligence on the part of the boy to engage for his passage on the train and to know of the movements of the train, would authorize the court to take the case from the jury. The case should have been submitted to the jury.

There is nothing in the objection to the petition that gross

negligence was not alleged; death did not result from the injuries; the suit is for the benefit of the injured party, and not for the parent. It is said by the appellee that the petition does not show that the servants of the company were at the time of the accident in a position to have prevented the boy from jumping from the train. This is true. But the failure of the conductor in the performance of a duty owing to the child, his misconduct in refusing to stop the train to enable the child to get off at his home without danger, is the negligence complained of. The agreement and the signal created the obligation. The child was compelled to jump from the train or be carried away from home. If it exposed itself to danger by so doing, and so contributed to its injuries, but was not of sufficient intelligence to be responsible for its acts, the company would be liable for the consequences. The circumstances under which the injuries occurred are sufficiently set out in the petition, and the negligence or reckless misconduct of the company's servants is clearly averred: *Hull v. East Line etc. R. R. Co.*, 66 Tex. 619; *Texas etc. R'y Co. v. Cole*, 66 Tex. 562; *Gulf etc. R'y Co. v. McGown*, 65 Tex. 640.

It was error to sustain the general demurrer to the petition, for which the judgment should be reversed and the cause remanded.

INFANTS — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. — Whether an infant has sufficient capacity to understand the consequences of his acts, and therefore to be guilty of contributory negligence, is a question for the jury: *Rhodes v. Georgia R. R. etc. Co.*, 84 Ga. 320; 20 Am. St. Rep. 362; *Cook v. Houston etc. Nav. Co.*, 76 Tex. 353; 18 Am. St. Rep. 52, and note; *Westbrook v. Mobile etc. R. R. Co.*, 66 Miss. 560; 14 Am. St. Rep. 567, and extended note.

MISSOURI PACIFIC RAILWAY COMPANY v. LONG.

[81 TEXAS, 258.]

RAILROADS — PASSENGERS — NEGLIGENCE. — Although a railway company has provided a safe way of egress from its cars, a passenger who is ignorant thereof is not guilty of negligence if he fails to ascertain that fact and to avail himself of that way, when he sees another way, apparently safe, is in general use by passengers, with the tacit permission of the railroad company.

RAILROADS — PASSENGERS — NEGLIGENCE. — Although a railway company has provided a safe exit from its cars, yet if at the same time there exists another way which is not safe, and which is in such general use by its passengers as to induce the belief that it was provided, in part at least,

for that purpose, the company is liable to a passenger who, by taking the latter way, is injured in alighting from the cars, in the absence of warning by the company's employees that there is another and safer way which he is expected to use.

RAILROADS — PASSENGERS — CONTRIBUTORY NEGLIGENCE. — Where a railway company has provided a safe exit from its cars, while another way which is not safe exists, and is in such general use by its passengers, with the tacit consent of its employees, as to induce the belief that it is provided as a means of exit, a passenger who, in alighting, takes the latter way at night, and is injured by stepping into an opening between the cars and the platform, is not guilty of contributory negligence.

R. C. Foster and A. E. Wilkinson, for the appellant.

Harris and Saunders, for the appellee.

GAINES, A. J. This suit was brought by appellee against appellant to recover damages for personal injuries. The accident occurred at Echo, the point of junction between the defendant's main line and a branch road operated by it which extended to Belton. The facts of the case, as shown by the testimony, are accurately stated in the brief for appellant as follows:—

"Plaintiff took passage on one of defendant's trains, . . . leaving Belton about 11:30, P. M. They arrived at Echo, a station where the Belton tap road connects with defendant's main line, about twelve or one o'clock, A. M. The train lay at Echo some three hours, till the arrival of the south-bound train on the main line, on which plaintiff was to take passage. The train on which plaintiff was riding from Belton to Echo was a mixed one, consisting of freight-cars with a coach at the rear.

"This coach was what is known as a combination car, having at the front end a compartment for baggage and express matter, with a wide door in the side for receiving it from and unloading it upon the depot platforms, while the rear part was fitted with seats for passengers, with the ordinary door, platform, and steps at the end, such as is usual on passenger-coaches.

"The train was brought to a stop at the depot platform at Echo in the position customary for that train on the west side of the station. The depot was surrounded by a platform about the level of the main track on the east side, and sloped upward toward the west side, where it was about five feet high next to the track on which plaintiff's train stood, and about even with the sill of the door on the side of the baggage compartment. There was a low platform on the south of this depot platform connected with it by a flight of steps, and designed for passen-

gers boarding or leaving the car, as the high platform was for the receiving or loading of baggage, express, and freight. The car in which plaintiff was riding stopped, as it always did, in such position that the side door in the baggage compartment was opposite the high platform, and the rear platform and steps of the passenger compartment were opposite the low platform provided for passengers.

"Plaintiff remained upon the car until the arrival of the south-bound train, as did most of the passengers, without objection on the part of defendant's employees. When the train whistled, the passengers got up and went out of the car, plaintiff last, carrying a large can in one hand and a cake in the other, and followed by the conductor, who carried a lantern.

"Plaintiff passed through the door into the baggage compartment, and in stepping from the side door of the car, between which and the edge of the platform there was a space of seventeen inches, stepped into this open space and fell, striking his side against the platform and receiving serious injuries.

"Passengers had generally followed this course in leaving the car. There had been some effort made at previous times to prevent them from going this way and compel them to go down the steps in the rear, but it was found difficult to do so, and the trainmen had ceased to attempt it. Plaintiff had traveled over the road before, and had always gone in and out by this door, and had seen others do the same. . . . The conductor testified that he followed behind plaintiff as he went out, with a lantern.

"Plaintiff testified that he had traveled over the road a good many times, and always left the car by this door (the side door of the baggage-car). It was a dark starlight night, and his recollection was, that there were no lights about the door at which they went out, and it was too dark for him to see where he was stepping. As to his fall, he testified: 'It was too dark for me to see where I was stepping, and as I passed out of the door, not seeing the opening or knowing it was there, and supposing that I was stepping onto the platform, I stepped into the opening and fell on my right side and arm against the edge of the depot platform.'

"Charles Townsend, the conductor of the train, testified that the train laid at Echo that night about three and one half hours before the north-bound train on the main line arrived. Witness called out, 'Echo. Change cars.' Plaintiff did not then

get off the car. He had two seats turned opposite, and laid down with a pillow and went to sleep on the car. The rear door was not locked, and there was nothing to prevent passengers getting out that way. Witness went into the coach and laid down near the south or rear door until the approaching train whistled. The passengers all went out, passing through the baggage compartment and stepping from that to the platform, plaintiff last, followed by witness, holding a lantern. Plaintiff went out through the baggage-room, and put one foot upon the sill of the baggage-car and felt with the other for the edge of the platform, but did not get his foot far enough upon it. He just got his toe on the edge of the platform, and when he stepped forward his foot slipped and he fell."

The night of the accident was clear, but as to the question whether the moon was shining or not the evidence was conflicting. There was also a conflict as to the question whether or not there was a light upon the platform. The evidence upon the point was not very satisfactory either way. Several witnesses testified that they had frequently traveled on the car in question, and that the passengers were accustomed to go out through the side door, and that they did not recollect having seen any passengers leave the train by any other door. The conductor also testified that he had at first attempted to prevent passengers from going out by the side door, but that the attempt had been fruitless, and that for some time before the accident he had ceased to forbid it.

Was the evidence sufficient to support the verdict? It was claimed that it was not, upon two grounds: 1. Because it was shown that the defendant had provided a safe way for the exit of its passengers, and therefore was not guilty of negligence; and 2. For the reason that but for the plaintiff's own negligence in stepping off the car the accident would not have occurred.

If the plaintiff had sought a recovery on account of the failure of the defendant to provide a safe way of egress from its car, the first ground upon which the verdict was sought to be set aside should have been sustained. The evidence showed there was a safe way provided by the company, by taking which the accident might have been avoided. But such was not the basis of the action. The plaintiff did not seek to recover because there was not a safe way, but upon the ground that there was another way which under the circumstances was not safe, and which, by reason of the conduct of the ser-

vants of the company in permitting its general use by passengers, he was led to believe was provided for their use.

Was the evidence sufficient to sustain the case which the plaintiff sought to make? At the time of the accident he was still a passenger, and in regard to passengers the law requires of carriers the highest degree of care. Whether such care had been used or not was a question for the jury, and we think the evidence was sufficient to warrant them in finding that issue in the negative. They may have concluded that more care could have been used, that better lights could have been provided, or that some appliance to bridge the interval between the car and platform would have avoided the injury, and that without either the one or the other there did not exist that perfect safety which the law requires in such cases.

Now it may be that when a railway company has provided a safe way of egress from its cars, and a passenger knows it, he will not be held without fault in taking another merely because other passengers do so and the servants of the company do not forbid it. But it does not follow that because a safe way is provided a passenger is bound at his peril to ascertain the fact and to avail himself of that way, when he sees that another way, apparently safe, is in general use by the passengers with the tacit permission of the servants of the company. Such use and such permission are calculated to induce the belief that the way is provided, in part at least, for the egress of passengers, and that a passenger is expected to make use of it should he elect to do so. Under such circumstances, a man of ordinary prudence might avail himself of such a plan of exit, and therefore it cannot be declared as a matter of law that it is negligent to do so. The question would be for the jury. On the other hand, can it be announced as a legal conclusion that a railway company has discharged its whole duty to the passenger when it has provided a safe exit from its cars, while at the same time there exists another way which is not safe, and which is in such general use by its passengers as to induce the belief that it was provided, in part at least, for that purpose? We think not. A railway company, it is true, is not bound to see that its passengers act in a prudent manner, or to use physical means to compel them to do so. But when its servants see that its passengers are in the habit of leaving its cars by a door not provided for the purpose, it would seem to be the duty of such servants at least to warn them that there is another door which they are expected to use. In this case

there was testimony sufficient to warrant the jury in concluding that the side door was almost exclusively used by the passengers in making their egress from the car; and we cannot hold that there was not evidence to justify the findings that that way of egress was not safe for passengers, and that it was negligence on the part of the company to permit it to be used as such.

We are also of the opinion that the court did not err in holding that the jury were warranted in finding that the defendant was not guilty of contributory negligence in stepping off the train. It would be difficult to resist the conclusion that there was a want of due care if the accident had occurred in the daytime. But it was night; and if the jury believed that there was not sufficient light, as there was testimony to justify them in believing, we cannot say that their verdict upon this issue was without evidence to support it. The conductor's testimony, that the plaintiff "put one foot on the sill of the baggage-car and felt with the other for the edge of the platform, but did not get his foot far enough upon it," tends to show not only that the edge of the platform could not be seen, but also that the plaintiff exercised care in trying to avoid danger. The plaintiff testified that he could not see the platform and thought he was stepping upon it. Assuredly his conduct was not so clearly negligent as to warrant us in setting aside the verdict upon that ground.

The appellant also complains that the court erred in refusing to give the following special charge: "If you believe that defendant provided for the use of passengers boarding or alighting from its trains a platform and steps and door in the end of the car of the usual form used on passenger coaches, but that the plaintiff, being familiar with the structure of its car and platform, chose to leave the car by passing through the compartment provided for baggage, express, and mail, and stepping from the side door of the baggage-car upon the depot platform because the same was a nearer and more convenient way and more frequently used by the public, plaintiff, by adopting such means of getting off the car, assumed the risk incident in stepping across the open space between the coach and the platform, and if injured under these circumstances, by inadvertently stepping into instead of across such opening, he cannot recover."

For two reasons we think the charge was properly refused. Before the plaintiff could be held responsible, under the pecu-

liar facts of this case, for attempting to pass out by the side door, he must, in our opinion, have known that the end door was provided for the egress of passengers, and that by the rules of the company they were expected to use the latter door. From the fact that he knew of the construction of the car, and was familiar with the construction of the doors of ordinary passenger-coaches, the jury would have been at liberty to infer that he knew the purpose for which the end door was provided; but this could not properly be assumed as a matter of law. Then again, even if he knew that the end door was intended for the use of passengers in entering and leaving the car, it would not follow necessarily that he was at fault in failing to avail himself of it, when the use of the side door was such as may have evidenced the belief that it was also intended for the same purpose.

The proposition announced in the charge of the court, that it was the duty of the defendant company "to keep in a safe condition all portions of its platforms and approaches thereto," is not strictly correct as broadly stated. But under the facts of this case the jury could not have been misled. There was no evidence tending in the slightest degree to show that there was any faulty construction, except in the relation between the side door and the platform, which was opposite to it, and the jury could not have understood the instruction as referring to any other. As applied to the facts, it could hardly be deemed error, but if error, it was harmless. The charge, as a whole, very fairly and pointedly presented the issues in the case.

There is no error in the judgment, and it is affirmed.

RAILROAD COMPANIES — DUTY TO PROVIDE SAFE MEANS OF ACCESS TO AND FROM DEPOT. — A railroad company must provide a safe means of access to and from its stations. If there are two ways, one of which is faulty in construction and dangerous, if passengers are allowed to use it, the company will be liable in damages to one injured thereby: *Delaware etc. R. R. Co. v. Troutwein*, 82 N. J. L. 169; 19 Am. St. Rep. 442, and note; note to *Lucas v. Pennsylvania Co.*, 16 Am. St. Rep. 325. Where there are no accommodations for a passenger alighting, the railroad must use every caution to protect him from injury: *Franklin v. Southern Cal. etc. Co.*, 85 Cal. 63.

Knowledge by a passenger that there is no platform on one side of the track, while there is one on the other, is notice of a rule of the company, and if he disregards this rule by alighting at night upon the side in which there is no platform, he cannot recover for injuries caused thereby: *Drake v. Pennsylvania R. R. Co.*, 137 Pa. St. 352; 21 Am. St. Rep. 883.

HAMBLIN v. KNIGHT.

[81 TEXAS, 351.]

JUDGMENTS WITHOUT NOTICE—RELIEF BY INJUNCTION.—One against whom a judgment has been rendered without notice may obtain relief from it by injunction, although it may appear, from an official return or by the recitals in the final judgment, that he has been duly served, or that he has voluntarily appeared, either in person or by attorney.

JUDGMENTS WITHOUT NOTICE—RELIEF BY INJUNCTION from a judgment without notice will not be given when the party complaining has an adequate remedy at law, nor, as a general rule, when he has an opportunity to make a motion for a new trial at the term at which the judgment was rendered.

JUDGMENTS WITHOUT NOTICE—LACHES.—RELIEF BY INJUNCTION from a judgment obtained without notice should be sought without delay, or the delay excused by showing the party seeking relief has a meritorious defense to the action; otherwise relief will not be granted.

JUDGMENT WITHOUT NOTICE—NEW TRIAL—EXCUSE FOR NOT MOVING FOR.—WHEN RELIEF BY INJUNCTION is sought during the continuance of the term at which a judgment was rendered, an allegation of the existence of any circumstances making an application for a new trial an inefficient or less effective remedy than a separate suit would afford, is sufficient to entitle the party to proceed by injunction instead of being confined to a motion for a new trial.

JUDGMENT WITHOUT NOTICE—LEGAL REMEDY—WHEN MUST BE PURSUED.—When a petition for an injunction against a judgment rendered without notice admits that the term of the court at which the judgment was rendered had not adjourned at the time the petition was filed, the petitioner is not entitled to relief, in the absence of a showing that his remedy by motion for a new trial was inadequate.

X. B. Saunders, for the appellant.

Bassett, Seay, and Muse, and Ralston and Muse, for the appellee.

HENRY, A. J. This suit was brought by the appellant to enjoin the collection of a judgment for money which was rendered against him in the district court of Milam County on the sixth day of January, 1874.

The material facts appear in the report of the cause on a former appeal, except that on the trial from which the present appeal was taken, it was agreed that the term of the district court at which the judgment complained of was rendered was still in session when the petition for injunction was filed.

The ground, in addition to a meritorious defense, upon which it was sought to enjoin the collection of the judgment was, that the court that rendered it had not acquired jurisdiction over Hamblin, because he had never been served with citation nor voluntarily appeared, notwithstanding the sheriff

had returned a citation for him as duly served, and an attorney had filed an answer for him. He charged that the return of the officer was untrue, and that the appearance of the attorney who filed the answer was without his knowledge or consent.

The petition for injunction charged, and it was proved at the trial, that Hamblin did not live in Milam County, and did not know that a judgment had been rendered against him until after more than two days had expired from the date of its rendition.

In the view taken by us of the cause, the only question that it becomes necessary to consider is, Was the proceeding by a suit for an injunction proper when the remedy by a motion for a new trial was still open?

The question was decided by this court in the case of *Bryerly v. Clark*, 48 Tex. 345. In that case, as in this, a petition for an injunction against the enforcement of a judgment was resorted to during the term of the court at which the judgment was rendered, and after the expiration of more than two days from its date.

In the opinion it is said: "The petition was defective, for it does not attempt to show any excuse for not making a motion for new trial embodying in it the same matter, unless, indeed, such excuse is to be found in the fact that a motion for new trial, setting up only a part of the same matters imperfectly, and unsupported, save by the affidavit of the party, had in fact been made and overruled. The judgments of the court are under its control during the term, and a second motion for a new trial may be allowed. It is true, as contended by appellant, that equity may grant a new trial after a motion for a new trial has been overruled. But when the more direct remedy of a second or amended motion is equally available, there is no excuse for resorting to the circuitous remedy of a separate suit. The petition, as a petition for a new trial, fails to show a sufficient excuse for not having made the same showing by motion."

The correctness and applicability of this opinion was recognized by this court in the opinion rendered on the first appeal of this cause: *Hamblin v. Knight*, 60 Tex. 40.

The petition for an injunction filed in this cause is substantially a suit for a new trial.

One against whom a judgment has been rendered without notice may no doubt obtain relief from it by injunction, notwithstanding it may appear, from an official return or by the

recitals in the final judgment, that he had been duly served with citation, or that he had voluntarily appeared, either in person or by an attorney. Such relief by injunction will not be administered when the party has an adequate remedy at law, nor, as a general rule, when he has an opportunity to make a motion for a new trial at the term at which the judgment was rendered. In every case where such relief is sought by injunction, it should be done without delay, or if from any cause delay exists, it should be accounted for and excused, in addition to which it must be shown that the party has a meritorious defense to the action. If relief against such a judgment is sought during the continuance of the term at which it is rendered, and there exist any circumstances making an application for a new trial an insufficient or less effective remedy than a separate suit would afford the party, upon alleging such facts he should be allowed to proceed by a separate suit and apply for an injunction instead of being confined to a motion for a new trial.

In this case, nothing was alleged by the plaintiff tending to show that his remedy by a motion for a new trial was not adequate. His petition excused his omission to seek that remedy by alleging that the term of the court had adjourned before he could apply for relief, after being informed that the judgment had been rendered. If he had proved that allegation, this suit would have been proper.

We feel constrained, however, by the decisions of this court, to hold that when it was admitted that the term of the court at which the judgment was rendered had not adjourned when the original petition was filed, the court did not err by charging the jury to find for the defendant.

The judgment is affirmed.

JUDGMENTS — INJUNCTION AGAINST, WHEN PROPER. — Where an agreement for the dismissal of an action has been entered into, and defendant thereafter procures a judgment for costs without notice to plaintiff, the judgment will be enjoined in equity: *Greenwaldt v. May*, 127 Ind. 511; 22 Am. St. Rep. 660, and note. A bill in equity will lie to restrain the enforcement of a judgment against a defendant who has not had his day in court: *Given's Appeal*, 121 Pa. St. 266; 6 Am. St. Rep. 795, and note. Equity will enjoin the enforcement of a judgment if any fact exists which clearly shows it to be against conscience to execute the judgment, as where it has been obtained by fraud or accident: *Hibbard v. Eastman*, 47 N. H. 507; 23 Am. Dec. 467, and note; *Pollock v. Gilbert*, 16 Ga. 398; 60 Am. Dec. 732, and note; *Pearce v. Chastain*, 3 Ga. 226; 46 Am. Dec. 423, and note. Equity will not enjoin a judgment merely because process was not served upon the de-

pendant; it must be further shown that the judgment is inequitable and unjust: *Burch v. West*, 134 Ill. 258.

JUDGMENTS — RECITAL OF SERVICE OF PROCESS THEREIN — CONCLUSIVE EFFECTS OF. — Although a judgment recites due service, the judgment is a nullity when the recitals in the judgment show that the process was not lawfully served: *Forster v. Simpson*, 79 Tex. 611; 23 Am. St. Rep. 370, and note; *Reinhart v. Lego*, 86 Cal. 395; 21 Am. St. Rep. 52, and note; extended note to *Taylor v. Lewis*, 10 Am. Dec. 127-129.

STEWART v. MORRISON.

[81 TEXAS, 396.]

ADMINISTRATORS — LIABILITY ON BOND BEFORE FINAL DISCHARGE. — When a probate court has passed all orders fixing the administrator's final liability to the heirs, and has ordered the amount found due to be paid to them, the administrator's refusal to obey such order on demand is a violation of his trust, which authorizes suit against the sureties on his bond, before his final discharge.

ADMINISTRATORS. — SUIT AGAINST SURETIES on an administrator's bond is properly brought in the county where the parties defendant reside, instead of the county of the administration.

JUDGMENT — JOINT OR SEVERAL. — When separate causes of action are alleged by each plaintiff, a judgment for plaintiffs for an aggregate sum, distinctly stating the amount which each of them is to receive, is not erroneous, as being joint instead of several as to them.

ADMINISTRATORS — SURETIES — PROBATE ORDERS AGAINST, CONCLUSIVE ON. — Probate court orders ascertaining and fixing the amount finally due by an administrator are conclusive against the sureties on his bond, in a suit against them for his failure to pay over such amount as ordered by the court.

Lane and Mayfield, for the appellants.

F. Vandervoort and F. B. Earnest, for the appellees.

COLLARD, J., Section A. This was a suit by appellees, Susan Morrison and Sarah Dougherty, as heirs of the estate of John McDavitt, deceased, upon the bond of W. A. Stewart, administrator, and his sureties, for their shares of the estate ordered by the probate court to be turned over and delivered to them, which the administrator refused to do upon demand. The McDavitt succession was opened in McMullen County, on the 24th of January, 1880. At the May term of the probate court, 1887, the administrator's final account was approved, showing a balance in money in his hands due the estate, and at the same term partition among the heirs of such fund was ordered, and the administrator ordered to pay to each of them \$767.90. Upon his refusal to obey the order of the court after demand,

this suit was brought October 15, 1887, in the district court of La Salle County, where the defendants reside, upon the bond of the administrator. The petition asked for ten per cent per month damages upon the amounts respectively due the petitioners, from the time demand was made and refused, to which the court below sustained special exceptions.

The trial resulted in a judgment for the plaintiffs for the aggregate amount ordered to be paid to them, \$1,531.80, one half of said sum to each of said plaintiffs, and \$103.14 interest on the whole amount, at eight per cent per annum from the time of demand, "aggregating \$1,634.94, in two equal shares, in the right respectively of said Susan Morrison and the said Sallie Dougherty," etc.

The sureties on the administrator's bond have appealed.

It will not be necessary to take up all the assignments of error in detail, though they will all be disposed of in the following general review of the case. The principal question raised by assignments of error is, Could the suit on the bond be brought before the administrator was discharged by the probate court? It is said in *Buchanan v. Bilger*, 64 Tex. 589, that "during the pendency of administration in the county court that court has entire supervision of the estate, and is armed with full powers to protect the interests of the heirs, legatees, and creditors. These are authorized to come into that court and object to any irregularities or improper conduct of the administrator in the execution of his trust; to have his accounts scrutinized and revised by the judge, and the administrator himself removed if necessary; and if the county court make incorrect rulings in prejudice of their rights, to have them corrected on appeal to the district court."

These principles cannot be questioned; but when the probate court has passed all orders that can be made in that court upon the subject of the administrator's final liability to the heirs, and orders the amount found to be due to be paid to them, no other judgment can be required of that court; the duty of the administrator is plain,—he must pay the heirs as directed by the judgment, and if he refuses to do so on demand, he violates his trust, and becomes liable on his bond. There was nothing pending in the probate court in reference to the administration after the final account was approved, and the partition was ordered among the heirs and distributees of the balance on hand.

The last order of court had been entered that was necessary

to fully administer the estate, after seven years of administration. The administrator had not been discharged, and could not be until he filed his receipt showing that he had delivered the balance of the estate to the distributees, in compliance with the order of the court; but it could not be said that the administration was still pending, in the sense that the probate court had other matters to adjudicate concerning the rights of the heirs or any one else. Everything had been adjudicated and settled so far as the probate court could determine; and now, if the administrator fail to deliver to the heirs their portions of the estate in his hands, as ordered by the court, the remedy is by suit on his bond, which cannot be brought in the probate court. All this is evident from the nature of the jurisdiction of the probate court, and without a statute would be plain enough. But there are statutes which at once settle the controversy if there could be any doubt about it. The statute provides that "in all cases where an order shall have been made by any county judge, under the provisions of this title [relating to estates of deceased persons], for an executor or administrator to pay over money to any person other than the treasurer of the state, and such executor or administrator shall neglect to make such payment when it is demanded, such executor or administrator shall be liable on his official bond for damages, upon the amount he shall so neglect to pay, at the rate of five per cent per month for each and every month he shall so neglect to make such payment after the same was so demanded; such damages to be recovered by suit against such executor or administrator, and the sureties on his bond, before any court having jurisdiction of the amount claimed, exclusive of interest and such damages": Rev. Stats., art. 2049.

There is a similar provision of the statute relating specially to the failure of an administrator to pay any portion of an estate ordered to be paid or delivered to a distributee after demand, except that the damages are fixed at ten per cent per month on the amount of the share withheld, recoverable by suit in any court having competent jurisdiction: Rev. Stats., art. 2127. These statutes authorize the suit for the damages only; but we apprehend it was not intended by the legislature that the amount or share ordered to be paid or delivered should not also be embraced in the suit. We have now seen that the suit on the bond in this case can be maintained; that it was not premature, because the estate was practically settled and

closed,—legally administered as far as it could be done in the probate court.

We think the suit was properly brought in the county of the residence of the defendants. The statute requiring a suit against an administrator to establish a money demand against the estate to be brought in the county where the estate is administered does not apply to this case: Rev. Stats., art. 1198, sec. 6.

Appellants complain by assignment of error that the court erred in overruling their motion in arrest of judgment, which showed that the judgment was joint for both plaintiffs, when the petition declared on separate causes of action for each plaintiff. This objection to the judgment is not good. It distinctly states the amount each one of the plaintiffs is entitled to, and executions may issue in favor of each for one half of the whole amount and accrued interest.

The sureties were concluded by the probate orders ascertaining and fixing the amount due by the administrator, and his failure to pay as ordered authorized the suit on the bond.

The judgment is correct, and should be affirmed.

EXECUTORS AND ADMINISTRATORS — LIABILITY OF SURETIES ON BOND OF. — The sureties of an administrator are in privity with him, and are bound by any lawful order made by the surrogate, to which the administrator is a party: *Deobold v. Oppermann*, 111 N. Y. 531; 7 Am. St. Rep. 760, and note. See extended note to *Commonwealth v. Stub*, 51 Am. Dec. 525. The sureties on an administrator's bond may be held liable for his failure to execute a final decree of the probate court: *Power v. Speckman*, 126 N. Y. 354; *Burnside v. Robertson*, 28 S. C. 583.

GREEN v. HUGO.

[51 TEXAS, 452.]

PRINCIPAL AND AGENT — CORPORATION — CONVEYANCE BY AGENT OF. — Where a resolution of the board of directors of a corporation authorizes a director "to make contracts of sale of the lands of the company," he has no authority to convey such lands as the attorney in fact of the corporation; and such a conveyance of the land by him to his wife without consideration will not even operate as a contract of sale.

PRINCIPAL AND AGENT — CONVEYANCE BY AGENT TO HIS WIFE. — A deed by an agent, under power to sell and convey his principal's land, conveying such land to the agent's wife as her separate property, is void, because such agent cannot sell, either directly or indirectly, to himself.

PRINCIPAL AND AGENT — NOTICE OF AGENT'S AUTHORITY. — One claiming under a contract executed by an agent is bound to know the extent of

the agent's authority, unless he has been held out by his principal as having powers not in fact conferred.

PRINCIPAL AND AGENT — CONVEYANCE BY AGENT — NOTICE TO SUBSEQUENT PURCHASERS. — One who takes under a conveyance of land from an attorney in fact is bound to know the extent of the attorney's authority, and a certificate of acknowledgment, showing that the same land was subsequently conveyed by such attorney and his wife, is sufficient notice of the nature of their title to those claiming under them.

STATUTE OF LIMITATIONS — COLOR OF TITLE — VOID CONVEYANCE. — One who claims land under a void conveyance or contract of sale, executed by one who assumes to act as agent, has no such color of title as will confer ownership, or preclude a recovery under the statute of limitations.

William S. Temple, for the appellant.

J. A. and N. O. Green, and L. C. Grothaus, for the appellee.

GAINES, A. J. — This was an action of trespass to try title, brought by appellant to recover of appellee three tracts of land patented to the Leona Irrigation and Manufacturing Canal Company, a private corporation. The plaintiff claimed title, both by a chain of conveyances from the original grantee and by the statutes of limitation of three years. In a supplemental petition she alleged that she claimed under a certain instrument purporting to be a deed executed by one C. J. Jones, as agent of the corporation, to Hannah J. Jones, and averred that if it was not good as a deed it was a valid contract for the conveyance of the land, and prayed for a specific performance.

The plaintiff's chain of title, as shown by the evidence, disclosed, —

1. A resolution of the board of directors of the Leona Irrigation and Manufacturing Canal Company, of which the following is a copy: —

"May 8, 1877. That the directors of this company, to wit, W. H. Young, William Heuermann, and C. J. Jones, and Hugh F. Young, agent of said company, be and each of them are hereby empowered and authorized to make contracts of sale of the land of the company, and the president is hereby authorized and empowered to make, execute, and deliver in the name of the company a bond for title to the purchaser or purchasers thereof, upon he or they paying one half cash, and executing his or their note for the balance of the purchase-money, said bond to be conditioned that a good and sufficient warranty deed shall be made and delivered on payment of said note."

2. A resolution of the same board, dated September 11, 1887, withdrawing the power granted by the former resolution to Heuermann, W. H. Young, and H. F. Young to make con-

tracts of sale of any land of the corporation, which Jones was attempting to sell. This resolution did not enlarge Jones's powers.

3. A purported conveyance from the corporation, signed by C. J. Jones as agent and attorney in fact, to Hannah J. Jones, of 11,520 acres of land, including those in dispute, for the consideration of \$11,777.77, recited to have been paid by the grantees.

4. A deed from C. J. Jones and Hannah J. Jones to Mary Long, conveying the land in controversy. This deed was acknowledged by the grantors as husband and wife, and the certificate is in form sufficient to convey the separate property of a married woman.

5. A deed, dated April 23, 1888, from Mary Long to Shadrach Green, conveying the land in controversy. The plaintiff proved that Shadrach Green was dead, and that she was his surviving wife and sole heir.

The first question for determination is, Did the purported deed executed by Jones, as agent and attorney in fact, to his wife convey any right and title to her? It is clear that the resolution of May 8, 1877, conferred no authority on Jones to convey any land of the company. It may therefore be admitted, for the purposes of the argument, that the corporation could have empowered him or any other agent to convey its lands, although our statute in relation to private corporations, as well as the by-laws of the company introduced in evidence, conferred that power upon its president alone. The resolution authorized Jones only to make a contract of sale, and by clear implication withheld from him authority either to receive the consideration or to make bond for title. It is apparent, therefore, the pretended deed executed by him to his wife did not take effect as a conveyance, and we are of opinion that it cannot be treated as a contract to convey. There was no proof that any consideration was paid for the land. The testimony of the defendant tended to show that none in fact was paid. The treasurer testified that no money was ever received by him for the land, and both Jones and wife were shown to be insolvent at the date of the attempted conveyance. Not being authorized to receive the consideration, the recital in the pretended deed of the payment of the purchase-money was about a matter beyond the scope of his authority, and is not evidence against the company, or any one holding under it.

But even if Jones had had the power to sell and convey the

company's lands, he was not authorized to convey them to his wife. If the intention had been to make them her separate property, the income would have belonged to the community, and he therefore had a direct personal interest in the transaction. An agent cannot, either directly or indirectly, sell to himself. The pretended conveyance stands, therefore, as if it had been executed by one having no authority whatever.

It follows from the conclusion just announced that the plaintiff cannot successfully maintain that her husband was a *bona fide* purchaser without notice. One who claims under a contract executed by an agent is bound to know the extent of the agent's authority, unless he has been held out by his principal as having powers which have not in fact been conferred: *Fitzhugh v. Franco-Texan Land Co.*, 81 Tex. 306. Besides, the certificate of acknowledgment to the deed from C. J. Jones and Hannah Jones to Mary Long showed that they were husband and wife, and we think it was sufficient to give notice of the fact to all persons claiming under that instrument. If Green knew that Hannah Jones was the wife of C. J. Jones, he is affected with notice that Jones could not as agent convey his principal's property to her. It is clear, therefore, that neither the plaintiff's husband nor any one under whom he claimed was an innocent purchaser.

We are also of opinion that the plaintiff failed to make out title under the statutes of limitation of three years. A pretended conveyance or contract of sale by one who assumes to act as agent of another, but who is in fact without authority, is void, and does not constitute such color of title as will confer ownership, or preclude a recovery under the statutes of limitation of three years: *Thompson v. Cragg*, 24 Tex. 582; *Vera-mendi v. Hutchins*, 48 Tex. 541; *League v. Rogan*, 59 Tex. 427.

Our conclusions upon the questions discussed dispose of the appeal. The plaintiff wholly failed to show title, and the facts proved admitted of no proper disposition of the case, except a judgment for the defendant. A discussion of the numerous assignments of error is unnecessary. It is especially useless to consider the questions raised upon the defendant's title. The plaintiff could recover only upon the strength of her own, and not upon the weakness of her adversary's, claim.

There is no error in the judgment, and it is affirmed.

latter to acquire an interest in the purchase is not a *bona fide* purchaser as against the principal: *Miller v. Louisville etc. R. R. Co.*, 83 Ala. 274; 3 Am. St. Rep. 722. An agent whose duty it is to sell property for the best price cannot become a purchaser thereof unless authorized by law: *Ames v. Port Huron etc. Co.*, 11 Mich. 139; 83 Am. Dec. 731, and note; *Harrison v. McHenry*, 9 Ga. 164; 52 Am. Dec. 435, and note; *Robertson v. Western etc. Ins. Co.*, 19 La. 227; 36 Am. Dec. 673, and note; *Moseley v. Buck*, 3 Munf. 232; 5 Am. Dec. 503; *Tilley v. Wolberton*, 46 Minn. 256. An agent to sell real estate cannot convey the same to his wife for a less sum than it will bring in the market: *McNutt v. Dix*, 83 Mich. 328; *Winter v. McMillan*, 87 Cal. 256; 22 Am. St. Rep. 243. A husband cannot convey property to his wife as her separate property which he is empowered to sell as agent: *Tyler v. Sutherland*, 128 Ill. 136; 15 Am. St. Rep. 97, and note.

AGENCY — NOTICE OF AGENT'S AUTHORITY. — One dealing with a special agent is bound at his peril to know the extent of the agent's authority: *Cleveland v. Pearl*, 63 Vt. 127; 25 Am. St. Rep. 748, and note; *Johnson v. Alabama etc. Mfg. Co.*, 90 Ala. 506; *Foster v. Virtue*, 17 Or. 697; *Clapin v. Continental etc. Works*, 85 Ga. 27.

SCHERFF v. MISSOURI PACIFIC RAILWAY COMPANY.

[IN TEXAS, 671.]

JUDGMENT ON DEMURRER AS RES JUDICATA. — Final judgment on general demurrer, after plaintiff has declined to amend, precludes him from recovering upon the same cause of action in another suit.

JUDGMENT ON DEMURRER, WITH LEAVE TO AMEND, AS RES JUDICATA. — Judgment on general demurrer, with leave to plaintiff to amend, is not final; and if he subsequently suffers a nonsuit and obtains a dismissal, the judgment on demurrer is not conclusive against him as *res judicata*.

JUDGMENT TO HAVE AUTHORITY OF RES JUDICATA must be a definitive judgment of condemnation or dismissal, upon the merits of the case.

APPEAL — FAILURE OF COURT TO SUSTAIN demurrers will not be reviewed on appeal, unless assigned as error in the lower court.

L. H. Blevins, W. R. Neal, and Burges and Dibrell, for the appellant.

J. D. Gwinn, for the appellee.

GAINES, A. J. The appellant brought this action to recover of the appellee damages for the failure to deliver, in accordance with its contract, two hundred bales of cotton. It was alleged in the petition, in effect, that the defendant company undertook to transport the cotton from New Braunfels to Austin, and to deliver it to plaintiff's own order; and that the defendant, without his consent, delivered the cotton to one Barbeck, whereby the plaintiff was damaged \$503. It was admitted that Barbeck had paid the plaintiff the full value of the cotton, except the sum just named.

To the petition the defendant pleaded an estoppel by a former judgment. It was alleged in the answer which set up this defense that in a certain suit in the district court of Travis County, brought by the plaintiff in the present suit against this defendant and others, upon the same cause of action which is sued upon in this case, a demurrer, interposed by this defendant to the plaintiff's petition, was sustained by the court, and the suit dismissed. A transcript of the proceedings in the former suit was made a part of the answer, from which it appears that the International and Great Northern Railway Company, and H. Barbeck, as well as the present defendants, were parties defendant in that action. It also appeared that at the June term, 1886, of the district court of Travis County, the court sustained the general demurrer of the railway companies to the petition, and gave the plaintiff leave to amend; and that at the same time it overruled the demurrers of the defendant Barbeck, and continued the cause until the next term of the court. At the next term the plaintiff, without amending, appeared, and was permitted to dismiss his suit.

The court, in the case now before us, instructed the jury that the record of the suit in the district court of Travis County sustained the plea of *res adjudicata*, and directed a verdict for the defendant. We think that ruling was erroneous.

It may be considered settled law in this state, that when a general demurrer to a petition is sustained, and the plaintiff declines to amend, and a final judgment is rendered against him, he is precluded by the judgment from a recovery upon the same cause of action: *Bomar v. Parker*, 68 Tex. 435; *Parker v. Spencer*, 61 Tex. 155; *Dixon v. Zadek*, 59 Tex. 529; *Girardin v. Dean*, 49 Tex. 243.

But the question for our consideration is, whether or not an interlocutory judgment sustaining a demurrer to a petition, and granting leave to amend, and the subsequent dismissal of the case by the plaintiff, are to be treated as such a definite determination of the controversy upon the merits as will estop the plaintiff from asserting the same cause of action in a new suit.

We are of the opinion that the question should be answered in the negative. When a general demurrer to a petition is sustained, and the plaintiff declines to amend, he practically confesses that he has alleged in his pleading every fact he is

prepared to prove in support of his action. Therefore in such a case nothing remains to be done except to render a judgment for the defendant. Since the defendant, by his demurrer, has admitted the facts of the plaintiff's case, we see no reason why the judgment should not be regarded as a conclusive determination of the litigation upon its merits. So, also, if the plaintiff takes leave to amend, but fails to do so, and judgment is rendered against him for that reason, it is as if he had declined to amend in the first instance. But when he takes leave to amend, he virtually asserts that he has not set up his whole case in his petition; and although the judgment is that his petition does not show a cause of action, yet the leave to amend takes from the judgment that quality of finality which is necessary to make it an estoppel, and thus "sets the matter at large." However, as before said, if the plaintiff, after taking leave, fails to amend, and the court, because of that failure, dismisses his suit, it ought to be treated as if he had declined to amend, at the time the demurrer was sustained, and as if the final judgment had then been rendered. But if, while the case is left open by the leave granted, the plaintiff, with the permission of the court, volutarily dismisses his suit, in our opinion the judgment sustaining the demurrer ought not to be held conclusive upon him. "A judgment, to have the authority or even the name of *res judicata*, must be a definitive judgment of condemnation or dismissal": Freeman on Judgments, sec. 51, quoting 2 Pothier on Obligations. By dismissal as here used, we understand, not a mere nonsuit or discontinuance by the plaintiff, but a dismissal by the court upon the merits of the action. The supreme court of New York says: "By discontinuance of an action, the further proceedings in that action are arrested not only, but what has been done therein is also annulled, so that the action is as if it never had been. If a suit be discontinued at any stage, or the judgment therein be set aside, vacated, or reversed, then the adjudication therein concludes no one, and it is not an estoppel or bar in any sense": *Loeb v. Willis*, 100 N. Y. 231. In the case cited, the judgment, which was pleaded as an estoppel, was rendered after a trial upon the merits, and the plaintiff had been allowed by the court to discontinue his action after the judgment was rendered. The decision was not that it was proper for the court to permit the discontinuance, but that it had the power to do so, and that the discontinuance vacated the judgment previously rendered in the case.

The appellee insists that the court should have sustained its demurrers to the petition, and that therefore the judgment should be affirmed. In order to have the rulings of the court made against it revised, the appellant should have filed assignments of error. But if this had been done, and we should have concluded that the petition was insufficient, we could not affirm the judgment. This would be to deprive the plaintiff of the right to amend. We could, however, have decided the question for the guidance of the court below upon another trial.

For the error in the proceedings which has been pointed out the judgment is reversed and the cause remanded.

JUDGMENT ON DEMURRER AS RES JUDICATA. — Where, to an action upon a judgment, a demurrer to the complaint is sustained upon the ground that the court had no jurisdiction, and judgment is rendered upon such demurrer, it is final, and precludes the bringing of another action upon the judgment demurred to: *McLoughlin v. Doane*, 40 Kan. 392; 10 Am. St. Rep. 210, and note.

A judgment overruling a demurrer to a complaint, and allowing the defendant to plead, is simply an interlocutory order, and does not estop the defendant to set up the same matter in the proper method: *Baker v. Garrie*, 108 N. C. 218.

FROST v. ERATH CATTLE COMPANY.

(81 TEXAS, 506.)

POWERS OF ATTORNEY ARE TO BE STRICTLY CONSTRUED.

POWERS OF ATTORNEY DELEGATING AUTHORITY TO PERFORM SPECIFIC ACTS, and also containing general words, are limited to the particular acts authorized.

POWER OF ATTORNEY TO SELL AND CONVEY LAND, and also containing general words, does not include power to convey, in discharge of a debt or in settlement of an adverse claim.

POWER OF ATTORNEY GIVEN TO A PARTNERSHIP may be executed by a member of the firm.

DEEDS — DEFECTIVE ACKNOWLEDGMENT. — Where the certificate of acknowledgment to a deed fails to show that the grantors were known to the officer taking it, or that they were proved to him on the oath of another to be such grantors, and fails to use any equivalent expression, the omission is fatal to the validity of the deed.

DEEDS — LATENT AMBIGUITY — EVIDENCE TO EXPLAIN. — Where the deeds in a chain of title contain such latent ambiguity in the description as to render them inadmissible in evidence, but such description contains data by which the land conveyed may be identified, extraneous evidence is admissible to explain such ambiguity, and identify the land conveyed.

Thomas T. Ewell, for the appellant.

TARLTON, J., Section B. This suit was instituted in form of trespass to try title by appellee against appellant, on December 29, 1885, in the district court of Hood County, to recover the W. R. Martin 640 acres survey in that county. After the patent, appellee's title consisted of consecutive transfers to himself, the first of these transfers being a letter of attorney from Richard B. Kimball, the patentee of the land, to Richard Kimball, together with a deed thereunder, executed by the attorney in fact, Richard Kimball, to Rebecca De Cordova, embracing a number of surveys in Hood and Erath counties, the power of attorney bearing date January 11, 1868, the deed August 23, 1871.

Appellant claims through a judgment for debt from the district court of Galveston County, against the patentee, Richard B. Kimball, in favor of R. Ostermann, dated June 9, 1869, and on which executions issued annually until June 5, 1878, the date of the last execution, until May 6, 1884, when the execution issued under which one James M. Robinson, the vendor of appellant, bought July 1, 1884, after due levy and advertisement. Appellant claims that the judgment referred to was recorded in Hood County in 1876.

The court rendered judgment for the plaintiff for the land as described in the petition, and from this judgment the defendant appeals.

No conclusions of law and fact are in the record.

The plaintiff read in evidence, over the objection of defendant, a quitclaim deed from Richard B. Kimball, through his attorney in fact, Richard Kimball, to Rebecca De Cordova, reciting, as the consideration thereof, "the release to him by the said Rebecca De Cordova of all her claims, right, title, and interest in and to the Texas lands of the said Richard B. Kimball, or the proceeds thereof, and more especially the interest in said lands derived by the said Rebecca De Cordova by virtue of an instrument executed in her favor by the said Richard B. Kimball, and bearing date January 22, 1852, and by virtue of a certain agreement made by the said Richard B. Kimball and Rebecca De Cordova, dated February 20, 1869. Appellant's objection to this instrument was, that its execution by Richard Kimball was not authorized by the power of attorney under which he claimed to act; and we are called upon by his first assignment of error to review the action of the court in

overruling the objection. The power of attorney recites that the attorney in fact, Richard Kimball, is authorized "to take full and absolute charge of all my business and affairs whatsoever in the state of Texas; to demand, sue for, recover, and receive all and any debts due me; to compound the same in his discretion, and give acquittances and discharges therefor; and further, to make contracts for the sale of any and all tracts of land owned by me in said state of Texas, at any price in the discretion of my said attorney; and as my agent and attorney hereby constituted, to execute full and sufficient deeds of conveyance in law to any person or persons to whom he may or shall make sale of any of my lands aforesaid, and legally to acknowledge and deliver the same, and receive from the purchaser or purchasers the consideration money therefor; and make contracts for the leasing of any of my said real estate, and for the improvement thereof, according to his discretion, and to execute leases, grant privileges, and generally to manage, direct, and control all matters connected with or appertaining to my property in the state of Texas; hereby revoking by this instrument any previous power of attorney by me executed, relating to my property in Texas, giving and hereby granting to my said attorney full power and authority in and about the premises to use all due means, cause, and process in the law for the full, effectual, and complete execution of the business aforescribed, and in my name to make and execute due acquittance and discharge, and for the premises to appear and the person of me the constituent to represent, before any governor, judge, justice, officers and ministers of law whatsoever, in any court or courts of judicature, and there, on my behalf, to answer, defend, and reply unto all actions, causes, matters, and things whatsoever relating to the premises. Also to submit any matter in dispute respecting the premises to arbitration or otherwise, with full power to make and substitute, for the purposes aforesaid, one or more attorneys under my said attorney, and the same at pleasure to revoke; and generally to say, do, act, transact, determine, accomplish, and finish all matters and things whatsoever relating to the premises, as fully, amply, and effectually to all intents and purposes as I, the said constituent, if present, ought or might personally, although the matter should require more special authority than is herein comprised, I, the said constituent, ratifying, allowing, and holding firm all and whatsoever my

said attorney or his substitutes shall lawfully do or cause to be done in and about the premises by virtue of these presents."

It sufficiently appears from the recitals in the deed that the transaction therein referred to was the settlement of some interest held or claimed by Mrs. Rebecca De Cordova in the lands of Richard B. Kimball, or the proceeds of them. The transaction was plainly not a sale. "A sale is defined to be an agreement by which one of two contracting parties, called the seller, gives the thing and passes the title to it for a certain price in current money": *Hampton v. Moorhead*, 62 Iowa, 93. "It differs from accord and satisfaction, because in that contract the thing is given for the purpose of quieting a claim, and not for a price": *Bouvier's Law Dict.* The deed in question excludes and negatives the idea of price or money paid. Under the terms of the power of attorney, was Richard Kimball, the agent, authorized to execute deeds in discharge or adjustment of adverse claims preferred by Rebecca De Cordova against Richard B. Kimball? It appears from the letter of attorney that it is only in connection with the sale of lands that he is authorized to execute conveyances; and such power is not elsewhere conferred in the instrument, unless it be included in the expression, "to take full and absolute charge of all my business and affairs in Texas, and to say, do, act, transact, determine, and finish all matters and things whatsoever relating to the premises, as fully, amply, and effectually to all intents and purposes as I might, etc., although the matter should require more special authority than is herein comprised."

Powers of attorney, unlike deeds and wills, are to be strictly construed; the authority delegated is limited to the meaning of the terms in which it is expressed: 1 Devlin on Deeds, sec. 358; *Skaggs v. Murchison*, 63 Tex. 353; and "where the authority to perform specific acts is given, and general words are also employed, such words are limited to the particular acts authorized": *Mecham on Agency*, sec. 318; *Billings v. Morrow*, 7 Cal. 171; 68 Am. Dec. 235. It follows, then, that these general expressions, however broad, are to be referred to the particular acts elsewhere specified and authorized; and as the power to execute conveyances is given only with reference to the power to sell, that unless the power to execute deeds for the sale of land includes the power to execute deeds in discharge or settlement of claims, the conveyance in question was unauthorized by the letter of attorney. It is well settled

that a power to convey in sale of lands does not authorize a conveyance in exchange or partition of lands: *Mecham on Agency*, secs. 326, 329; *Reese v. Medlock*, 27 Tex. 120; 84 Am. Dec. 611; *Borel v. Rollins*, 80 Cal. 408. And the reasoning by which we reach the conclusion that the power to sell does not include the power to exchange or partition impels the conclusion that the power to sell and convey does not include the power to convey in discharge of a debt or a claim. In *Berry v. Harnage*, 39 Tex. 638, and in *Moss v. Berry*, 53 Tex. 633, a power of attorney abounding in general expressions delegating authority was held insufficient to authorize the sale of land, though it empowered the execution of conveyances on the discharge of debts due the constituent. We think that the converse should hold in this case, where the authority is specifically given to execute deeds for the sale of land, but not in the discharge of adverse claims to land. It may be that the execution of this deed was afterward ratified by Richard B. Kimball, by an acceptance of the consideration stated, or by such acts under its provisions as would operate as an estoppel: *Zimpelman v. Keating*, 72 Tex. 320; *Mecham on Agency*, sec. 129. If so, it devolved upon the appellee claiming thereunder to prove ratification: *Reese v. Medlock*, 27 Tex. 124; 84 Am. Dec. 611. It does not appear that Richard B. Kimball was ever notified of its execution, or that he has in any way accepted any benefit derived from it. We are to be understood as passing upon the sufficiency of the deed under the power of attorney adjudged solely by its recitals. Applying this test, we think the deed was improperly admitted.

Appellant's second assignment of error questions the correctness of the court's ruling in admitting, over objection, a deed to Monks and Cobb, dated in 1872, and signed "Rebecca De Cordova, by C. R. Johns & Co., per W. Von Rosenberg." The objections were: 1. The power of attorney under which the deed was executed was in the name of "C. R. Johns & Co.," and would not support the deed when signed by only one member of the firm in the name of the firm. 2. It does not appear that Von Rosenberg was a member of the firm in 1871, the date of the power of attorney.

Both objections were, we think, properly overruled. In urging the first objection, appellant relies upon the rule that when authority is delegated to two or more persons all must concur in the execution of such authority: *Story on Agency*, sec. 42. This rule applies where the power is given to two

persons by their names as individuals, and when so delegated, though partners, each must act individually. This principle, however, does not obtain where a power is conferred upon a partnership as such. In such a case, the partnership becomes the agent; the individuals do not become separate and several agents. Each member of the firm, within the scope of the partnership, is the agent of the firm, and all are accountable for the acts of each. The authority is delegated with reference to these principles: *Mecham on Agency*, secs. 65, 70; *Deakin v. Underwood*, 37 Minn. 101; 5 Am. St. Rep. 827; *Gordon v. Buchanan*, 5 Yerg. 71.

The firm name, "C. R. Johns & Co.," was signed by the individual W. Von Rosenberg. The deed was dated in 1872, and it was proved that Von Rosenberg was then a member of the firm of C. R. Johns & Co. These facts we think were sufficient to justify the presumption, in the absence of testimony to the contrary, that Von Rosenberg was a member of the firm of C. R. Johns & Co. when the power of attorney was executed in 1871.

In his third assignment of error appellant complains that the court erroneously overruled his objection to the introduction in evidence of the deed from Monks and wife to G. W. and W. F. Horton. We sustain appellant's contention. The deed was dated November 12, 1879, and the certificate of acknowledgment fails to show that the grantors were either known to the officer, or that they were proved to him on the oath of another to be the persons who executed the instrument, and the certificate failed to use any equivalent expression. Since the adoption of our Revised Statutes, such an omission is fatal to the acknowledgment: *Rev. Stats.*, arts. 4309, 4312; *Hayden v. Moffatt*, 74 Tex. 648; 15 Am. St. Rep. 866; *McKie v. Anderson*, 78 Tex. 207.

The appellant in his third and fourth assignments complains of the action of the court in overruling his objections to the deeds from Charles Cobb to Joseph Monks, and from Monks to G. W. and W. F. Horton, and from G. W. and W. F. Horton to J. H. Traylor. The objections are founded on the alleged insufficiency of the description contained in the deeds, on account of both patent and latent ambiguity. Without detailing or analyzing the matters of description, we deem it only necessary to say that in our opinion there is such ambiguity in the description as to render the deeds inadmissible, as they were offered unaided by other testimony, but that the ambigu-

ity is latent, not patent, and that as the descriptions contains data by which the land conveyed might be identified, resort for that purpose might be had on another trial to extraneous evidence: *Kingston v. Pickins*, 46 Tex. 101.

It is unnecessary to consider the remaining assignment of error.

For the errors pointed out, we think that the judgment should be reversed and the cause remanded, and we so report.

AGENCY — POWER OF ATTORNEY — HOW CONSTRUED. — Powers of attorney receive a strict construction, and the authority by them is never extended beyond that expressed in terms, or absolutely necessary to carry the authority into effect: *Gilbert v. Hou*, 45 Minn. 121; 22 Am. St. Rep. 724, and extended note; *Gouldy v. Melcalf*, 75 Tex. 455; 16 Am. St. Rep. 912, and note; *Lamy v. Burr*, 36 Mo. 85; 63 Am. Dec. 135, and note; *Camden etc. Ass'n v. Jones*, 53 N. J. L. 189; *Dwerak v. More*, 25 Neb. 735.

ACKNOWLEDGMENT — WHAT MUST CONTAIN. — An acknowledgment to a deed which fails to recite that the grantor was personally known to the officer is fatally defective: *Tully v. Davis*, 30 Ill. 103; 83 Am. Dec. 179, and note; *Wolf v. Fogarty*, 6 Cal. 224; 65 Am. Dec. 509, and note; *Salmon v. Huff*, 80 Tex. 133; *McKie v. Anderson*, 78 Tex. 207. It is not necessary that the certificate of acknowledgment of a deed by an administrator should recite that the grantor was personally known to the officer: *Hughes v. McDivitt*, 102 Mo. 77.

DEEDS — AMBIGUITY IN — EXTRANEOUS EVIDENCE TO EXPLAIN. — Evidence is admissible to explain ambiguities in a deed: *Palmer v. Farrell*, 129 Pa. St. 162; 15 Am. St. Rep. 708, and note. Reference may be had to another deed for such purposes: *Campbell v. McArthur*, 2 Hawks, 33; 11 Am. Dec. 738, and note. Evidence is admissible to show whether a person intended an instrument to be a will or a deed: *Robertson v. Duan*, 2 Murph. 133; 5 Am. Dec. 525. In order to explain doubts in a deed, the court may consider the condition of the property, state of the title, or other material matters, to aid it in its interpretation: *Cannon v. Emmans*, 44 Minn. 294. Where descriptions in a deed are uncertain, reference may be had to prior deeds conveying the same land: *McAfee v. Arline*, 83 Ga. 645. See *Gruber v. Lindenmeier*, 42 Minn. 99; *Raymond v. Nash*, 57 Conn. 447.

SEABY v. HUNTER.

[51 TEXAS, 644.]

INFANT'S DEED IS VOIDABLE, NOT VOID; and in order to avoid it, he must disaffirm it within a reasonable time. What is such reasonable time is a question of fact.

INFANCY — COVERTURE — WHEN EXCUSES LACHES IN DISAFFIRMING A DEED. — A married woman may be barred by lapse of time from disaffirming her deed made during infancy; but her coverture should be considered in determining, as a question of fact, whether the disaffirmance has been attempted within a reasonable time or not.

INFANCY — RIGHT TO DISAFFIRM DEED. — The conveyance of land to an innocent purchaser for value by the grantee of an infant will not bar the right of the latter to disaffirm his conveyance within a reasonable time.

INFANCY — DISAFFIRMANCE OF DEED. — A conveyance by a grantor or his heirs is one mode of disaffirming his prior deed made during infancy.

INFANCY — ATTORNEY FEES AS NECESSARIES. — Beneficial legal services in defense of the rights of an infant may be considered as necessities, and constitute a valid consideration for a deed to a share of the land recovered.

H. L. Stone and John D. Lee, for the appellants.

Simpkins and Neblatt, for the appellee.

GAINES, A. J. The appellants, Overton Searcy and Shelby Searcy, brought this suit by their guardian to recover of defendant a tract of one hundred acres of land, and obtained a judgment for an undivided interest.

There is no statement of facts filed in the record, but the case is brought here upon the conclusions of fact and law of the judge who tried the case below without a jury. From the findings of fact, it appears, in substance, that Annie E. Hollingsworth, then a minor, and others owned a large survey of land known as the Haggerty survey; that their interest had been in common, but had been severed by partition; that the heirs of Haggerty brought suit for the entire land against the other owners, but did not make Annie a party. She had no legally appointed guardian, but her step-father, hearing of the suit, wrote to Simpkins and Simpkins, attorneys at law, requesting them to look after her interest in the land, and to take such steps as were necessary to protect her rights. They obtained of the court leave for her appearance as a party defendant, and filed an answer for her. The cause went to trial, and resulted in a judgment for the defendants. Subsequently she conveyed to Simpkins and Simpkins the land in controversy in this suit in consideration of their services. Her interest in the Haggerty survey was about 750 acres, as shown by the petition in this case, and the tract in controversy is a part of it. At the time of the conveyance she was about sixteen years old. While still a minor, in October, 1882, she married, and died in July, 1883, leaving as her heirs her mother, a married woman, and appellants, her half brother and sister, and her husband, one Blanks. Her mother died in December, 1883, leaving appellants as her only surviving children. Blanks conveyed his interest in the land to

the appellant Overton Searcy. The object of the suit was to disaffirm the deed to Simpkins and Simpkins, and recover the land. The court gave judgment for the appellants for all the interest in the land except that inherited by the mother, and for that interest, gave judgment for defendant. The judgment is assigned as error, and appellants maintain that they should have had judgment for the whole.

An infant's deed is voidable, not void; and it is well settled in this state that in order to avoid it, he must disaffirm it within a reasonable time after attaining his majority: *Kilgore v. Jordan*, 17 Tex. 341; *Stuart v. Baker*, 17 Tex. 421; *Bingham v. Barley*, 55 Tex. 281; 40 Am. Rep. 801. As to what is a reasonable time, there is an irreconcilable conflict in the authorities. The case last cited recognizes the rule that when mere lapse of time is relied upon to defeat the right of avoiding the deed, it must be such as, under all the circumstances, will rebut any presumption of any intended disaffirmance. Without passing upon the correctness of the rule thus laid down, we are of opinion that there does not appear in the judge's findings of fact such circumstances as justified the court in holding as a matter of law that the mother of appellants at her death was barred of her right to avoid the deed. We think the question of a reasonable time one of fact to be found by the court as such, or, in case of a trial by the jury, by the jury under proper instructions from the court. For the error of the court in concluding that the appellants cannot recover in the right of their mother, the judgment will be reversed; and in view of the fact that the case seems to admit of a fuller development upon another trial, the cause will be remanded.

There are other questions suggested in the briefs that require consideration. The authorities at common law seem to be that a married woman will not be barred of the right of disaffirming a deed made during infancy at any time during her coverture. We think, however, that rule should not apply in this state. It is true, she cannot here disaffirm by deed without consent of her husband; but she can disaffirm by suit without his concurrence. Still, we think that coverture is a circumstance to be considered in determining, as a question of fact, whether the disaffirmance has been attempted within a reasonable time or not.

Appellee contends that when the grantee of the minor sells the land for value to a purchaser in good faith, the right of

disaffirmance is lost. We have found no authority to support the proposition. Such a doctrine would enable the grantee to make the deed valid by a mere sale to an innocent purchaser, and would practically destroy a rule established to protect minors against the consequences of improvident conveyances of their property.

Appellee also maintains that the appellant Overton Searcy should not have recovered as grantee of J. G. Blanks, the surviving husband of the grantor in the deed sought to be avoided. But we understand the law to be that a conveyance by the grantor or her heirs is one mode of disaffirming the deed of an infant.

Appellee also insists that the legal services of Simpkins and Simpkins were a lawful consideration for the conveyances, and that the land cannot be recovered without paying a compensation for that consideration. For necessities furnished an infant the law implies a contract. These are usually food, lodging, wearing apparel, medicine, medical attendance, and the means of an education. Such is the more rigid rule of the common law. But there are cases which recognize that fees of attorneys for services rendered infants may, under some circumstances, be treated as necessities, for the payment of which the law will imply a contract: *Epperson v. Nugent*, 57 Miss. 45; 84 Am. Rep. 434; *Thrall v. Wright*, 38 Vt. 494; and see, for a general discussion, *Hall v. Butterfield*, 59 N. H. 354; 47 Am. Rep. 209. Looking to the condition of affairs in our own state, it seems to us that to refuse to allow an attorney who, at the instance of a next friend, has instituted a suit in behalf of a minor, and recovered for him money or property, to claim from the infant a reasonable compensation for his services would be to establish a rule which would operate to the prejudice of the class it is designed to protect. In such case, where the services have been beneficial to the infant, we are of opinion that reasonable compensation should be allowed. The court found in this case that the deed to Simpkins and Simpkins was without consideration. That should be made to depend upon the question whether their services were beneficial to the infant or not. If so, the plaintiff should in no event recover without an offer to pay and the payment of a just and reasonable compensation. We have had some difficulty in determining whether the judgment in the suit of Haggerty's heirs was conclusive in her favor. If not, the legal services in the suit

were, as to her, without value. But we think the judgment should be held conclusive. An infant may bring suit by a next friend, and we see no reason why he may not intervene in the same manner. Annie Hollingsworth was permitted to make herself a party defendant in the suit, and we think she was practically an intervener asserting her claim against the plaintiffs in that suit, and that they are bound by the judgment. The right of Simpkins and Simpkins to compensation depended upon the question whether, in view of the state of the title and the attendant expense of litigation, it was beneficial to her interest to intervene in the suit or not.

For the errors pointed out, the judgment is reversed and the cause remanded.

INFANTS — DEEDS OF — VOID OR VOIDABLE. — The deed of an infant is voidable only; the title passes by it, and remains in the grantee until some clear act of disaffirmance done by the grantor after coming of age: *Logan v. Gardner*, 136 Pa. St. 588; 20 Am. St. Rep. 939, and note; note to *Craig v. Van Beiber*, 18 Am. St. Rep. 575-579; *Manning v. Johnson*, 26 Ala. 446; 62 Am. Dec. 732; *Bool v. Miz*, 17 Wend. 119; 31 Am. Dec. 285, and note; *Ikley v. Padgett*, 27 S. C. 300; *Hoffert v. Miller*, 86 Ky. 572.

INFANTS — COVERTURE OF, NO BAR TO DISAFFIRMANCE OF DEED. — An infant married woman is not bound by her deed, though executed and acknowledged in conformity with the statute: *Harrod v. Meyers*, 21 Ark. 592; 76 Am. Dec. 509, and note; extended note to *Craig v. Van Beiber*, 18 Am. St. Rep. 584-587, 638; *Cummings v. Everett*, 82 Ma. 260.

INFANTS — DISAFFIRMANCE OF DEEDS OF — WHAT AMOUNTS TO. — Where a minor executes a deed of conveyance, and after attaining majority conveys the same land to a third person, the second deed is a disaffirmance of the first: *Craig v. Van Beiber*, 180 Mo. 584; 18 Am. St. Rep. 569, and extended note at pages 662-667; *Peterson v. Laik*, 24 Mo. 541; 69 Am. Dec. 441, and note.

INFANTS — ATTORNEY'S FEES AS NECESSARIES. — The estate of an infant is liable for the fees of counsel whose services were beneficial thereto: *Epperson v. Nugent*, 57 Miss. 45; 34 Am. Rep. 434, and note; *Munson v. Washband*, 31 Conn. 303; 83 Am. Dec. 151, and note. An infant is liable as for necessities for the services of an attorney who defended him in a bastardy proceeding: *Barker v. Hibbard*, 54 N. H. 539; 20 Am. Rep. 160. *Askey v. Williams*, 74 Tex. 294, holds that the services of an attorney should be held necessary to an infant when he is charged with crime.

CASES
IN THE
SUPREME COURT
OF
WASHINGTON.

SPOKANE TRUCK AND DRAY COMPANY v. HOEFER.

[2 WASHINGTON, 45.]

NEGLECT, INSTRUCTION AS TO, ALREADY GIVEN, NEED NOT BE REPEATED.

— Where the court has already instructed the jury that if it did not appear by a preponderance of testimony that the injury for which recovery was sought was occasioned by the negligence of the defendant they should find for the defendant, it is not error to refuse to instruct them that if the injury occurred by defects in the wall, caused by the elements, which were not discovered by ordinary care, in the absence of further negligence on the part of the defendant, the plaintiff cannot recover.

CARE, DEGREE OF, REQUIRED OF PERSON PERFORMING ACT WHERE SAFETY OF PUBLIC INVOLVED. — A person engaged in hoisting a heavy safe in a public place where people are constantly passing is bound to use such care as the nature of the employment and the situation and circumstances require of a prudent person experienced and skilled in such or similar work.

PUNITIVE DAMAGES NOT RECOVERABLE. — The doctrine of punitive damages is unsound in principle and unfair and dangerous in practice, and such damages cannot be recovered in Washington, although the defendant may have been guilty of gross negligence.

ACTION for personal injuries. The opinion states the case.

Turner and Graves, and W. C. Jones, for the appellant.

Jesse Arthur, for the appellee.

DUNBAR, J. The plaintiff, **Mina Hoefer**, had her arm broken, and was otherwise injured, by the falling of a safe, which was being hoisted by the defendant into a five-story brick building, known as the "Eagle Block," in the city of Spokane Falls. Plaintiff had been to the office of her physician in the second story of said building, where she was accustomed

to go for treatment daily, and while returning from such a visit on the seventh day of February, 1890, she passed down the stairway and into the court or opening under the hoisted safe just as it fell. The said stairway started from the entrance of said court, or well, on Stevens Street, and landed on the north end of the covered way on the second floor of the rear building. Dr. Thiel's office, where Mina Hoefer had been just before she was injured, was in a room on the second floor of the Stevens Street building, and was the first room north of the Stevens Street entrance. There was one other and perhaps main entrance to the building from Riverside Avenue, and it is claimed by the defendant that the court, or well, on that side of the block was used for hoisting heavy articles to the upper stories of the building, and was not generally employed by the public as an entrance to the upper stories of the block; yet we think it fairly appears that the stairway leading from Stevens Street was in common use, and that the plaintiff had a right to use it in going to and from the office of her physician. Suit was brought against the defendant, alleging damages in the sum of five thousand dollars. The case was tried by a jury, and a verdict rendered for plaintiffs for two thousand five hundred dollars, and a judgment rendered for the same, from which judgment an appeal was taken to this court.

The defendant assigns as error the following instructions to the jury, given by the court upon its own motion: "Furthermore, gentlemen, the plaintiffs claim in this action that the defendant was not only guilty of negligence, by reason of which the plaintiff was damaged, but was guilty of gross negligence, and in case you find they were guilty of gross negligence, a different rule of damages applies to the case. . . . 'Gross negligence' means a wanton and reckless disregard of the rights of other persons, taken into consideration with the facts in the case; and in case you find that it was, then, in addition to the actual damages which you may find for plaintiff, you may assess a sum which the law calls 'exemplary damages.' That means, a damage to deter others from being wanton and reckless of the rights of others."

Also the following instructions, asked by plaintiffs:—

"If the jury believe from all the evidence that the agent and employees of defendant, the Spokane Truck and Dray Company, in placing the beams and planks across the well-hole, in plaintiffs' petition mentioned as being in the Eagle

Block, in the city of Spokane Falls, and in any other way, in the construction and preparation of the appliances for hoisting the safe up and through said well-hole, and in the hoisting of the same, failed to use such care as the nature of the employment, and the situation and circumstances surrounding the same, required of a prudent person having had experience, and skilled in such or similar work, and that, by reason thereof, said beam and planks, and other appliances, in the attempt to hoist said safe, gave way, or were broken, and fell down through said well-hole, striking plaintiff, Mina Hoefer, breaking her arm, and otherwise injuring her, they should find for plaintiff, assessing the damage, if any, at such sum as they find she has sustained, not exceeding five thousand dollars, the amount claimed in the complaint."

"The jury is instructed that if they find for plaintiff under the preceding instruction, in assessing the damage they have a right to consider and allow for the loss of the personal services of plaintiff, Mina Hoefer, to her family; her mental suffering and bodily pain; the extent of probable duration of the injury, and the prospective loss of service occasioned thereby; also the expense incurred for medicine, nursing, etc., and such reasonable doctor bill as plaintiffs were obligated to pay."

"Should the jury find for plaintiffs under instruction No. 1, and also find that defendant's agents and employees, in constructing the appliances for hoisting said safe, and in hoisting the same, were guilty of gross negligence,—that is, exercised so little care as to evince a reckless and willful indifference to the safety of plaintiff, Mina Hoefer, and all others using said entrance and stairway,—then they may find for plaintiffs exemplary damages,—that is, damages in money by way of punishment, in addition to the damages they may find under instruction No. 2, in no case exceeding in all the amount of five thousand dollars claimed in the complaint."

The court refused to give the following instruction asked by the defendant, which refusal defendant also assigns as error: "If you find by the evidence that the injury occurred by defects in the wall, caused by the elements, and such defects were not discovered by ordinary care, in the absence of further negligence on the part of the defendant, the plaintiff cannot recover."

So far as the instruction is concerned that was asked for by defendant and refused by the court, we think it had already been substantially given by the court, and it was not neces-

nary to repeat it in another form of words. The court had already instructed the jury that "if it did not appear by a preponderance of testimony that this injury was occasioned by the negligence of the defendant, that it was their duty to find for the defendant." Courts should not be called upon to particularize by referring to certain portions of the testimony. It is a far safer rule to state the law governing the case in general terms.

It is claimed by the defendant that the language used by the court in the first instruction asked by plaintiffs makes the defendant an actual insurer of the safety of the public, and is therefore erroneous. The statement was, "that the defendant was bound to use such care as the nature of the employment, and the situation and circumstances surrounding the same, required of a prudent person having had experience, and skilled in such or similar work." We are unable to see how this instruction could be materially modified. Undoubtedly, the "nature of the employment" must be taken into consideration. If it is an employment which is likely to endanger life or property, certainly a greater degree of care would be required than an employment the careless performance of which would not ordinarily result in injury to person or property. It is plain that "the situation and circumstances surrounding the employment" must be considered; for, applying the rule to a case of this character, a person in hoisting a heavy weight in an unfrequented place, in no way connected with any thoroughfare or passage-way, would not be held to the same degree of care as he would be if the work were being done in a public thoroughfare, where people had a right to pass, and were actually constantly passing. It certainly cannot be gainsaid that "prudence" should be one of the requisite qualifications of a person engaged in such employment. Nor must his qualifications stop here, when engaged in a business which is liable to injuriously affect the public; for he might be an ordinarily prudent man, and yet, if he had no experience or skill in the particular work in which he is engaged, disastrous results would be liable to follow. Language which is not technical must be construed by its ordinarily accepted meaning, and we do not think the language employed by the court could not be so construed as to make the defendant an insurer; and we concur with the counsel for the plaintiffs, that it states substantially the same doctrine as the quotation from Shearman and Redfield on Negligence, section

47, by defendant, where they define ordinary care to be "the care usually bestowed upon the matter in hand by persons accustomed to deal with such matters, and having the average prudence of the general class of society to which the person whose conduct is in question belongs."

We next pass to the instruction of the court, both upon its own motion and upon the motion of the plaintiffs, in relation to punitive damages. This is a question which has engaged the earnest attention of courts and authors. A careful investigation of the discussion of this subject by such noted authors as Greenleaf, Sedgwick, and Parsons, and also other eminent text-writers, and by numerous courts, shows a wonderful diversity of opinion on this interesting subject. The weight of authority, especially considering the older cases, seems to be in favor of the doctrine of punitive damages; but the opposite doctrine has received the support and advocacy of many modern writers, and the judicial sanction of many modern courts; while other courts have frankly stated their repugnance to the doctrine, yet considered themselves bound by former decisions in their respective states to still maintain it, appealing to the legislature to relieve them from what they believe to be a pernicious practice. In this state it is a new question, and the court approaches its investigation untrammelled by former decisions, free to accept the reasoning which most strongly appeals to its judgment, and to adopt the rule, which, in its opinion, will simplify judicial proceedings, and lead to the least embarrassing complications in the administration of the law, and the determination of rights thereunder. And this desired ultimatum, we think, will best be attained by adopting the rule laid down by Mr. Greenleaf (vol. 2, sec. 253), that "damages are given as a compensation or satisfaction to the plaintiff for an injury actually received by him from the defendant. They should be precisely commensurate with the injury, neither more nor less; and this whether it be to his person or estate," — although it is stoutly maintained by so eminent an author as Mr. Sedgwick that this definition is too limited, and that wherever the elements of fraud, malice, gross negligence, or oppression "mingle in the controversy, the law, instead of adhering to the system or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms 'punitive,' 'vindictive,' or 'exemplary' damages; in other words, blends together the interests of society and of the aggrieved individual, and gives damages not only

to recompense the sufferer, but to punish the offender": 1 Sedgwick on Damages, 38, 7th ed., 53. It seems to us that there are many valid objections to interjecting into a purely civil action the elements of a criminal trial, intermingling into a sort of a medley or legal jumble two distinct systems of judicial procedure. While the defendant is tried for a crime, and damages awarded on the theory that he has been proven guilty of a crime, many of the time-honored rules governing the trial of criminal actions, and of the rights that have been secured to defendants in criminal actions, "from the time whereof the memory of man runneth not to the contrary," are absolutely ignored. Under this procedure, the doctrine of presumption of innocence until proven guilty beyond a reasonable doubt finds no lodgment in the charge of the court, but is supplanted by the rule in civil actions of a preponderance of testimony. The fallacy and unfairness of the position is made manifest when it is noted that a person can be convicted of a crime, the penalty for which is unlimited save in the uncertain judgment of the jury, and fined to this unlimited extent for the benefit of an individual who has already been fully compensated in damages on a smaller weight of testimony than he can be in a criminal action proper, brought for the benefit or protection of the state, where the amount of the fine is fixed and limited by law; and in addition to this, he may be compelled to testify against himself, and is denied the right to meet the witnesses against him face to face, under the practice in civil actions of admitting depositions in evidence.

Exclusive of punitive damages, the measure of damages as uniformly adopted by the courts and recognized by the law is exceedingly liberal towards the injured party. There is nothing stinted in the rule of compensation. The party is fully compensated for all the injury done his person or his property, and for all losses which he may sustain by reason of the injury, in addition to recompense for physical pain, if any has been inflicted. But it does not stop here; it enters the domain of feeling, tenderly inquires into his mental sufferings, and pays him for any anguish of mind that he may have experienced. Indignities received, insults borne, sense of shame or humiliation endured, lacerations of feelings, disfiguration, loss of reputation or social position, loss of honor, impairment of credit, and every actual loss, and some which frequently border on the imaginary, are paid for under the rule of compensatory damages. The plaintiff is made entirely

whole. The bond has been paid in full. Surely the public can have no interest in exacting the pound of flesh.

Ordinarily, the administration of the laws is divided into two distinct jurisdictions, the civil and the criminal, each governed by rules of procedure, and by rules governing the admission and weight of testimony different and distinct from the other. The province of the civil court is, as its name indicates, to investigate civil rights. There its jurisdiction ends, or ought to end; while the province of the criminal court is, as its name imports, to investigate and punish crime and restrain its commission. And it is to the criminal and not to the civil jurisdiction that society looks for its protection against criminals. The object of punishment is not to deter the criminal from again perpetrating the crime on the particular individual injured, but for the protection of society at large; and as the state is at the expense of restraining and controlling its criminals, and as fines are imposed for the double purpose of restraining the offender and of reimbursing the state for its outlay in protecting its citizens from criminals, we are at a loss to know by what process of reasoning, either legal or ethical, the conclusion is reached that a plaintiff in a civil action, under a complaint which only asks for compensation for injuries received, is allowed to appropriate money which is supposed to be paid for the benefit of the state. It is to be presumed that the state has fully protected its own interests, or as fully at least as they could be protected by laws, when it provides for the punishment of crime in its criminal statutes, and fixes the fine at a sum which it deems commensurate with the crime designated; hence punitive damages cannot be allowed on the theory that it is for the benefit of society at large, but must logically be allowed on the theory that they are for the sole benefit of the plaintiff, who has already been fully compensated,—a theory which is repugnant to every sense of justice.

Again, while jurors should be the judges of the character and weight of testimony, that judgment should be exercised under some rule, and be amenable to some law, so that an abuse of discretion could be ascertained and corrected; but, under the doctrine of punitive damages, where the whole question is left to the unguided judgment of the jury, and where, under the very nature of the doctrine, no measure of damages can be stated, and hence no limits compelled, where there are no special findings provided for, it would not be often that a

court would be warranted in interfering with a verdict, if indeed it could do so at all, if the verdict fell within the amount asked as compensatory damages. Take the case at bar, for instance, and the court has no way of ascertaining whether the jury found that the plaintiff had actually been damaged to the full amount of two thousand five hundred dollars, or whether they found her actual damages to be five hundred dollars, and assessed the other two thousand dollars by way of punishment. It seems to us that a practice which leads to so much confusion and uncertainty in the administration of the law, and that is always liable to lead to injustice, the correction of which is impracticable, cannot be too speedily eradicated from our system of jurisprudence. In this connection, we quote approvingly the language of the supreme court of Indiana in *Stewart v. Maddox*, 63 Ind. 51. Says the court: "The doctrine of exemplary or punitive damages rests upon a very uncertain and unstable basis. It is almost equivalent to giving the jury the power to make the law of damages in each case; and in a case where the defendant is a commanding, popular, influential person, and the plaintiff of the opposite character, and the local and temporary excitement or prejudice of the time happens to be in favor of the defendant and against the plaintiff, the jury is apt to be reluctant in giving even pecuniary compensation without adding anything by way of exemplary or punitive damages; while in a case in which the character of the parties and the circumstances are reversed, the jury will be liable to push their power to an unwarranted and unconscionable extent, dangerous to justice and the security of settled rights."

Says the court in *Murphy v. Hobbs*, 7 Col. 541, 49 Am. Rep. 366: "The reflecting lawyer is naturally curious to account for this 'heresy' or 'deformity,' as it has been termed. Able and searching investigations made by both jurist and writer disclose the following facts concerning it, viz., that it was entirely unknown to the civil law; that it never obtained a foothold in Scotland; that it finds no real sanction in the writings of Blackstone, Hammond, Comyns, or Rutherford; that it was not recognized in the earlier English cases; that the supreme courts of New Hampshire, Massachusetts, Indiana, Iowa, Nebraska, Michigan, and Georgia have rejected it in whole or in part; that of late other states have falteringly retained it, because committed so to do; that a few years ago it was cor-

rectly said: 'At last accounts, the court of queen's bench was still sitting hopelessly involved in the meshes of what Mr. Chief Justice Quain declared to be "utterly inconsistent propositions"'; and that the rule is comparatively modern, resulting in all probability from a misconception of impassioned language and inaccurate expressions used by judges in some of the earlier English cases." And in support of this theory, the Colorado court quotes Mr. Justice Foster in *Fay v. Parker*, 53 N. H. 342, 16 Am. Rep. 270, who concludes a discussion of the expression "smart-money," as used by Grotius and jurists contemporary with that author, in the following language: "It is interesting, as well as instructive, to observe that 120 years ago the term 'smart-money' was employed in a manner entirely different from the modern signification which it has obtained, being then used as indicating compensation for the smarts of the injured person, and not, as now, money required by way of punishment, and to make the wrong-doer smart." Some courts have held that it was in violation of the constitutional guaranty "that no person should be twice put in jeopardy for the same offense," where the criminal code provided a punishment for the same offense, and some have restricted or limited its abrogation to cases where the act charged to have been committed was made punishable by law; but without expressing any opinion on the constitutional question, we believe that the doctrine of punitive damages is unsound in principle, and unfair and dangerous in practice, and that the instruction of the court on the subject of punitive damages was erroneous. With this view of the law, it is not necessary to examine the further objection urged by defendant, "that this was not a proper case for the application of the doctrine of punitive damages."

The judgment is reversed, and the case remanded for a new trial.

NEGLECT — WHAT CONSTITUTES. — Negligence in a legal sense is the failure to observe, for the protection of another person, that degree of care, precaution, and vigilance which the circumstances demand, to avoid injury to him: *Barrett v. Southern Pac. Co.*, 91 Cal. 296; 25 Am. St. Rep. 186, and note. Ordinary care means that degree of care which an ordinarily prudent and careful person would exercise under like circumstances: *Winters v. Kansas City etc. R'y Co.*, 99 Mo. 509; 17 Am. St. Rep. 591; *Tetlow v. St. Joseph etc. R'y Co.*, 98 Mo. 74; 14 Am. St. Rep. 617, and note; *Dreher v. Fitchburg*, 22 Wis. 675; 99 Am. Dec. 91, and note, citing cases where ordinary care is defined. Railroads are required to use such care and diligence in moving their trains as ordinarily prudent men would use under

the circumstances: *Gulf etc. Ry Co. v. Hodges*, 76 Tex. 90. A master must exercise such care to avoid injury to his servant as a person of ordinary prudence would use under the circumstances: *Hoffman v. Dickinson*, 31 W. Va. 142.

PUNITIVE DAMAGES — WHETHER ALLOWABLE IN CIVIL ACTION. — In *Fay v. Parker*, 53 N. H. 342, 16 Am. Rep. 270, it is questioned whether punitive damages are ever allowable in civil actions.

REED v. TACOMA BUILDING AND SAVINGS ASSOCIATION.

[2 WASHINGTON, 198.]

BOUNDARIES, PRESUMPTION THAT COURSES IN, ARE RUN ACCORDING TO TRUE MERIDIAN. — Where a deed describes the boundary line of the land conveyed thereby as commencing at a point west of the northeast corner of a certain section, the presumption is, that the point is due west, notwithstanding the north line of the section is not on the true meridian. But this presumption may be rebutted by extraneous testimony.

EJECTMENT. The opinion states the case.

Doolittle, Pritchard, and Stevens, and R. B. Lehman, for the appellants.

Garretson, Bracket, and Rosling, and Galusha Parsons, for the appellee.

DUNBAR, J. The description of the lands in the deed to plaintiff's grantor of that tract of land which is claimed to have been platted into Cavender's first addition is in the words and figures following to wit: "Situate, lying, and being in the county of Pierce, Territory of Washington, and bounded and described as follows, to wit: Commencing at a point 60 rods west of the northeast corner of section 8, in township 20 north, of range 3 east; running thence west 20 rods, south 8 rods; thence east 20 rods; thence north 8 rods, — containing one acre."

The plaintiff proved a straight title to the premises in question from the United States patent, down to and including the the deed received by him from his grantor; but owing to the fact that the north line of said section 8 did not run due west, as indicated by the true meridian, or in other words, did not run parallel with the meridian line, but diverged from the true west line to the north, the main questions are as to the actual location on the face of the earth, of the north line

of the northeast quarter of section 8, as the same runs west from the northeast corner of said section, and whether the deed should be construed to mean west according to the true meridian, or west according to the government survey. On this question the court instructed the jury as follows: "Plaintiff also introduces in evidence a duly certified copy of the several deeds and plats under which it claims title to said lots of land. I instruct you as a matter of law, therefore, that according to the meaning of the language in those deeds, the north line of Cavender's first addition to Tacoma, Washington Territory, in Pierce County, should be laid out on an east and west line starting from the northeast corner of section 8, in township 20 north, of range 3 east, and running thence west according to the United States survey; and that when those deeds upon which the plaintiff relies for its title mentioned, as a beginning point, sixty rods west of the northeast corner of said section 8, the construction in law is, that such beginning point is on the north line of section 8 according to the United States survey thereof"; which instruction defendant duly excepted to, and assigns as error herein. There were some subsequent instructions that might tend somewhat to modify the rule laid down by the court in the instruction quoted; but that the court substantially instructed the jury that the presumption was conclusive; that west in said deed meant west according to the government survey, and that that was plaintiff's theory of the case, is borne out by the oral argument of the attorneys for the appellee, as well as by the statement in its brief that "unless defendant's counsel can maintain their claim upon the main question of a right to controvert the government's surveys, the rulings and instructions are clearly right. If they can maintain that claim, it would be a waste of time to discuss the rulings, as they assume the contrary." We think it is clear that under the description above set forth the government surveys may be contradicted, or, probably more properly stated, ignored. Of the many cases cited by counsel, we have been unable to find any that will elucidate or throw any light on the very practical question involved in this case.

We do not think that the mere reference to the northeast corner of section 8, as it is referred to in the deed, is sufficient to raise the presumption that the parties intended to be governed by the United States surveys, but that it was referred to simply as a known point, the same as any monument or spe-

cific permanent object might be referred to. If the language of the deed had been "sixty rods west of the northeast corner of section 8 on said section line," then the word "west" would have been construed in connection with the section line, and the presumption would have been that the conveyance was made with reference to the established government survey; but the language is quite different. If the words of a deed are ambiguous, or susceptible of two constructions, testimony will be allowed to prove the meaning of the deed, although this manner of ascertaining the intention of the parties must not be invoked when the description can be ascertained from the deed itself. Title to land must not rest upon the fallible memory of witnesses when it can be avoided. Appellee in this case argues with a considerable degree of plausibility that there is nothing doubtful in the language of this deed; that the word "west" means "west"; that it is in no sense ambiguous, and will not admit of any construction to explain its meaning. However, considering the importance of this decision to the public, and recognizing the probability that the city of Tacoma was uniformly platted and located according to one or the other of the theories urged here, and that structures and improvements amounting to many millions of dollars have been made throughout the city which would probably be affected by this decision, its results reaching far beyond the parties to this action, we are of the opinion that public policy demands that the custom of surveyors, in locating town plats in the state of Washington, and especially in the city of Tacoma, may be submitted to the jury to aid them in construing the intention of the parties to the deed. The jury should be instructed that, under the language of the deed in question, the presumption is, that the north line of Cavender's first addition commences at a point sixty rods west, according to the true meridian, of the northeast corner of section 8, in township 20 north, of range 3 east, and running thence west, according to the true meridian, etc.; but that such presumption may be rebutted by extraneous testimony. The judgment is reversed, and the case remanded to the court below, with instructions to proceed in accordance with this opinion, with leave to amend pleadings.

BOUNDARIES. — A description of land as "south part of section 5, township 14, range 4 east, 225 acres," is not void for uncertainty. The lands will be located by laying off 225 acres having the south, east, and west sides of the

section for boundaries, and the remaining boundary is parallel to the south line of the section: *Tierney v. Brown*, 65 Miss. 563; 7 Am. St. Rep. 672, and note. The word "easterly," when used alone in a description of land, will be construed to mean due east, but when other words are used to qualify its meaning, it will be construed according to such qualification: *Fratt v. Woodward*, 32 Cal. 219; 91 Am. Dec. 573.

CASTOR v. PETERSON.

[2 WASHINGTON, 204.]

NEGOTIABLE INSTRUMENTS — MAKER OF NOTE PAYABLE TO ORDER OF MARRIED WOMAN GUARANTEES HER CAPACITY TO INDORSE IT. — The maker of a promissory note payable to the order of a married woman guarantees her capacity to indorse and transfer the same; and the fact that such note is community property will not affect the title of a *bona fide* indorsee for value before maturity, who has no notice that it is community property.

ACTION on promissory note. The opinion states the case.

Davidson and McFalls, and Reavis and Mires, for the appellant.

Pruyn and Ready, for the appellee Pool.

HOYT, J. Defendant W. H. Peterson made his negotiable promissory note to Mrs. Eliza E. Pool or order for the sum of \$1,070. This note the payee sold to the plaintiff for a valuable consideration, and indorsed the same, and delivered it to said plaintiff before its maturity. Plaintiff sought in this action to recover upon said note against the maker. L. Pool, the husband, intervened in the suit, and alleged that the money loaned for which the note was given was community property, and claimed that the transfer to plaintiff was void, and that he had no title upon which he could recover of the maker. The court below sustained this contention of the husband, and gave judgment for defendants.

There was no evidence tending to show bad faith on the part of plaintiff, and the only circumstance relied upon to charge him with notice that the note was claimed by the community was the fact that it was payable to a woman whom he supposed to be married. Under these circumstances, we think plaintiff took such a title to the note that he should have been allowed to maintain his action against the defendants. The maker promised to pay Mrs. Eliza E. Pool or order, and in making the note so payable, he guaranteed to every person

taking such note in good faith her ability to order the same paid to another,— that is, to indorse it,— and as to every such person buying in good faith and for value such guaranty was conclusive. That the maker of negotiable paper thus guarantees the capacity of the payee to indorse and transfer the same seems to arise from the necessity of the case, and the rule is therefore founded upon reason. It is likewise abundantly supported by authority: See Daniel on Negotiable Instruments, sec. 93, and cases there cited. This rule has been frequently applied to notes made to and transferred by infants: See sec. 227 of authority above cited. Likewise to married women under the disabilities of the common law: See same authority, sec. 242. In the case of a married woman under the disabilities of the common law, such a note was the property of her husband, and besides she had absolutely no power to make a contract of any kind; and if, as we have seen, the maker of a note to such person could not dispute the title of her indorsee, it is evident that he could not do so in the case at bar. Under our law, the wife is fully competent to make a personal contract, and an indorsee of such married woman stands in a much stronger position than under the common law. Any other rule as to the passing of title to negotiable paper would be contrary to the universal practice of the commercial world in its dealing therewith. An indorsee knows that he is responsible for the genuineness of the indorsement under which he holds, and he understands that in further transferring it he guarantees that the first indorser is the payee, and that the indorsement of each special indorsee is the genuine signature of the person so named; but we think that it would work a great revolution in business circles, and cause an unheard of panic therein, if the doctrine was once established, that, in addition to the responsibilities above named, he also assumed that of a guarantor of the title and capacity to sell of all prior indorsers.

We do not lose sight of the fact that all property, personal as well as real, acquired after marriage, is *prima facie* that of the community; but we hold that, from the very nature of negotiable paper, one who makes it payable to the order of any person cannot be allowed to say to a *bona fide* holder that the authority which he in terms gave to such person to order the same paid to another is void. We think, moreover, that from the nature of such property, money and negotiable paper bear a different relation to the community than other property. Not

that they do not belong to the community, as between the spouses and all others having full knowledge of all the facts, but that, as between the one who is in possession thereof and one dealing in good faith and for value, they should be treated as the separate property of such possessor. We cannot see that public policy would be subserved by holding the presumption as to ownership of such possessor to be less than that of another person who is in the possession thereof without any semblance of title except such possession. Yet the books are full of cases where the title to purchasers in good faith of such property has been sustained, although it appeared that the one from whom title was received had none except possession. The possession of these classes of property raises a much greater presumption of title than the possession of other classes, and we think that the rules of the law merchant in relation thereto have not been changed by our statute.

The claim of intervener is so unconscionable that courts would not give it effect unless the statute very clearly warranted his contention. He says that the community had \$1,070; that it loaned it, and obtained the note in question; that it delivered said note to plaintiff, and received therefor \$1,070, and is thus placed in exactly the same position as before the note was taken; but that it is still entitled to recover of the maker of the note another \$1,070, thereby, without any consideration having passed therefor, doubling its money, and this at the expense of the plaintiff, who, though having contributed his \$1,070 to the community, is turned out of court without a cent. The judgment must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

NEGOTIABLE INSTRUMENTS—INDORSEMENT BY MINOR.—Where an employer executes a promissory note to a minor employee, who indorses the same to a third person for value, the indorsee can recover from the maker, even though he has paid the amount of the note to the father of the indorser: *Nightingale v. Wilmington*, 15 Mass. 272; 8 Am. Dec. 101, and note.

STATE EX REL. ROHDE v. SACHS.

[2 WASHINGTON, 372.]

CONTEMPT OF COURT, MANDAMUS LIES TO COMPEL COURT TO VACATE ORDER SUSPENDING ATTORNEY FOR, WHEN. — Where a superior court imposes a fine upon an attorney for contempt of court, and further orders that he purge himself of the said contempt, and, after the fine is paid, makes another order suspending the attorney from practice in said court until he has purged himself of the contempt by apologising, the supreme court can intervene by its writ of *mandamus* to compel said court to vacate and set aside its order of suspension. The latter part of the first order, if it required anything more than the payment of the fine, required something which the court had no right, under any circumstances, to order, and was, therefore, absolutely void, and could not for that reason furnish any foundation for the proceedings which led to the entry of the second order, which was, therefore, absolutely void as an entirety.

MANDAMUS. The opinion states the case.

R. A. Ballinger, for the relator.

Trumbull and Plumley, for the respondent.

HOYT, J. By his demurrer to the alternative writ issued herein, the respondent admits the entry of an order, as follows: "On this twenty-eighth day of March, A. D. 1891, in open court, while the Hon. Morris B. Sachs, a judge of the superior court of the state of Washington, was engaged as such judge in deciding a motion pending in the case of *Nickelsburg v. Stencil et al.*, then pending in the superior court of Jefferson County, Washington, over which the said Morris B. Sachs was then presiding as judge thereof, one William J. Rohde, an attorney of record of said court, and an attorney for the defendants in said cause, interrupted the said judge in said proceedings, and while said judge was deciding said motion, addressed said judge, and spoke in a disorderly, contemptuous, and insolent manner, the following words: 'I wish the court would not talk to me.' And whereas, the said William J. Rohde in said matter was guilty of disorderly, contemptuous, and insolent behavior towards the said judge, while holding said court, which said behavior of said William J. Rohde tended to impair the authority of said court, and of said judge thereof, and to interrupt in an unbecoming, disorderly, contemptuous, and insolent manner the due course of the said proceedings before said court: Now, therefore, it is ordered by the said court that said William J. Rohde be and he is hereby, by reason of the aforesaid behavior, declared guilty of contempt of said court, and that he pay a fine to twenty dollars,

and that he stand committed to the custody of the sheriff of Jefferson County, Washington, until the same is paid; and that it is further ordered that said William J. Rohde purge himself of said contempt."

That upon the entry thereof, the relator, the said William J. Rohde, fully paid the fine therein imposed; that afterwards the said William J. Rohde, in behalf of a certain client, appeared in said court and asked to be heard as to the matter therein pending. Whereupon the judge thereof refused to allow said Rohde so to be heard therein, and caused to be entered on the records of the said court the further order, as follows, to wit: "This court having, on the twenty-eighth day of March, A. D. 1891, duly entered of record, and which said order adjudged and decreed that the said William J. Rohde, an attorney of record in this court, was guilty of contempt of court, and adjudged that said William J. Rohde be fined the sum of twenty dollars, and is ordered to purge himself of such contempt; and whereas, afterwards, to wit, on the said twenty-eighth day of March, A. D. 1891, the said William J. Rohde paid to the clerk of this — the fine assessed against him in said matter, and has neglected, failed, and refused to comply with the said order of said court, and failed, neglected, and refused to purge himself of said contempt by apologizing for his said disrespectful conduct: Now, on this twenty-first day of April, A. D. 1891, the said William J. Rohde appeared in open court, before the judge thereof, and the judge thereof, to wit, Morris B. Sachs, thereupon called the attention of said William J. Rohde to the order of this court so as aforesaid made and entered on the twenty-eighth day of March, A. D. 1891, and further called the attention of said William J. Rohde to the fact that he had so failed, neglected, and refused to comply with said order; and thereupon the said William J. Rohde, still failing, neglecting, and refusing to comply with said order: Wherefore it is ordered, adjudged, and decreed that said William J. Rohde has violated his official oath of office as an attorney at law, and has failed to maintain the respect due to this court, and the judicial officer thereof; and it is ordered, adjudged, and decreed that the said William J. Rohde is and will not be permitted to appear as an attorney or counselor before this court until he does comply with said order, and until the further order of this court."

The question presented is as to the validity of said orders, and the regularity of the action of the court in said matter.

The contention of the respondent is, that although the latter part of the first order above set out, and all of the second order, may be irregular, and the action of the court in entering the same may be ground of reversal on appeal, yet as the court had jurisdiction of the subject-matter, and of the person of the relator, there can be no relief against such orders by *mandamus*. This contention is doubtless correct, if the orders entered were such as, under any state of facts connected with the proceedings, the law would authorize. We think, however, that the latter part of the said first order, if it required anything at all more than the payment of the fine mentioned in said order, required something which the court had no right, under any circumstances, to order, and that this portion of said order was therefore not only voidable, but absolutely void, and that for that reason there was absolutely no foundation for any of the proceedings which led to the entry of the second order, and that the said second order was therefore absolutely void as an entirety. This being so, we think this court could properly intervene, and by its writ of *mandamus* require said court to vacate and set aside said last-named order, especially where, as in this case, the effect of said order was to deprive the relator of his right to appear in said court as an attorney thereof. His right so to appear was property, and could not be taken from him excepting by due process of law, and this court can intervene by this writ to prevent such deprivation. It follows that the peremptory writ of *mandamus*, commanding substantially the same as the alternative writ, must issue, and it is so ordered.

MANDAMUS is the appropriate remedy to restore an attorney to practice in an inferior court, where his name has been stricken from the rolls by an abuse of the discretion of the judge: *State v. Kirke*, 12 Fla. 278; 95 Am. Dec. 314, and note on page 344, where cases on this subject are collected; note to *Dane v. Derby*, 89 Am. Dec. 740.

OREGON RAILWAY AND NAVIGATION CO. v. EGLEY.

[2 WASHINGTON, 429.]

CONTRIBUTORY NEGLIGENCE, BOY NINE AND A HALF YEARS OLD RESPONSIBLE FOR, WHEN. — A boy nine and a half years old, injured while stealing a ride upon the foot-board of a switch-engine, who is shown to have been of ordinary intelligence, familiar with the working of a switch-engine, aware of the danger of his act, frequently forbidden by his parents to go upon the cars, and several times driven away from them by the employees of the railroad company, is chargeable with such contributory negligence as will bar a recovery by him for the injury.

REVERSAL OF JUDGMENT, ABSENCE OF TESTIMONY OF MATERIAL POINT GOOD GROUND FOR. — When a judgment is rendered in a case where there is no testimony tending to establish a fact the establishment of which is necessary to warrant a verdict, the court will reverse the judgment.

NEGLIGENCE, RAILROAD COMPANY NOT GUILTY OF, WHEN. — A railroad company is not negligent in failing to ascertain that a boy of tender years is stealing a ride on the back foot-board of a switch-engine, unknown to its employees, who are shown to have immediately driven off and threatened boys, whenever they saw them about the cars, and to have done all they reasonably could be expected to do to carry out the instructions of the company, forbidding boys to be allowed on the track.

ACTION for personal injuries. The opinion states the case.

W. W. Cotton, W. B. Gilbert, and C. B. Upton, for the appellant.

Brents and Clark, for the appellees.

DUNBAR, J. The undisputed facts in this case are, that Zene Egley, on the third day of May, 1889, was run over by the switch-engine of the defendant, in the city of Walla Walla, and as the result thereof, his right leg was so crushed that afterwards it was amputated about four inches below the knee-joint. This action is brought by the plaintiffs against the defendant for the injury to the said Zene Egley, the child of the plaintiffs. The plaintiffs, as will be seen by reference to the pleadings, alleged that this injury was caused by the defendant in wrongfully inviting, inducing, and permitting said child to be and go upon the said engine, and thereafter carelessly running and operating the same while the child was thereon, exposed to great danger. The defendant in its answer denied these allegations, and set up the defense of contributory negligence. Other matters in relation to the ownership of the road were contested at the trial below, but were abandoned by the appellant here.

The fourth special finding of the jury was entirely unwarranted and unsupported by the testimony. In response to the question, "Did the said Zene Egley know that it was dangerous for him to ride upon the engine and freight-cars of the railway mentioned in the complaint, in the manner in which it has been shown by the evidence he was doing at the time he was injured?" jury answer, "No." There is no evidence tending to prove this finding. The whole testimony shows that Zene Egley was a boy of ordinary understanding, capable of comprehending and acting upon what was told him. It appears from the testimony of all parties (including the testimony of the boy himself), that he had been warned time and time again, not only by his parents, but by the servants of the company and his associates, not to attempt to ride on the cars. His own father testified as follows: "Well, I often told him not to ride upon the cars; not to go near them. I cautioned him in this respect."

It is not too much to say that the jury ought to have understood from the expression, "I cautioned him in this respect," that the witness meant to say, or did say in effect, "I warned him of the danger of riding on the cars." The boy himself testified that he was afraid he would get run over by the cars. On re-direct examination, commencing on page 82 of the transcript, the following testimony was given:—

"Question by Mr. Brents: Zene, you stated yesterday that you knew it was dangerous to be on that back end of the tender. When did you first know that it was dangerous, — when did you first find out that it was dangerous? A. Before I got hurt, — before.

"Q. Did you know it was dangerous before you got hurt? A. Yes."

This was direct and positive testimony by the boy in answer to direct questions by his own attorney, and was not in any way affected by the leading and misleading examination which immediately followed, which was as follows:—

"Q. Did you know it after you got hurt? A. Yes, sir.

"Q. You knew it by getting hurt? A. Yes, sir.

"Q. Was that the first thing that caused you to know that it was dangerous? A. Yes, sir."

Cross-examination, which followed, was as follows:—

"Q. Zene, did n't your father and mother tell you not to go upon the engine? A. Yes, sir.

"Q. Did they tell you why? A. Yes, sir.

"Q. When did they tell you not to get upon the engine?
A. Before I got hurt.

"Q. Why did they tell you not to get upon the engine?
A. Said I would get hurt.

"Q. Zene, have you ever been driven away from the cars at various times? A. Yes, sir.

"Q. Did the train-men ever say anything to you? A. Yes, sir.

"Q. What did they say to you? A. Told me to get away.

"Q. Did they say they would do anything to you if you got on board? A. Yes, sir.

"Q. What did they say? A. Said they would punish me.

"Q. You knew it was dangerous to get on there, did n't you, before the accident? A. No, sir.

"Q. Had n't you been told it was dangerous? A. No, sir.

"Q. Did n't your mother tell you it would hurt you? A. Yes, sir.

"Q. Did n't your father tell you it would hurt you? A. Yes, sir.

"Q. Well, did n't you know it would hurt you? A. Yes, sir.

"Q. And you knew this before the accident? A. Yes, sir."

Thus it will be seen that while the boy testified that he did not know it was dangerous, it is evident that he did not definitely understand the meaning of the word "dangerous," for he testified in the next breath that his father and mother told him it would hurt him, and that he knew it would hurt him. It is too evident for discussion that the testimony of the boy, outside of any other testimony, shows conclusively that he did know it was dangerous for him to ride upon the cars in the manner in which he was riding when he was hurt, and that there was no conflict of testimony on that subject worthy of the consideration of the jury; and while it is true that a case will not be taken from the jury when there is conflict of testimony, and that a court will not be justified in disturbing a verdict because its judgment may run counter to the judgment of the jury, or because the weight of testimony is, in the opinion of the court, opposed to the verdict, it is equally true that where there is no conflict of testimony on material points, and there is no testimony tending to establish a fact, the establishment of which is necessary to warrant a verdict, the court will not hesitate to interfere in the interests of justice, and reverse the judgment.

In this case it is shown by the testimony that Zene Egley was nine and a half years old. It is shown by the testimony, and not disputed, that he was a boy of ordinary intelligence and practical experience, and that he was familiar with the workings of railroads, and especially with the workings of the switch-engine by which he was injured, and that he had discretion enough to know that the amusement on which he was insisting was amusement fraught with danger, and that he was a trespasser on the railroad when he was stealing the rides. He may not have known the technical meaning of the word "trespass," but all the testimony, including his own, shows that he knew he had no right on the car; that not only had he been cautioned and forbidden by his parents to go upon the cars, but had been frequently driven away by the yard-master and other employees; and that they had threatened to punish him if he did not keep away; and shows that he knew he was a wrong-doer. See the following testimony:—

"Q. Do you know the yard-master by sight? A. Yes, sir.

"Q. Had he ever driven you off the cars? A. Yes, sir.

"Q. How many times? A. I don't know.

"Q. How many do you think. A. About three times.

"Q. About how many? A. Three; not more than three,—though may be more.

"Q. Well, how many more? A. I can't tell just how many times.

"Q. Well, how many do you think? A. About five or six.

"Q. When you were on a car, and you saw him coming, what did you do? A. Got down and run.

"Q. And you always did that, did you? A. Yes, sir.

"Q. What would he do if he happened to get near you? A. I don't know.

"Q. Did he ever tell you to stay off the cars? A. Yes, sir.

"Q. Did n't he always tell you to stay off the cars when he got close enough to speak to you? A. Yes, sir.

"Q. And every time he saw you he said that? A. Yes, sir."

Add this to the testimony of the father, that he had cautioned the boy not to go on the cars, and that at one time he prevented him from doing so; and that of the yard-master, Mr. Gould, that he had at one time stopped the train and put him off, and to use his own language, "In two or three cases I gave him to understand I would give him a thrashing when I got close to him, and he would get off a distance and begin to swear and abuse me, and call me names,—some of them,—and after that they kept clear of me, and watched me pretty close,"—

and it plainly appears, without any doubt whatever, that the boy was of a mind sufficiently discriminating to know that he was trespassing, and to be responsible for contributory negligence. Of course, I recognize the fact that a different gauge or measure must be used in ascertaining or determining the degree of guilty negligence to be imputed to a child, from that used in determining the degree of negligence to be imputed to an adult of ordinary intelligence. This is a distinction founded in justice, and the reasoning which sustains it cannot be gainsaid. Neither do I question the proposition, stated by counsel for the plaintiff, that since the law does not, in any case, exact an unreasonable or impossible thing from any one, the duty thus devolved upon each depends upon his powers of comprehension and performance; and the duty of a child, therefore, is proportionate to its mental and physical capacity. But strictly applying the principles of that proposition to the facts of this case, as shown by undisputed testimony, the conclusion above is reached. The law as laid down by Shearman and Redfield on the law of negligence (vol. 1, sec. 73) is as follows: "It is now settled by the overwhelming weight of authority that a child is held, so far as he is personally concerned, only to the exercise of such degree of care and discretion as is reasonably to be expected from children of his age. No injustice is done to the defendant by this limitation of the defense of contributory negligence, since the rule itself is not established primarily for his benefit, and he can never be made liable if he has not been himself in fault. Thus where one is driving a horse with ordinary care, at a rate of speed suited to the locality, he is of course not liable for an injury by the horse to a child who suddenly throws itself in the way, and is run over before the driver can prevent it. So if a child, proceeding in reckless haste, however natural to its age, should rush against a railroad car while in motion, the driver of the car or engineer of the train not seeing him, it is obvious that his act is the sole cause of his injury; and even though he may be entirely free from blame, the most that can be said in his favor is, that the case is one of inevitable accident; and the owner of the car is no more responsible for his injury than would have been the owner of a wall against which the child had thoughtlessly struck himself."

The contributory negligence in this case being proven by undisputed testimony, the next question is, Was there any negligence on the part of the railroad company which was the

approximate cause of the injury? or, to state it negatively, could the injury have been prevented by any degree of care which the law imposed upon the railroad company? The testimony, in my judgment, shows no negligence at all on the part of the company. Whenever they saw boys about the cars, they immediately drove them off, and threatened to punish them. It appears from the testimony that the company had issued a bulletin not to allow boys on the track, and that its servants did all they could reasonably be called upon to do to carry out the instructions of the company in this respect; and it was well understood by the boys in that neighborhood generally, and by Zene especially, that they had no right to go into or about the cars. He slipped on the engine with a view of hiding himself from the engineer, and located himself on the foot-board at the back end of the engine, where the engineer could not see him while attending to his duties. It is not claimed that any employees of the company saw him there, or had any knowledge of his whereabouts.

"Negligence," says Shearman and Redfield, "includes two questions: 1. Whether a particular act has been performed or omitted; and 2. Whether the performance or omission of this act was a breach of a legal duty. The first of these is a pure question of fact; the second is a pure question of law": Sec. 52. As was said by the supreme court of Connecticut in the case of *Nolan v. New York etc. R. R. Co.*, 53 Conn. 461: "'Negligence' may be defined to be a failure to perform some act required by law, or the doing of the act in an improper manner. The law determines the duty; the evidence shows whether the duty was performed. The duty resting upon the defendant was a question of law; was the duty performed, was a question of fact."

These authorities, I think, fairly present the law, and the relative duties of the court and the jury, on this perplexing question. The theory of the plaintiff in this case is, that the company was negligent in not ascertaining that the boy was on the engine at the time of the accident, and this seems to be all the negligence attributed to it; and it is evident, from the special findings and the verdict, that this view was taken by the jury, and it becomes the duty of this court to announce that the omission of the act complained of does not constitute legal negligence. As wide a range as the decisions of courts have taken on this interesting subject, no court, to my knowledge, has gone so far as to hold that railroad companies are

the absolute insurers of the life and limbs of boys who, against their express commands, insist upon trespassing upon their property, and to sustain this case would, in my opinion, go that far. The only way the company could prevent this would be to keep a sufficient number of guards to detect boys in their attempts to board the cars or engines. If the presence of the boy on the engine or cars had been brought to the knowledge of the operators of the engine, it is plain that their duty would have been to have protected him from harm, no matter how great his negligence might have been. The testimony shows that they did not see the boy on the engine, and did not know that he was there; for by reason of his location on the foot-board of the engine, the engineer, in the performance of his ordinary duties, could not have seen him. The verdict is wholly unsustained by the evidence, and strictly, the defendant would probably be entitled to judgment on the third and fifth special findings; but as the jury was evidently influenced, both as to their general verdict and special findings, by the instructions of the court, which in their general scope, and especially in the seventeenth instruction, went to the extent that the defendant should have exercised care in ascertaining whether or not Zene Egley was on said engine immediately preceding said injury, the judgment will be reversed, and the cause remanded to the lower court, with instructions to retry the case, and to modify the instructions in accordance with this opinion.

NEGLIGENCE—CONTRIBUTORY—INFANTS, WHEN RESPONSIBLE FOR.—Where a boy seven years of age, in disregard of warnings not to do so, gets upon dangerous machinery for the purpose of riding thereon, and is injured in consequence thereof, he cannot recover: *Rodgers v. Lees*, 140 Pa. St. 475; 23 Am. St. Rep. 250, and note. A child running in front of a cable-car on the street is guilty of contributory negligence and cannot recover for an injury caused thereby, in the absence of negligence, on the part of the gripman: *Winters v. Kansas City etc. R'y Co.*, 99 Mo. 509; 17 Am. St. Rep. 591, and note; extended note to *Westbrook v. Mobile etc. R. R. Co.*, 14 Am. St. Rep. 590-596, where the negligence of infants as a bar to recovery for personal injuries is discussed. A child going upon a tugboat in violation of the rules of the company, and against the assent of the officer in charge, cannot recover for injuries received thereon: *Cook v. Houston etc. Nav. Co.*, 76 Tex. 353; 18 Am. St. Rep. 52. A child of nine years of age is required to exercise such care and diligence as characterize the average of his age: *Bidenhour v. Kansas City etc. R'y Co.*, 102 Mo. 270.

RAILROADS—WHEN NOT GUILTY OF NEGLIGENCE TO INFANTS.—A boy ten years of age, who was lying on his back beneath the cars, and crosswise of the track, and who was not in the employ of the company, nor attempting to cross the track, cannot recover if injured by the moving of the cars: *Mo-*

Mullen v. Pennsylvania R. R. Co., 132 Pa. St. 107; 19 Am. St. Rep. 591, and note; *Lafayette etc. R. R. Co. v. Huffman*, 28 Ind. 287; 92 Am. Dec. 318, and note. A boy ten years of age, who, in company with other boys, enters an empty freight-car on a moving train without the knowledge of the train-men, cannot recover for injuries received thereby: *Ourley v. Missouri Pac. R'y Co.*, 38 Mo. 12.

HORTON & Co. v. LONG.

[2 WASHINGTON, 426.]

COMPLAINT IN FORECLOSURE NEED NOT ALLEGE CHARACTER OF INTEREST OF CO-DEFENDANT. — A complaint in an action to foreclose a mortgage, which alleges that a party made a co-defendant with the mortgagor has, or claims to have, some interest in or claim upon the mortgaged premises, is sufficient, without alleging the nature of such interest.

MORTGAGE BY CORPORATION, DEFECTS IN, CURED BY RATIFICATION, WHEN. — Where a mortgage by a corporation is signed, without authorization by resolution, by its president and secretary, who were two of its three trustees, but the corporation receives the benefits of the mortgage, the defect in its original execution will be regarded as cured by acquiescence and ratification. If money has been obtained by a corporation upon its securities, which are irregular and *ultra vires*, but the money has been applied for the benefit of the corporation, with the knowledge and acquiescence of the stockholders, the corporation and its share-holders will be estopped from denying the corporation's liability to repay it.

ATTORNEY'S FEE, REASONABLENESS OF, WHEN DENIED, MUST BE PROVED. — Where the complaint in a suit to foreclose a mortgage alleges that \$250 is a reasonable attorney's fee, and the answer denies that any greater sum than \$100 is a reasonable fee in the case, and no testimony is offered on that point, the court should allow the latter sum only. When the reasonableness of an attorney's fee is denied, it must be proved like any other fact.

SUIT to foreclose a mortgage. The opinion states the case.

Cole, Blaine, and De Vries, for the appellant.

Allen and Powell, for the appellee.

DUNBAR, J. We are of the opinion that, construing the complaint together, and considering the relief prayed for, the complaint is simply for a foreclosure of a mortgage, and that the question of whether or not the vendor's lien exists in this state is not in issue in this case. There were some allegations in the complaint which were not necessary to a complaint in foreclosure, but they were subject to a motion to strike, and were not grounds of demurrer. The demurrer, we think, was properly overruled.

It is contended by the appellant that the complaint should have alleged what interest the appellee had in the lands which

plaintiff sought to foreclose. The sufficiency of the complaint in this respect, it seems to us, is established by almost universal usage. The form prescribed by Estee is: "The defendant has or claims some interest in or lien upon the said real property; but the same, whatever it may be, is subject to the lien of the said mortgage."

This is substantially the same as the tenth allegation in the complaint in this clause, and is all the allegation that is necessary. The defendants' answer was a general denial, and their claim, if they had any, was not disclosed. It is claimed by the appellant that this was not a disclaimer of interest, and that it put in issue the fact that it was subject to plaintiff's lien, and cites *Elder v. Spinks*, 53 Cal. 293, in support of its contention. This case evidently sustains appellant's theory, but is in conflict with the earlier California authorities, and, we believe, with the well-established and generally recognized practice. In *Anthony v. Nye*, 30 Cal. 402, it was held that in an action to foreclose a mortgage, the allegation that a party who is made co-defendant with the mortgagor has, or claims to have, some interest or claim upon the mortgaged premises, is sufficient without averring the character of the interest; and Judge Sawyer, who rendered the opinion, says: "The allegation of her claim and interest is in the form universally adopted and long established. The plaintiff is not supposed to know the nature of every person's claim. It is enough that a claim is set up. It is the defendant's business, when thus called upon, to disclose its nature. There is no personal judgment against the wife. If she has no claim, she is in no way injured. If she has any, she has had an opportunity to present it. There is neither merit nor plausibility in the objection," — the objection being that the complaint did not disclose the defendant's interest. To the same effect, see *Mitchell v. Steelman*, 8 Cal. 363; *Pomeroy on Remedies*, 2d ed., sec. 341. We think the doctrine laid down by the earlier California courts much more in harmony with the general rules governing pleadings than the doctrine promulgated by the latter case, and therefore feel bound to follow it. The only object in making Dexter Horton & Co. parties to the suit was to settle any claim that they might set up to the mortgaged premises. The object of the law in permitting this is to avoid a multiplicity of suits, so that all claimants may have their rights adjusted in one action.

Another objection raised by the appellant is, that the mortgage was not executed by the trustees of the defendant corpo-

ration, but that the president and secretary, by whom the mortgage was executed, had no authority to enter into such a contract, and that it was therefore *ultra vires*. Even conceding that the contract was *ultra vires*, and that the appellant has placed himself in a position, in this case, to legally allege it, under the testimony in this case it will not avail against the plaintiff. The corporation was attempting to execute a *bona fide* mortgage. It was within the power of the corporation to execute it, and its officers and agents were trying to carry out the will of the corporation. There were but three trustees, and two of them signed the mortgage, but not as trustees. They did not go through the form of an authorization by resolution, but a majority of those who had power to pass the resolution, by a short cut, brought about the result which the resolution would have authorized. The formality of the resolution, it is true, was omitted, but the corporation, taking possession of the property by virtue of the mortgage, indorsed its execution, and if there were any technical defect in its original execution, it has been cured by acquiescence and ratification. Where money has been obtained by a corporation upon its securities, which are irregular and *ultra vires*, but the money was applied for the benefit of the company, with the knowledge and acquiescence of the stockholders, the company and the shareholders are estopped from denying the liability of the company to repay it: *In re Cork etc. R'y Co.*, L. R. 4 Ch. App. 748. And a court of equity abhors forfeitures, and will not lend its aid to enforce them: *Marshall v. Vicksburg*, 15 Wall. 146. Neither will it give its aid to the assurance of a mere legal right, contrary to the equity and justice of the case: *Lewis v. Lyons*, 13 Ill. 117. In this case the contract is not executory, but is executed, and a stronger rule obtains in favor of the validity of the contract. Says the supreme court in *Bradley v. Ballard*, 55 Ill. 413, 8 Am. Rep. 656: "But if any one of the parties proceeds in the performance of the contract, expending his money and his labor in the production of values which the corporation appropriates, we can never hold the corporation excused from payment on the plea that the contract was beyond its power."

Such we believe to be the doctrine of the authorities generally.

We have examined the other points raised by appellant, and are unable to find any error. All the facts found by the court are, in our opinion, justified by the testimony, with the excep-

tion of the fact that \$150 is a reasonable attorney's fee. The complaint alleged \$250 as a reasonable attorney's fee. The answer denied that any greater sum than one hundred dollars is a reasonable attorney's fee in this case. There being no testimony offered on this point, and as the reasonableness of an attorney's fee, when denied, must be proven as any other fact, the court should have found that one hundred dollars was a reasonable attorney's fee, and rendered judgment accordingly. The case will be remitted to the lower court, with instructions to modify the judgment in accordance with this opinion.

MORTGAGES — FORECLOSURE — SUFFICIENCY OF COMPLAINT. — A general allegation in a complaint to foreclose a mortgage, that certain parties joined as co-defendants have or claim to have some interest in the property, is all that is required: *Poett v. Stearns*, 28 Cal. 227; *Martin v. Noble*, 29 Ind. 216.

MORTGAGE BY CORPORATION — DEFECTS IN, CURED BY RATIFICATION. — Where a corporation has power to mortgage its real estate to borrow money, and does so, and uses the money so borrowed, it is estopped to contend that such mortgage was void: *Wright v. Hughes*, 119 Ind. 324; 12 Am. St. Rep. 412, and note. That the proceeds of an unauthorized mortgage have been applied to the use of the corporation is not a sufficient ratification to render it binding: *Legyett v. New Jersey Mfg. etc. Co.*, 1 N. J. Eq. 541; 23 Am. Dec. 728, and note; *Duke v. Marham*, 105 N. C. 131; 18 Am. St. Rep. 689.

STATE INSURANCE COMPANY v. MEESMAN.

[2 WASHINGTON, 459.]

INSURANCE POLICY — PERIOD OF LIMITATION STIPULATED IN, BEGINS TO RUN FROM DATE OF FIRE. — Where a policy of fire insurance contains a stipulation that no action upon the policy shall be sustained unless commenced within six months after the time the fire shall have occurred, the period of limitation begins to run from the date of the fire, although the policy also provides that no loss shall become due and payable until proof of loss is made and examined into by the insurance company.

ACTION ON an insurance policy. The opinion states the case.

E. E. Coover, and *R. and E. B. Williams and Carey*, for the appellant.

Gilbert and Snow, for the appellee.

ANDERS, C. J. This is an action upon a fire insurance policy issued by appellant to appellee, to recover a loss amounting to \$221, alleged to have been sustained by appellee by reason of the destruction by fire of the property insured. The complaint

was filed February 3, 1890, and service duly made. Defendant appeared and answered, setting up as a defense false representations made by plaintiff to defendant in his application for insurance, concerning his title to the land upon which the insured buildings were situated; and that, by the terms of the policy, action should be commenced thereon, if at all, within six months after the date of the fire. Plaintiff in his reply denied making any false representations, or that he knew any statements or representations contained in his said application were false or untrue; and alleged that at the time of making application for the policy of insurance he fully and truly explained to the agent of the defendant who received said application the true nature of his right and title in and to said land; and that said agent thereafter filled out said application, and plaintiff signed the same in good faith, and relying upon and believing the statement of said agent then and there made to plaintiff that the said application was right and in proper form. Plaintiff further alleged that his loss was adjusted by and between himself and the defendant on the eighth day of August, 1889, at \$221. The issues having been thus joined, the case was tried by a jury, who returned a verdict in favor of the plaintiff for the sum claimed in the complaint. A motion for a new trial having been denied, judgment was entered in favor of the plaintiff and against defendant for the amount specified in the verdict. Defendant brings the case to this court for review, and seeks a reversal of the judgment for errors duly assigned.

Counsel for appellant contend that the action is barred by limitation fixed in the policy for bringing the action; and in order to determine that question, it becomes necessary to examine the contract as made by the parties thereto. Among the provisions in the policy are the following:—

“It is hereby expressly covenanted and agreed by the parties hereto that no suit or action against this company for the recovery of any claim under and by virtue of this policy shall be sustained in any court of law or chancery unless such suit or action shall be commenced within six months after the time the fire shall have occurred; and in case any such suit or action shall be commenced against this company after the expiration of the aforesaid six months, the lapse of time shall be taken and admitted as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

"All persons having a claim under this policy for loss or damage shall proceed at once to put the property saved or damaged in the best order possible, separating the damaged from the undamaged, and shall give immediate notice, and render a particular account thereof, in writing, to the company, stating the time, origin, and circumstances of the fire, the occupancy of the building insured or containing the property insured at the time of the loss, the whole value and ownership of the property insured, and all encumbrances; all of which shall be verified by the affidavit of the assured and claimant. If required, the assured and claimant shall be examined and re-examined under oath by any person appointed by the company, at such time or times and place or places, in the county where the loss occurs, as the company or such persons may require, touching all questions relating to the claim, and shall subscribe to the same; and until such examination (if required) shall have been submitted to, subscribed and verified as herein specified, the company shall not be called upon to consider such claim or loss, nor shall the same become due and payable; . . . provided, further, that it shall be optional with the company to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time, giving notice of their intention so to do within sixty days after receipt of proofs herein required; and in case the company elect to rebuild, the assured shall, if required, furnish plans and specifications of the buildings destroyed.

"In case of any differences of opinion as to the amount of loss or damage, such differences may be submitted to the judgment of two disinterested and competent men mutually chosen (who, in case of disagreement, shall select a third), whose award shall be conclusive and binding on both parties as to the amount only."

The fire occurred on July 31, 1889. On August 8, 1889, the agents of the company went to the plaintiff to determine the amount of his loss. The plaintiff testified: "My loss was adjusted at \$221"; and this was not disputed by the agents themselves when called as witnesses on the part of the defendant. They did not agree that the loss would be paid, but at most, only promised to do the best they could for plaintiff. On August 13, 1889, however, the secretary of the insurance company wrote a letter to the plaintiff, in which he said: "We cannot see that you have any claim against this company for

your loss, and must therefore decline to give the matter further consideration."

As before stated, plaintiff commenced this action on February 3, 1890, which was six months and three days after the fire occurred. It is not claimed by counsel for appellee that the limitation of time expressed in the policy for the commencement of an action for the loss sustained is invalid, and so far as we have been able to ascertain from an examination of adjudicated cases, such stipulations have been uniformly held valid and binding. But counsel contend that plaintiff could not have maintained an action against the company until August 13, 1889, at which time the company refused to pay the loss, and that the action was therefore commenced in time, although more than six months had elapsed since the happening of the fire. In other words, appellee claims that the time of limitation did not commence to run at the date of the fire, but at the time when the cause of action accrued, and that all of the provisions of the policy, taken together, warrant that construction. Numerous authorities are cited in support of appellee's contention. The decisions in these cases are based upon the assumption that the provision in the policy postponing a right of action until proof of loss is made, or until a certain number of days thereafter, is in conflict with the provision limiting the time within which an action may be commenced, and that these stipulations must therefore be harmonized by judicial construction. We cannot assent to this doctrine. The most careful reading of the provisions and stipulations in the policy now before us will fail to disclose any conflict therein. In the case at bar, every stipulation in favor of the company was waived, excepting that providing for the proof of loss. After adjustment of the loss, and the waiver of all other conditions, appellee still had five and one half months of the stipulated time remaining. No excuse or reason is given by him for his procrastination; and yet we are now called upon to sustain the action, notwithstanding the delay in bringing it until after the contract limitation had expired, upon the ground that the contract really means something different from what it says. The parties stipulated that no action upon the policy "shall be sustained unless commenced within six months after the time the fire shall have occurred"; and that "the lapse of time shall be taken and admitted as conclusive evidence" against the validity of any claim against the company. This language is certainly plain and unam-

biguous. The other stipulations simply provide that no action shall be commenced until certain things therein specified shall have been done; and the evident meaning of the whole contract is, that no action shall be commenced before the doing of these things, nor, in any event, after the lapse of six months. This construction gives full force and effect to every stipulation and provision in the policy, and does violence to none. But it is urged by counsel for appellee, that inasmuch as the company has secured itself against being sued immediately on the occurrence of the loss, it must be presumed not to have been the intention of the parties to suspend the remedy, and at the same time to provide for the running of the period of limitation. We are unable to perceive, however, how any such presumption can arise without in effect substituting another and different contract for the one made by the parties. It was but natural and reasonable for the insurance company to protect itself against the cost and annoyance of an action until it could have an opportunity to investigate the circumstances attending the fire by which the loss occurred, and ascertain its liability, and determine whether to replace the property or pay the loss, or to refuse to pay it, if satisfied of the unjustness of the claim; and appellee, having consented to such a stipulation, should not now, in our opinion, be heard to object that the company thereby waived or extended the limitation of time for bringing an action. It is proper to remark, in passing, that this policy differs essentially in the provision respecting the limitation of actions from most, if not all, of those in controversy in the cases cited by appellee. In most of those cases a period of sixty days was reserved after proof of loss, before the expiration of which no action could be commenced. And in the leading case of *Steen v. Niagara F. Ins. Co.*, 89 N. Y. 315, 42 Am. Rep. 297, cited by appellee, Danforth, J., says: "No doubt the appellant could have stipulated that the time of the fire should be looked to as the event from the happening of which the limitation should run, but it would require distinct language to show that such was the intention of the parties. It is not used here. It is found in *Schroeder v. Keystone Ins. Co.*, 2 Phila. 286, one of the cases cited by the appellant."

In the policy before us we have almost identically the same "distinct language" that was used in the policy in the *Schroeder* case, and it is impossible to give it any different construction from the one there adopted. The following cases

also support the view we take of this question: *King v. Watertown Fire Ins. Co.*, 47 Hun, 1; *Travelers Ins. Co. v. California Ins. Co.*, 1 N. D. 151; *Bradley v. Phoenix Ins. Co.*, 28 Mo. App. 7; *Johnson v. Humboldt Ins. Co.*, 91 Ill. 92; 33 Am. Rep. 47; *Fullam v. New York etc. Ins. Co.*, 7 Gray, 61; 66 Am. Dec. 462; *Thompson v. Phoenix Ins. Co.*, 25 Fed. Rep. 296; *Virginia etc. Ins. Co. v. Wells*, 83 Va. 736; *Tasker v. Kenton Ins. Co.*, 58 N. H. 469.

Holding, as we are constrained to do, that the action is barred by the lapse of time, it is not necessary to examine the other objections raised by appellant. The judgment of the court below is reversed, and the action dismissed.

DUNBAR, J., delivered a dissenting opinion, of which the following is a synopsis: This contract must be construed with reference to all of its provisions, and especially must this provision be construed with reference to other provisions on the same subject. The provision in the policy that the company shall not be liable after a fire occurs until an examination is made of the loss, at such time or times as the company may require, is on the same subject as is the provision relied on by the appellants. The two provisions must be construed together. The time within which proof must be made is not limited, but the time shall be at such time as the company shall require, and the law will probably construe this to be a reasonable time. But another provision gives the company sixty days more after the receipt of the proof to make up its mind whether it will rebuild or pay the money. During these sixty days additional the company cannot be sued, and if at the end of that time it concludes not to pay at all, probably half the time allowed the insured has expired. The general rule as to limitation is, that it does not begin until after the right of action accrues. The central idea of the law is, that the party shall have the right during all the time within the statute to bring his action, and if anything occurs to prevent the exercise of this right, the statute in the mean time is not running. This provision of the statute is so universally acted upon that parties may well be supposed to have contracted for a shorter limitation with reference to conditions universally surrounding and attaching to statutes of limitation. The provision limiting the right of action to six months is inserted for the special benefit of the company, and is a restriction of the legal rights of the insured. If, therefore, there are any doubts as to its proper import, they should be resolved most strongly in favor of the insured, against whom it was intended to operate: *Ames v. New York W. Ins. Co.*, 14 N. Y. 253; *Mayor etc. v. Hamilton F. Ins. Co.*, 39 N. Y. 45; 100 Am. Dec. 400; *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235; 33 Am. Rep. 607; *Steen v. Niagara F. Ins. Co.*, 89 N. Y. 315; 42 Am. Rep. 297; *Ohandler v. St. Paul etc. Ins. Co.*, 21 Minn. 85; 18 Am. Rep. 385; *Killips v. Putnam Ins. Co.*, 28 Wis. 472; 9 Am. Rep. 506; *Martin v. State Ins. Co.*, 44 N. J. L. 485; 43 Am. Rep. 397; *Ellis v. Council Bluffs Ins. Co.*, 64 Iowa, 507; *Vette v. Clinton F. Ins. Co.*, 30 Fed. Rep. 668.

It is true that in many of the cases cited the language of the provision is within so many months "after the loss shall have occurred," but those cases cannot be distinguished in principle from those where the language employed

in so many months "from the time of the fire." It is true that in *Steen v. Niagara F. Ins. Co.*, 89 N. Y. 315, 48 Am. Rep. 297, the court undertook incidentally to distinguish the language, but the attempt was a failure, and the courts, generally, in holding in favor of the view urged by appellee, have placed their decisions squarely upon the ground that all the conditions of the policy must be construed together, and that so construing them the intention was gathered that the limitation did not begin to run from the date of the loss, but at the time when the right to sue accrued: *Vette v. Clinton F. Ins. Co.*, 30 Fed. Rep. 668; *Spare v. Home Mut. Ins. Co.*, 17 Fed. Rep. 563; *Chandler v. St. Paul etc. Ins. Co.*, 21 Minn. 85; 18 Am. Rep. 385; *Mayor v. Hamilton F. Ins. Co.*, 39 N. Y. 45; 106 Am. Dec. 400; *Ellis v. Council Bluffs Ins. Co.*, 84 Iowa, 507; *Miller v. Hartford F. Ins. Co.*, 70 Iowa, 704; *Hey v. Star Fire Ins. Co.*, 77 N. Y. 235; 33 Am. Rep. 607; *Barber v. Fire etc. Ins. Co.*, 16 W. Va. 658; 37 Am. Rep. 800; 2 May on Insurance, sec. 479; *Mix v. Ins. Co.*, 9 Hun, 397; *Killips v. Putnam Ins. Co.*, 23 Wis. 472; 9 Am. Rep. 506; *Murlock v. Franklin Ins. Co.*, 33 W. Va. 407. In *Friezen v. Germania F. Ins. Co.*, 30 Fed. Rep. 352, the policy provided, just as this one does, that the action to recover upon the policy should be commenced within six months after the fire occurred, with similar provisions with regard to the time of payment, and the court held that these provisions should all be construed together, and the six months limitation be reckoned, not from the occurrence of the fire, but from the time the loss was due and payable. The court said: "In any other construction, the insured's right of action might be barred before it had occurred." To the same effect is *Cass v. Sun Ins. Co.*, 83 Cal. 473. Other courts have held that the letter of the limitation clause must govern, and that the period begins from the loss: *Johnson v. Humboldt Ins. Co.*, 91 Ill. 92; 33 Am. Rep. 47; *Glass v. Walker*, 66 Mo. 32; *Fullam v. New York etc. Ind. Co.*, 7 Gray, 61; 68 Am. Dec. 462; *Bradley v. Phoenix Ins. Co.*, 28 Mo. App. 7. But I think the contention of the appellee is based both on the weight of authority and right reasoning. The courts must construe the contract so as to give force to all its provisions, if possible, and make them all operative and harmonious. The parties evidently intended that the statutory time of limitation should be shortened to six months. Under that provision, standing by itself, the insured would have had six months from the date of the fire, during any time of which he could have brought his action to recover his loss. But the company, for its own protection, imposed other conditions, having indirect reference to and modifying the provisions giving the party the right to sue any time within the six months; the subsequent condition of immunity from suit for a certain time must, therefore, have been made with reference to the first provision in relation to the limitation, and this provision must not be construed relatively in favor of the interests of one party, and independently against the interests of the other. The provisions depend one upon the other, and must be construed together. The parties understood that the company was not to be harassed with a suit until it had had ample opportunity to adjust the loss; and that the insured was to have the benefit, not of three months, or of four months, but of six months to bring his action.

The question, as to whether or not Meesman in his application made misrepresentations in regard to the ownership of the land, was raised by the pleadings, and went to the jury, who found for the plaintiff, under instructions which correctly stated the law. It was not a question of varying a written contract by parol testimony, but simply whether the insured or the agent of the company was responsible for certain answers to certain questions in the application. One or two other points were made, of trifling importance,

but even if errors were made, they were not sufficiently important to justify a reversal of the judgment, which should, therefore, be affirmed.

The weight of authority seems to sustain the dissenting opinion in this case. In addition to the cases cited to support the doctrine that the period of limitation commences to run from the date of the loss, are the following: *Raymond v. Fish*, 51 Conn. 80; 50 Am. Rep. 3, and note; *Travelers Ins. Co. v. California Ins. Co.*, 1 N. D. 151; *Virginia etc. Ins. Co. v. Wells*, 83 Va. 738.

RITCHIE v. CARPENTER.

[2 WASHINGTON, 512.]

SISTER STATE JUDGMENT, RECORD OF, ADMISSIBLE IN EVIDENCE WITHOUT CERTIFICATE OF JUDGE THAT CLERK'S ATTESTATION IS IN DUE FORM. —

Under the code of Washington, the records and proceedings of courts of other states are admissible in evidence in that state without the certificate of the judge that the attestation of the clerk having charge of such records is in due form, as required by the act of Congress.

CLERK OF COURT PRESUMED TO BE PROPER CUSTODIAN OF ITS RECORDS. —

It will be presumed, without being certified or otherwise shown, that the clerk of a court of record who has attested its record offered in evidence is the proper custodian of its records.

SEAL OF COURT ATTACHED TO CLERK'S CERTIFICATE SUFFICIENT. — In attesting the record of a foreign court, it is only necessary that the seal of the court be attached to the certificate of the clerk. It need not be attached to the record.

JUDGMENT, JOURNAL ENTRY OF, NEED NOT BE SIGNED BY JUDGE. — The signature of the judge to the journal entry of a judgment offered in evidence is not necessary to make it valid.

VARIANCE BETWEEN PLEADING AND PROOF IMMATERIAL WHEN. — Where a complaint on a sister state judgment describes it as rendered for costs in the sum of \$19.30, and the judgment offered in evidence, though similar in other respects to the one pleaded, was rendered for costs in the sum of \$18.30, the variance is immaterial, it not appearing that the defendant was misled thereby.

OBJECTIONS, WHAT NOT TENABLE IN ACTION ON SISTER STATE JUDGMENT. —

Where an action is brought in Washington upon a judgment of a district court of Kansas, rendered in a case originally instituted before a justice of the peace, objections that the action in Kansas was instituted and carried on without any complaint having been filed, that there was no proof that the justice of the peace had any authority to certify the case to the district court, and that he did not in fact so certify it, cannot be raised in the action in Washington.

PRESUMPTION THAT COURT OF RECORD IS COURT OF GENERAL JURISDICTION.

— Where an action is brought upon a judgment of a court of record of another state, it will be presumed, in the absence of evidence to the contrary, that such court is a court of record; and the recitals in the record of such court of the jurisdiction acquired over the defendant's person in that proceeding are *prima facie* evidence thereof.

PLEAS TO JURISDICTION MUST SET UP FACTS TENDING TO SHOW WANT OF IT. — Pleas to the jurisdiction must be direct and certain, and set up the facts which go to show want of it.

WANT OF JURISDICTION, EXTENT TO WHICH IT MAY BE SHOWN. — Want of jurisdiction of a court of another state may be shown by the defendant, even to the extent of contradicting express recitals in the record.

IDENTITY OF NAME PRIMA FACIE PROOF OF IDENTITY OF PERSON. — In an action upon a sister state judgment, where the name of the defendant in the record offered in evidence is identical with that of the defendant in the action upon the judgment, this is *prima facie* proof of identity of person; and the defendant is bound, in order to raise the question of identity, to allege and prove every fact necessary to show that the court had no jurisdiction of his person.

INTEREST ON COSTS INCLUDED IN SISTER STATE JUDGMENT, JUDGMENT MAY BE RENDERED FOR. — In an action on a judgment entered in another state, a verdict may be rendered for the aggregate amount of the judgment, including the costs of the proceeding, with interest thereon.

ACTION on a judgment. The opinion states the case.

G. E. M. Pratt, and Thompson, Edsen, and Humphries, for the appellant.

Allen and Powell, for the appellee

SCOTT, J. This action was brought by respondent to recover on a judgment which he claimed to have obtained against the appellant in the district court of Cowley County, Kansas. It will require a somewhat extended statement to present the points raised. The amended complaint alleges: —

“1. That during all the times herein stated, the district court of the thirteenth judicial district of the state of Kansas, in and for the county of Cowley, was a court of general jurisdiction, duly created and organized by the laws of said state.

“2. That on the twenty-second day of May, 1889, this plaintiff commenced an action against the said defendant in the justice court for the city of Winfield, Cowley County, Kansas, before J. Van De Water, justice of the peace, to recover the sum of \$268.78, with interest, which was due this plaintiff by the defendant upon a certain promissory note, together with costs of suit; that on the twenty-second day of May, 1889, a summons was duly and regularly issued out of said court, and was on the same day, to wit, May 22, 1889, served on the defendant, Willis A. Ritchie, personally, by the proper officer of said court; that on the twenty-fifth day of May, 1889, said cause came on regularly to be heard; that on said day said defendant appeared in person in defense of said action, at which time said cause, upon motion of said defendant, was continued until the fourth day of June, 1889, and on the fourth day of June, 1889, said cause was regularly called for trial by said court, and the defendant appeared in person

and by attorneys Messrs. Crow and White, and thereupon certain proceedings were had, it appearing to the said justice that, under the laws of the state of Kansas, the action should be stayed, and should be certified to the district court of the thirteenth judicial district of the state of Kansas, in and for Cowley County, the said action was stayed, and was by said justice certified in due form to the said district court aforesaid.

"3. That thereafter, to wit, on the twenty-fifth day of January, 1890, said cause came on regularly to be heard in said district court, the said defendant appearing therein by his said attorneys, Messrs. Crow and White, a judgment was duly and regularly rendered by said court in said cause, in favor of the plaintiff and against the defendant, for the sum of \$301.40, and also for costs therein, amounting to and taxed at \$19.30; that said judgment bear interest from said date until paid, at the rate of ten per cent per annum; a copy whereof is hereto attached as a part hereof, and marked 'Exhibit A.'"

And contained a prayer for judgment in the sum of \$331.50, with interest thereon from the twenty-seventh day of May, 1890, at the rate of ten per cent per annum, and for costs of suit. The defendant denied these matters generally, and for a further defense alleged as follows:—

"1. He denies that the district court of the thirteenth judicial district of the state of Kansas, in and for the county of Cowley, ever obtained any jurisdiction over the subject-matter of any controversy between plaintiff and defendant, or ever had any such jurisdiction at any time over the subject-matter of any such action or proceeding as that described in plaintiff's amended complaint, or of any other description whatever.

"2. He denies that any cause of action in favor of plaintiff and against defendant ever existed or was pending in said district court of Cowley County, Kansas, or that any agreement or stipulation was ever entered into, by and between this defendant or any one authorized to act for him, or claiming or pretending to act for him, whereby any subject-matter of controversy of the character mentioned in plaintiff's amended complaint, or of any character, was agreed to be submitted, without the intervention of a complaint, to said district court of Cowley County, Kansas, for determination.

"3. He denies that any cause of action or the subject-matter of any controversy between plaintiff and defendant was

ever submitted to said district court of Cowley County, Kansas, for judgment and determination, with the knowledge or agreement of said defendant, or any one acting for him, whereby the filing of any complaint or cause of action was in any manner waived or dispensed with."

The only proof offered in evidence was the judgment record, to the introduction of which the defendant objected on the following grounds: That there is no showing that the district court of Cowley County, Kansas, had any jurisdiction of either the subject-matter of the action, or of the parties in controversy; that no statute of the state of Kansas is either pleaded or offered to prove the authority of the justice of the peace to certify an action or proceeding to the district court of Cowley County, or any other county in Kansas; that the justice of the peace did not in fact so certify such record; that the clerk of the district court aforesaid had no authority to certify to this court a copy of any such supposed transcript; that the said record had no seal of such district court attached to it, and that it was not sufficient to attach it to the certificate of the clerk; that the transcript showed that the judgment and record had not been signed by the judge of said court; that the judge did not certify that the attestation was in due form; that there was a variance between the record as pleaded and the record offered in evidence. The court admitted the record, and it appears thereby that personal service was had on Willis A. Ritchie in Kansas when the action was commenced in justice's court, and that said defendant appeared in person and by his attorneys, Crow and White; that after answering he moved the court as follows: "And now comes the defendant, and representing to the court that upon the issues raised by the pleadings herein, title to land is in dispute in this action, moves the court to certify this cause to the clerk of the district court of Cowley County, Kansas, in accordance with the provisions of section 7 of the Act of Civil Procedure, before a justice of the state of Kansas."

Which motion the justice of the peace overruled at the time, but subsequently, after hearing evidence, granted. Then follows a transcript of the purported journal entry of the judgment rendered therein in said district court, which recites that, "Now, on this twenty-fifth day of January, A. D. 1890, this cause comes on its regular order for trial; plaintiff appears by Peckham and Henderson, his attorneys, and the defendant appears by Crow and White, his attorneys, and the plaintiff

and the said defendant announce themselves ready for trial and waive a jury, declaring that this cause shall be heard and tried by the court, and hereupon both parties offer their evidence; in consideration whereof, the court finds for the plaintiff and against the said defendant upon the issues joined between them herein, and finds that the said Willis A. Ritchie is indebted to plaintiff upon the promissory note sued on in the sum of three hundred and one and 40-100 dollars (\$301.40); and it is hereupon ordered and adjudged by the court that the said plaintiff do have and recover of and from the said defendant, Willis A. Ritchie, the said sum of three hundred and one and 40-100 dollars, and also his costs herein expended, amounting to \$18.30, and that the said judgment bear interest at the rate of ten per cent per annum from the twenty-fifth day of January, 1890, and that said plaintiff have general execution against the said defendant therefor."

And the following certificates are appended, attested by the seal of said district court:—

"STATE OF KANSAS, COWLEY COUNTY, ss.

"I, Ed. Pate, clerk of the district court of the thirteenth judicial district, in and for the county of Cowley and state of Kansas, do hereby certify that the foregoing are true copies of all the papers and pleadings, and the final journal entry in case No. 4077, John Carpenter v. Willis A. Ritchie, which case was certified to this court by J. Van De Water, a duly elected and qualified justice of the peace for the city of Winfield, Cowley County, state of Kansas; and that said case was tried in this court and judgment rendered for the plaintiff and against the defendant, Willis A. Ritchie, for the full sum as claimed in his bill of particulars, and for costs as shown by the journal entry; and that the same is the only case between the same parties that has been in this court, and that no appeal was ever taken by the defendant, Willis A. Ritchie, to the judgment of this court, but that said judgment still remains in force and unsatisfied.

October 13, 1890.

[Signed]

"ED. PATE,

"Clerk of the District Court of the Thirteenth Judicial District, in and for Cowley County, State of Kansas."

"I, M. G. Troup, judge of the thirteenth judicial district in and for Cowley County, state of Kansas, do hereby certify that the above certificate is signed by Ed. Pate, who is clerk of the

district court of Cowley County, state of Kansas, and in the thirteenth judicial district.

[Signed]

"M. G. TROUP,

"Judge of the Thirteenth Judicial District of Kansas."

"I, Ed. Pate, clerk of the district court of Cowley County, state of Kansas, do hereby certify that the last certificate is signed by M. G. Troup, who is judge of the thirteenth judicial district of the state of Kansas, October 15, 1890.

[Signed]

"ED. PATE,

"Clerk of the District Court, Cowley County, Kansas."

Section 1, article 4, of the constitution of the United States, declares that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; and the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." Section 905 of the Revised Statutes is as follows: "The acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory, or country affixed thereto. The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

Some of the minor errors alleged will first be taken up without following the order in which the objections have been stated. The point that the record was inadmissible in evidence because the judge did not certify that the attestation was in due form, as required by section 905 of the Revised Statutes, is disposed of by section 430 of the code of Washington, 1881, which reads as follows:—

"Sec. 430. The records and proceedings of any court of the United States, or any state or territory, shall be admissible in evidence in all cases in this territory when duly authenticated by the attestation of the clerk, prothonotary, or other officer having charge of the records of such court, with the seal of such court annexed."

While the legislature could not enact that any further or additional matters should be certified to nor required by the laws of the United States, it could dispense with some of the requirements there provided for: See *Kingman v. Cowles*, 108 Mass. 283.

A further objection was also made that it must appear, by the clerk's certificate or otherwise, that such clerk had charge of the records of the court in order to authorize him to certify thereto, as provided by the section of the code aforesaid; but section 905 of the Revised Statutes does not require this to be certified to or shown, and this fact would be presumed. The case last cited also holds that the seal of the court attached to the clerk's certificate attests his possession of the record.

The objections that the seal was not attached to the record, and that it was not sufficient to attach it to the certificate of the clerk, that the judgment entry was not signed by the judge, and that there was a variance between the record as pleaded and the one offered in evidence, are not valid. It is only necessary that the seal be attached to the certificate of the clerk, and there it is required by the section aforesaid of the Revised Statutes: See *Turner v. Waddington*, 8 Wash. C. C. 126. The signature of the judge to the journal entry of the judgment was not necessary to make it valid: See *Ainsworth v. Territory*, 3 Wash. Ter. 270; *Cathcart v. Peck*, 11 Minn. 45; *Childs v. McChesney*, 20 Iowa, 431; 89 Am. Dec. 545. The variance complained of is, that the complaint described the judgment as having been rendered for \$19.30 costs, while the judgment offered in evidence, though similar in other respects to the one pleaded, was rendered for costs in the sum of \$18.30. The judgment is pleaded in the third paragraph of the complaint; the denial thereto in the answer was as follows: The defendant "denies the allegations contained in the third paragraph of plaintiff's amended complaint." This was only a denial of the specific sum claimed, and was an admission of any lesser amount so far as the sum alleged was concerned. It is not claimed that the judgment below was, and it does not appear to have been, rendered for the full amount alleged and prayed for. The defendant was not misled. It was not shown or claimed that he was, and the variance was immaterial. Section 105 of the code of Washington, 1881, reads as follows:—

"Sec. 105. No variance between the allegation in a pleading and the proof shall be deemed material, unless it shall

have actually misled the adverse party to his prejudices in maintaining his action or defense upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as shall be just."

The objections raised, that there was no proof that the justice of the peace had any authority to certify the case to the district court, that he did not in fact so certify it, and one of the reasons urged in support of the objection raised to the jurisdiction, which was that the action was instituted and carried on in Kansas without any complaint having been filed, have no force here. The case was sent to the district court upon the defendant's motion, and he appeared in the district court and contested the action. The cause of action apparently was founded upon a promissory note which was described in the notice issued by the justice to the defendant; the execution of the note was admitted in the defendant's answer, and a failure of consideration alleged as a defense. Under the circumstances, these matters could only have been taken advantage of in the courts of Kansas, if at all.

Questions were raised as to where the burden of proof rested to show the jurisdiction of the Kansas court both over the subject-matter of the action and the person of the judgment debtor, and as to the identity of the defendant in this action as the judgment debtor, and also as to the construction and effect of the pleadings in relation to these matters. The appellant contends that it was incumbent upon the plaintiff to prove at the trial that the district court was a court of general jurisdiction, or that it had jurisdiction over the subject-matter of that action in any event, and especially so in this case, because the plaintiff had alleged jurisdiction in his complaint which appellant denied in his answer. Such allegations in the complaint are not necessary, it seems, under the authorities. However, the allegation that the district court was one of general jurisdiction cuts no figure as to changing the burden of proof in this case. In the absence of evidence to the contrary, it would be presumed that the district court aforesaid is a court of general jurisdiction: See *Phelps v. Duffy*, 11 Nev. 89; *Stewart v. Stewart*, 27 W. Va. 167; *Specklemeyer v. Dailey*, 28 Neb. 101; 8 Am. St. Rep. 119; *Pringle v. Haskins*, 90 N. Y. 502; *Butcher v. Bank*, 2 Kan. 70; 83 Am. Dec. 448. And the

production of the record with the seal of the court to the certificate was *prima facie* evidence that it was a court of general jurisdiction. It being a court of record, it is presumed to have had jurisdiction of the subject-matter of the action. The record itself affords presumptive proof of these matters. The subject-matter of the action was the money claimed to be due for which the action was brought, not the documents certified to the district court by the justice. Questions as to how the issue got in the district court only go to the regularity of the proceedings, and, as said before, could only be taken advantage of there if that court had jurisdiction of this defendant's person therein. The recitals in the record of the jurisdiction acquired over the defendant's person in that proceeding are *prima facie* evidence thereof, and the defendant offered no proof to contradict any of these matters.

He also contends here, that as his affirmative defense was not replied to or denied by the plaintiff, that it must be taken as true, and that judgment should have been rendered in his favor thereon. It is doubtful whether the defendant's whole answer raised any other issue than that of *nul tiel* record, and this is the only defense available under a general denial in an action upon a judgment of a court of record of a sister state. The so-called affirmative defenses were denials in form, and nothing was pleaded therein alleging that the court had not jurisdiction of either the subject-matter of the action, or of the defendant's person. The first paragraph of his further defense is the only one in any wise tending to show a want of jurisdiction of the subject-matter, wherein it seems to deny that the court had jurisdiction of anything. The first part of the second paragraph attempts to deny that the cause of action ever existed. These amounted to nothing more than statements of conclusions of law. The remaining part of this defense related to wholly immaterial matters. The affirmative defense could not have stood, had it been attacked in the superior court. Pleas to the jurisdiction must be direct and certain, and set up the facts which go to show a want of it: See *Hill v. Mendenhall*, 21 Wall. 453; *Welch v. Sykes*, 8 Gilm. 197; 44 Am. Dec. 680; *Dibler v. Davison*, 25 Ill. 486; *Moulin v. Trenton etc. Ins. Co.*, 24 N. J. L. 222; *Shumway v. Stillman*, 4 Cow. 292; 15 Am. Dec. 374; *Price v. Ward*, 25 N. J. L. 225. But no attention seems to have been given to the affirmative defense at the trial by either party. The appellant did not object to the plaintiff's proof as inadmissible, on the ground

that this defense had not been replied to, nor did he at any time move the court for judgment upon the pleadings, or ask for an instruction for a verdict in his favor upon that ground. If his answer, under the circumstances, raised any issue except that of a bare denial of the record, and any advantage could have been taken thereof, it was waived by him in failing to call the attention of the trial court thereto. It is possible an instruction was asked upon this ground by appellant, as an allusion is made in the record to instructions drafted by the defendant which the court refused to give, but none of these requests to charge are in the record, and consequently we know nothing of them.

Some of the cases above cited go to the extent of holding that not even jurisdictional matters can be questioned, in an action upon a judgment of a court of record of a sister state, unless a want of jurisdiction is shown by the record. *Mills v. Duryee*, 7 Cranch, 480, seems to be the first case laying down the doctrine that a want of jurisdiction in such cases could not be shown. This was subsequently recognized to be the correct rule in the opinions rendered in a number of cases arising in the state courts. But it was held not to apply, and the effect thereof was avoided, in nearly all of such cases to which our attention was called, in holding that where the appearance was by an attorney, his want of authority to appear could be shown; that the purported appearance by an attorney was only *prima facie* evidence thereof; or that where the record was silent as to any jurisdiction of the person, it could be shown that the court in fact had no such jurisdiction, etc. It is now well settled by the weight of authority, and is undoubtedly the better rule, that want of jurisdiction may be shown by the defendant, even to the extent of contradicting express recitals in the record, the same as in cases of foreign judgments. They are not regarded in the sense of foreign judgments, so that the merits may be inquired into, even where jurisdiction is had as in the case of judgments of the courts of other countries, nor yet in respect to jurisdictional matters are they to be regarded in the same light as judgments rendered in our own courts of record. The case of *Mills v. Duryee*, 7 Cranch, 480, and cases following that decision, are modified to this extent: Freeman on Judgments, 8d ed., secs. 452, 453, 559-566; *Thompson v. Whitman*, 18 Wall. 457; *Shumway v. Stillman*, 4 Cow. 292; 15 Am. Dec. 374; *Bissell v. Wheelock*, 11 Cush. 277; *Jarvis v. Robinson*, 21 Wis. 530; 94 Am. Dec. 566; *Buffum v. Stim-*

son, 5 Allen, 591; 81 Am. Dec. 768; *Wheeler v. Raymond*, 8 Cow. 311; *Reid v. Boyd*, 13 Tex. 241; 65 Am. Dec. 61; *Moulin v. Trenton etc. Ins. Co.*, 24 N. J. L. 222; *Stewart v. Stewart*, 27 W. Va. 167; *Danforth v. Thompson*, 84 Iowa, 245; *Borden v. Fitch*, 15 Johns. 140; 8 Am. Dec. 225; *Price v. Ward*, 25 N. J. L. 225. Nor did the fact that it was stated in the complaint in pleading the judgment record that the pleadings in Kansas were had against the defendant in this action, with the denials contained in the answer, raise any issue of identity of person, as such denials amounted to no more than a denial of the record, according to the authorities cited, and it was necessary in this particular, to raise the question of identity, for the defendant to allege and prove every fact necessary to show that the court had no jurisdiction of his person. Had the court been one of limited jurisdiction, a different rule would obtain, and the party relying upon the judgment would be bound to show that the court had jurisdiction, if it was denied. But by the great weight of authority in cases like the one here, anything going to show a want of jurisdiction is an affirmative defense, as much so as a defense founded upon a set-off, or upon a payment of a judgment, or that it was obtained by fraud, or that the statute of limitations had run against it, unless this fact should appear upon the face of the complaint, in which case it could be taken advantage of by a demurrer: *Wilt v. Buchtel*, 2 Wash. Ter. 417. The name of the defendant in the record offered, being identical with that of the defendant in this action, is *prima facie* proof of identity of person: *Campbell v. Wallace*, 46 Mich. 320. The judgment record, when introduced in evidence, was *prima facie* proof of the plaintiff's right to recover in this action; no less effect could be given thereto under the authorities.

The main controversy in this case was as to what issues were raised by the pleadings, and as to where the burden of proof rested thereunder. The disposition made of the first point carries the second with it.

The last objection urged, raised in the motion for a new trial, that the damages recovered were excessive, in that interest was computed upon the aggregate amount of the judgment recovered in Kansas from its date, which included the costs of that proceeding, is not well taken. The interest was only computed at the legal rate here. Code, section 320, is not limited to domestic judgments. The costs of that proceeding were included in the judgment there rendered, and became a part

thereof; said judgment also allowed interest thereon. The legal rate would be recoverable unless a lower rate was specified: See *Hopkins v. Shepard*, 129 Mass. 600; *Shickle v. Watts*, 94 Mo. 410; *Welkerill v. Stillman*, 65 Pa. St. 105.

The judgment of the superior court herein is affirmed.

FOREIGN JUDGMENT — HOW PROVED. — A foreign judgment may be proved by a copy thereof, duly authenticated by the duly authenticated certificate of an officer properly authorized by law to give a copy: *Guns v. Peabody*, 38 Minn. 177; 1 Am. St. Rep. 681, and notes; *Lumier v. Westcott*, 26 N. Y. 166; 32 Am. Dec. 404, and extended note; note to *Messier v. Amery*, 1 Am. Dec. 324. The clerk's certificate attached to the copy of the record of a judgment of another state is sufficient if the seal of the court is annexed, and the "presiding justice" of the court attaches his certificate that the attestation is in due form: *Beau v. Loryea*, 81 Cal. 151. *Andrews v. Flack*, 68 Ala. 294, is to the same effect.

JUDGMENTS — ENTRY BY CLERK. — As to the validity of judgments entered by a clerk, see *Rockwood v. Davenport*, 37 Minn. 533; 5 Am. St. Rep. 872.

JURISDICTION OF COURTS OF RECORD — PRESUMPTION AS TO: See extended note to *King v. Bates*, 20 Am. St. Rep. 521; extended note to *Morrill v. Morrill*, 23 Am. St. Rep. 114.

NAMES — IDENTITY OF, WHETHER PROOF OF IDENTITY OF PERSON. — That the obligor and obligee are the same person is not a legal deduction from the identity of names: *Allen v. Shadburne*, 1 Dana, 68; 25 Am. Dec. 121; see *Leland v. Eckert*, 81 Tex. 226.

LEISURE v. KNEELAND.

[2 WASHINGTON, 537.]

INSOLVENCY, DISCHARGE RE, NOT BAR TO RECOVERY, WHEN. — Where a decree of foreclosure is rendered against a party subsequent to his discharge in insolvency, but before such discharge is entered, and he fails to apply to the court to limit the plaintiff's recovery in the foreclosure suit to the proceeds of the sale thereunder, the discharge will not prevent a recovery for any deficiency that may remain after a sale of the mortgaged premises.

C. W. Hartman, for the appellant.

Allen and Ayer, for the appellees.

Scott, J. In December, 1884, the respondents filed petitions under the insolvent debtor act, in the territorial district court of the second judicial district holding terms at Olympia, to procure a discharge from their indebtedness, and on June 9, 1885, they each obtained an order in said proceedings discharging them as prayed for. These orders were entered on

the journal of said court June 17, 1885. Prior thereto an action was pending against them in said court, brought by appellant, to recover the amount due upon a certain note executed to him by the respondents, and to foreclose a mortgage upon lands given to secure the payment thereof. On June 16, 1885, judgment was rendered in the foreclosure suit in favor of appellant for the full amount of the mortgage debt, with interest thereon, thereafter, at the rate of eight per cent per annum. A sale of the lands mortgaged was ordered, and the proceeds arising therefrom directed to be applied upon the judgment. July 27, 1885, the real estate was sold, and the proceeds applied accordingly, leaving a balance of said judgment amounting to \$1,293.95 unsatisfied. August 12, 1889, appellant brought this suit to recover another judgment for said balance. The respondents answered, admitting that the judgment was obtained against them, and that the balance claimed had not been paid, but set up their discharges obtained in the insolvency proceedings as a bar to the action. Appellant replied, alleging fraud upon the part of respondents in procuring their discharges, and denying that his claim was among those included therein. A trial by jury was had, resulting in a verdict and judgment for the respondents.

No question was raised as to whether such an action would lie upon a domestic judgment. The main point raised by appellant being sufficient to dispose of the case, other questions presented will not be passed upon. Appellant contends that the discharges in insolvency were prior in point of time to the judgment rendered in the foreclosure suit, and that consequently they constituted no defense to this action. This point is well taken. The discharges took effect June 9, 1885, the day they were granted, and not at the later day, when they were entered in the journal. The appellant's said action was then pending, and had the respondents been entitled to a release therein from any liability for a deficiency that might remain after a sale of the mortgaged lands, to have availed themselves thereof they should have applied to the court to limit the appellant's recovery therein to the proceeds of such sale. This was not done, and the appellant's judgment being subsequent to the discharges, it was not barred thereby, even though such discharges were regularly obtained: See *Rahm v. Minis*, 40 Cal. 421.

Judgment reversed.

INSOLVENT — DISCHARGE — EFFECT OF. — A debt contracted before the passage of a state insolvent law cannot be discharged thereunder, although merged in a judgment rendered after discharge: *Conway v. Seamons*, 55 Vt. 8; 45 Am. Rep. 579; *Hicks v. Hotchkiss*, 7 Johns. Ch. 297; 11 Am. Dec. 472, and note; *Danforth v. Robinson*, 80 Ma. 466; 6 Am. St. Rep. 224.

TACOMA COAL COMPANY v. BRADLEY.

[2 WASHINGTON, 602.]

WARRANTY IN SALE OF GOODS, VENDOR NOT BOUND TO INSPECT GOODS BEFORE USING THEM. — Where goods sold under a warranty are defective, or unfit for the use intended, the vendee has a right to assume that they are of the quality ordered, and need not inspect them for the purpose of ascertaining imperfections before using them, and if sued for the price, he may set up a breach of such warranty as a counterclaim. And in such action it is error for the court to charge the jury "that if the defendant, before using the same, had an opportunity to inspect said goods, and did not do so, and if, upon such inspection, he could have ascertained the defects claimed, then said defendant is not entitled to any damages."

NOTICE OF DEFECTS IN GOODS SOLD UNDER WARRANTY NEED NOT BE GIVEN. — A vendee of goods sold under a warranty may retain the goods without giving notice to the vendor of defects therein, and in an action by the vendor for the purchase price, may plead breach of warranty for the purpose of recouping damages.

BURDEN OF PROOF OF WARRANTY AND ITS BREACH ON PARTY ALLEGING SAME. — When, in an action for the price of goods sold, the defendant alleges a warranty and a breach thereof, the burden of proving both is upon him, before he is entitled to receive any benefit therefrom.

INSTRUCTION HELD CORRECT. — Where, in an action to recover the price of brick, the defendant sets up a breach of warranty as a counterclaim, and relies upon the fact that the ovens constructed out of the brick fell in as positive proof of the unfitness of the brick for the use for which they were sold, it is not error to instruct the jury: "If you believe from the evidence that the falling in of said ovens was caused by a misconstruction of the same, or any defects in said construction or material used therein, other than the goods involved in this controversy, or the misuse of said oven subsequent to said construction, the defendant is not entitled to any damage herein."

LETTER BETWEEN PARTIES TO SUIT, WHEN RELEVANT AND ADMISSIBLE IN EVIDENCE. — In an action for the price of fire-brick, in which the defendant sets up breach of warranty as a counterclaim, a letter written by the plaintiff to the defendant, containing statements as to the quality of the brick which he proposed to sell to the defendant, is admissible in evidence, and the mere fact that other brick had been shipped to the defendant just previous to the order for those in controversy does not render the letter irrelevant or immaterial, although it does not specifically refer to the brick in controversy, it being a part of the correspondence between them concerning the subject of fire-brick.

Sheeks and Goodwin, for the appellant.

Snell and Bedford, for the appellees.

ANDERS, C. J. This action was brought by the respondents to recover from the appellant the sum of \$524.91, and interest, for certain fire-brick alleged to have been sold and delivered by the former to the latter between June 23 and August 6, 1888, at the agreed price of \$15 per thousand. The defendant admitted in its answer to the complaint the delivery of the brick as alleged by plaintiffs, but denied that the same were worth the sum of \$524.91, or any greater sum than \$120; denied that \$15 per thousand was a fair and reasonable price therefor, or that it agreed to pay that price; but admitted that it had not paid for the brick. As a counterclaim against the plaintiffs' demand, the defendant alleged that at the time it ordered the brick, it specifically informed the plaintiffs that they were to be used in the construction of coke-ovens, and that it only agreed to purchase of plaintiffs such brick as were suitable for that purpose; that the brick shipped by plaintiffs to defendant, except about eight thousand thereof, were utterly worthless, as the plaintiffs well knew, for building such ovens; that the defendant received said brick, relying upon the good faith and representations of plaintiffs, and were unable to discover the worthlessness of said brick until the same had been used in the construction of coke-ovens, which defendant constructed properly and of good material, with due skill and care; that all of said ovens constructed of the brick furnished by plaintiffs to defendant, except the eight thousand admitted to be of good quality, did, immediately upon use, and owing solely to the negligence of the plaintiffs in the manufacture of said brick, fuse, melt, and fall in, and were utterly worthless; that as soon as the defendant discovered said worthlessness of said brick, it notified plaintiffs thereof; that by reason of the negligence of the plaintiffs in furnishing defendant with brick unsuitable for the construction of coke-ovens, the defendant was damaged on account of freight paid for carriage of said brick \$2,000, for labor in construction of said coke-ovens \$250, and on account of defendant's loss of manufacture and sale of coke, in the sum of \$1,500; that it was damaged in all, after deducting \$120 for good brick, in the sum of \$4,630, for which sum it prayed judgment against plaintiffs. Plaintiffs denied each and every allegation of defendant's counterclaim, and upon

the issues thus joined a trial by jury was had, resulting in a verdict for plaintiffs for the sum claimed in the complaint.

It appears from the record that the respondents were engaged in the manufacture and sale of fire-brick at Layton Station in the state of Pennsylvania, and that appellant, a corporation, was engaged in the manufacture of coke at Wilkeson, in the territory (now state) of Washington. It also appears that the witness J. M. Kelly was employed by appellant to superintend the construction of its coke-ovens; that he knew the character of brick made by respondents, having formerly resided in Pennsylvania; that he was personally acquainted with respondent E. H. Bradley; and that he ordered, or caused to be ordered, by letter, the brick in controversy. It further appears that previous to ordering the brick in question, appellant had ordered and received twenty-eight or thirty thousand brick from respondents for the same purpose for which the latter were required, and that they had been used in building or repairing coke-ovens. It was not contended on the trial that respondents did not know the use to be made of the brick by appellant. Respondent E. H. Bradley, testifying in his own behalf, admitted that he knew the brick were to be used in constructing coke-ovens; and on May 17, 1888, Superintendent J. M. Kelly wrote a letter to Bradley concerning these brick, in which he stated: "I sent an order to Tacoma to-day for twenty-six thousand more crown bricks, and jams and arches for nine more ovens, and fifteen hundred bottom tile. I suppose they will order from you. I want you to be very careful about the quality. Do not send anything but what is A No. 1, and send as quick as possible."

And again on May 24, 1888, he wrote: "I sent an order to general office yesterday. I named twenty-six thousand crown brick. When the other reaches you, you will see what I want. Make the order twenty-eight thousand crown brick. Send me the best. This is a trade you will want to hold, and you can only do it by sending nothing but the best."

On the trial, the claim for damages on account of loss of sale of coke was abandoned, and no very satisfactory testimony appears respecting other items of damage claimed, although some testimony was adduced tending to show the amount paid for freight, and for constructing ovens claimed to have been worthless.

There can be no doubt that the contract between the parties amounted to a warranty on the part of the respondents of the

quality of the brick ordered by appellant, and the respondents seem to have recognized this fact on the trial, and very properly produced testimony tending to show that they had discharged their obligation to appellant by sending the character of brick required by the latter. But counsel for respondents insist that, if the brick were defective in quality, and not such as were ordered, the defect was patent; and that appellant, having inspected them, and having failed to return or offer to return them, can claim no damage on account of such defect. The court below seems to have adopted the view of counsel, and instructed the jury as follows:—

"10. You are further instructed, that in case you find a warranty of quality by these plaintiffs of the goods in question, and a breach thereof, then, in all events, the plaintiffs would only be responsible for such damage as the difference in the price of said goods as represented and the value of the goods as they really were, together with such other damages as were the direct and immediate consequence of the said breach; but that if the defendant, before using the same, had an opportunity to inspect said goods, and did not do so, and if upon such inspection could have ascertained the defects claimed, then said defendant is not entitled to any damages.

"11. You are further instructed, that if the defendant retained and used said goods after a knowledge of their defects, without notifying plaintiffs of such within a reasonable time, it waives its right to recover for damages."

Appellant claims that these instructions do not state the law correctly, and should not have been given to the jury. We think these instructions were erroneous, and that appellant's position must be sustained. Authorities are cited in the brief of counsel, from New York and Wisconsin, to sustain the correctness of these instructions. But the New York authorities simply hold that in cases of executory contracts for the sale and delivery of personal property in the absence of a warranty and a breach, the vendee's right to recover damages does not survive the acceptance of the property, after an opportunity to discover defects, unless notice has been given to the vendor, or the vendee returns or offers to return the property. The rule is there held inapplicable in cases of express warranty of quality. These decisions do not, therefore, support respondent's contention to the extent claimed: See *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260; 16 Am. St. Rep. 758; *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 519. The Wisconsin

cases cited by counsel declare the doctrine in that state to be, that if chattels sold under a warranty, express or implied, are defective or unfit for the use intended, and the defects were not open and palpable, and were unknown to the purchaser when he received the goods, he may, if sued for the price, without returning or offering to return the goods, and without notifying the vendor, recoup such damages as he may have sustained on account of such defects: See *Olson v. Mayer*, 56 Wis. 551; *Buffalo Barb Wire Co. v. Phillips*, 67 Wis. 129. In the case at bar the evidence is conflicting, and does not satisfactorily show that there was any patent and obvious defect in the brick in question. One of the plaintiffs, while claiming that the brick were of the quality ordered, testified that "a man who understands fire-brick can, nine times out of ten, tell whether or not brick are good by looking at them." On the contrary, Kelly, who was a man experienced in building coke-ovens, testified, substantially, that he knew of no method of ascertaining whether the brick were fit for such a purpose, other than actual use. But be that as it may, we are of the opinion that the appellant had a right to assume that the brick were of the quality ordered, and to act accordingly, and that appellant violated no duty it owed to respondents in failing to search for imperfections before using them.

It is undoubtedly true, that if the brick were defective, and appellant was silent, and did not give notice or offer to return them within a reasonable time after discovering defects, the right to rescind the sale was thereby waived. But the right to recover damages on account of defective quality was in no wise affected: Benjamin on Sales (Bennett's notes, 1888), sec. 901. It is also true that in such cases a failure to give notice or to offer to return the goods would have an important bearing upon the question of warranty, and would raise a strong presumption that the goods received were of satisfactory quality: *Babcock v. Trice*, 18 Ill. 420; 68 Am. Dec. 560; Abbott's Trial Evidence, 348. That the vendee may retain the goods without notice, and plead breach of warranty, in an action by the vendor for the purchase price, is shown by numerous authorities: *Dayton v. Hooglund*, 39 Ohio St. 671; *Polhemus v. Heiman*, 45 Cal. 573; *Holloway v. Jacoby*, 120 Pa. St. 583; 6 Am. St. Rep. 737; Benjamin on Sales, sec. 903, p. 867, and cases cited; *Babcock v. Trice*, 18 Ill. 420; 68 Am. Dec. 560; *Bagley v. Cleveland Rolling Mill Co.*, 22 Blatchf. 342; 21 Fed. Rep. 150.

The following instructions to the jury are objected to by the plaintiff:—

"8. Fraud is never presumed, but must be affirmatively proven by the party alleging the same. The law presumes that all men are fair and honest, that their dealings are in good faith, and without intention to disturb, cheat, hinder, delay, or defraud others. Where a transaction called in question is equally capable of two constructions, one that is fair and honest and one that is dishonest, then the law is, that the fair and honest construction should prevail, and the transaction called in question should be presumed fair and honest.

"9. You are instructed that in so far as the defendant relies upon a warranty of quality of the property sold and a breach of the same, the burden of proving the warranty is upon the defendant, and unless it has proved both the warranty and the breach alleged by a preponderance of evidence, it will not be entitled to any benefit therefrom in the suit."

"12. If you believe from the evidence that the falling in of said ovens was caused by a misconstruction of the same, or any defects in said construction or material used therein, other than the goods involved in this controversy, or the misuse of said oven subsequent to said construction, the defendant is not entitled to any damage herein.

"13. You are instructed that in no event is plaintiff liable for any damages for expected profits to be obtained from the sale of merchandise produced by said ovens, in which goods in controversy were to be used, unless the contract for the same were specially and specifically made known to plaintiff at the time of the purchasing of said goods, and that he understood that they were for that purpose.

"14. You are further instructed that the law is, that a known, defined, and described article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, defined, and described thing be actually shipped, there is no warranty that it shall answer the particular purpose intended by the buyer.

"15. You are further instructed that if you believe from all the evidence that the defendant, after a discovery of the alleged defects, agreed to pay for said goods, and said nothing about damages to the plaintiff, and made no demand therefor, then it will be taken to have waived all right to such damages."

The ninth instruction is unobjectionable. The defendant having alleged a warranty or its equivalent, and a breach

thereof, it was incumbent upon it to prove both in order to be entitled to any benefit therefrom. It is contended that there was no evidence to justify either the eighth, thirteenth, fourteenth, or fifteenth instructions, and that each of them was calculated to mislead and confuse the jury. As to the eighth, thirteenth, and fifteenth instructions, the point is well taken. The twelfth instruction was properly given. The fact that the ovens fell down was relied on by the appellant as positive proof of the unfitness of the brick. If the falling was caused by unskillful construction or defective material, other than that involved in this controversy, or subsequent misuse of the ovens, then there was practically no proof of poor quality, and there could therefore be no damage.

Appellant also claims that it was error for the court to refuse to admit its exhibit 1 in evidence. That was a letter written by E. H. Bradley to Superintendent Kelly, concerning prices and quality of brick sold by him, and concerning freight rates to Tacoma. It did not specifically refer to the brick in controversy, but it was a part of the correspondence between the parties concerning the subject of fire-brick, and was the only communication shown specifying the price of the brick. It contained statements as to the quality of the brick which the respondents proposed to sell to appellant, and the mere fact that the other brick had been shipped to appellant just previous to the order for those in controversy did not, in our opinion, render the letter irrelevant or immaterial. It should have gone to the jury for what it was worth.

The judgment of the court below is reversed, and the cause remanded for a new trial.

SALES — WARRANTY — NECESSITY FOR INSPECTION BY PURCHASER. — The fact that a buyer has inspected goods before acceptance does not deprive him of the protection of a warranty as to latent defects: *Miller v. Moore*, 83 Ga. 694; 20 Am. St. Rep. 329, and note. Where a purchaser buys goods of a certain described quality offered for sale, he may rely upon such description: *Brandley v. Thomas*, 22 Tex. 270; 73 Am. Dec. 284, and note; *Hyatt v. Boyle*, 5 Gill & J. 110; 25 Am. Dec. 276. An express warranty will not reach upon and visible defects: *Fisher v. Pollard*, 2 Head, 314; 75 Am. Dec. 740, and note; *Thompson v. Harvey*, 86 Ala. 519. A vendee who discovers a latent defect in an article purchased by sample may, after delivery, return the same to the vendor: *Hudson v. Rose*, 72 Mich. 262.

SALES BY WARRANTY — NECESSITY FOR NOTICE OF BREACH OR. — Where there is a breach of warranty in goods sold, the vendee may retain the same and sue for damages for the breach: *Underwood v. Wolf*, 131 Ill. 425; 19 Am. St. Rep. 40; *Argersinger v. Macnaughton*, 114 N. Y. 535; 11 Am. St. Rep. 687.

SALES.—WARRANTS.—BREACH ON.—BURDEN OF PROOF ON WHOM.—Where a vendee sues for a breach of warranty, the burden of proof is on him; *Underwood v. Wolf*, 131 Ill. 425; 19 Am. St. Rep. 40; *Gutta Percha Mfg. Co. v. Wood*, 84 Mich. 452.

EVIDENCE.—ADMISSIBILITY OF LETTERS IN.—Letters written by the parties to the action, and relating to the *res gestæ*, are admissible in evidence: *Tapley v. Tapley*, 10 Minn. 443; 32 Am. Dec. 76, and note; *Lee v. Campbell*, 77 Wis. 340.

STATE v. JONES.

[2 WASHINGTON, 682.]

PROHIBITION DOES NOT LIE WHERE REMEDY BY APPEAL EXISTS.—The writ of prohibition is an extraordinary remedy, only to be resorted to in cases where the usual and ordinary forms of remedy are insufficient to afford redress. It will not, therefore, lie to restrain courts having original jurisdiction of all cases in equity from issuing injunctions in excess of their jurisdiction, when there is a complete remedy by appeal from any final judgment they may render.

Turner and Graves, and W. C. Jones, for the petitioners.

Crowley and Sullivan, and H. J. Shively, for the respondents.

ANDERS, C. J. This is an application for a writ of prohibition commanding the judge of the superior court of Pierce County and the respondent Jones to refrain from further proceedings in a certain action pending in said court, wherein the said W. L. Jones is plaintiff, and the relators are defendants, which action was brought to restrain the relators George A. Black, S. B. Conover, and Andrew H. Smith, as commissioners appointed by the acting governor of the state to locate a site for an agricultural college, from further proceedings in the matter of said location; and the relators S. B. Conover, Andrew H. Smith, George W. Hopp, J. H. Bellinger, and Eugene Fellows, as the board of regents of said college, appointed by the said acting governor, from doing any act whatever as such board of regents; the relator T. M. Reed, as state auditor, from issuing any warrant or warrants for the payment of the appropriation made by the legislature for the establishment and maintenance of an agricultural college and school of science; the relator A. A. Lindsley, as state treasurer, from paying such warrant or warrants; and to have the said Black, Conover, and Smith decreed usurpers and intruders as commissioners under the act of the legislature of March 2, 1891,

entitled "An act to provide for the location and maintenance of the agricultural college, experiment station, and school of science of the state of Washington, and declaring an emergency," and their location of said college at Pullman declared null and void, and their commissions canceled.

It is alleged in the petition of relators that the defendant, Fremont Campbell, as judge of said superior court, on the twentieth day of May, 1891, issued a temporary restraining order as prayed for, and further ordered petitioners to show cause before him, on May 29, 1891, at the court-house, in the city of Tacoma, Pierce County, Washington, why such temporary restraining order should not be continued *pendente lite*, and upon the final hearing of the cause, be made perpetual; that thereafter petitioners appeared before said Fremont Campbell, and moved him, as judge of said court, to vacate and set aside said temporary restraining order, and to vacate said ruling to show cause, upon the grounds, — 1. That the complaint did not state a cause of action as against petitioners, or either of them; 2. That there was no equity in said complaint as against petitioners, or either of them; 3. That said court had no jurisdiction of said cause, or of the matters and things alleged in said complaint, or any of them, or of the relief sought by said complaint, or of any part thereof, as against petitioners, or any of them; and 4. That said court had no jurisdiction of said cause as against petitioners, or any of them; that said motion was by said judge overruled, to which ruling petitioners excepted, and said exception was allowed by the court; that thereafter said petitioners demurred to said complaint upon the same grounds stated and set forth in the above motion; and that thereafter said Fremont Campbell overruled said demurrer, and held that he had jurisdiction of said cause as against each and every of the defendants, and jurisdiction to grant the said restraining order *pendente lite*, and to hear and determine said cause.

The petition further alleges that the said Fremont Campbell, unless prohibited by this court, will continue to restrain petitioners pending the litigation, and will, upon the final hearing of the cause, grant the relief prayed for in the complaint, and make the said injunction perpetual, unless petitioners show to him, as said judge, some matters of fact other and different from those alleged in said complaint, sufficient, in his opinion, to prevent the granting of such relief. It is also alleged and suggested in the petition that the said superior court

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is wholly without jurisdiction, under the constitution and laws of the state, to hear, try, and determine the said cause as made by the said complaint, or to grant the restraining order, or to grant the relief prayed for in said complaint, or to perpetually enjoin petitioners, as prayed for in said complaint; and that the said Fremont Campbell, in attempting to grant said restraining order, and to hear and determine said cause, is acting wholly in excess of the jurisdiction conferred upon him, as judge of said court, by the constitution and laws of this state; and that petitioners are without any speedy and adequate remedy, other than the writ of prohibition.

Interesting and elaborate arguments were made, on the hearing of this petition, by the learned counsel of the respective parties, upon the question of the jurisdiction of this court and of the superior court, as well as upon the merits of the action sought to be prohibited. But as we view the case presented for our consideration, it is not necessary for us to determine or discuss the merits of the controversy at this time. Conceding that this court has power to issue the writ of prohibition to the superior court, the next question is, Does the petition present a proper case for the exercise of that power? And that depends upon the further question of whether the superior court has jurisdiction in the premises, and whether the relators have any other remedy than that of prohibition, whereby their grievances may be redressed. The superior courts of this state are courts of general jurisdiction. The state constitution provides that the superior courts shall have original jurisdiction of all cases in equity: See Const., art. 4, sec. 6. Counsel for the relators do not deny the power of the superior court to issue injunctions generally, but contend that the court in this instance has exceeded its jurisdiction, for the reason that the relators are public officers, and therefore a court of equity will not assume jurisdiction to control their official acts. Granting this to be true, it follows that the court below should have sustained the motion to dissolve the preliminary restraining order, or should have sustained the demurrer to the complaint for not stating a cause of action; but it does not follow, as matter of right, that the petitioners are entitled to a writ of prohibition.

Prohibition, being an extraordinary remedy, is only to be resorted to in cases where the usual and ordinary forms of remedy are insufficient to afford redress. It will not be allowed to take the place of an appeal or writ of error: High on

Extraordinary Legal Remedies, secn. 770, 771. In *Ex parte Greene*, 29 Ala. 58, Stone, J., in speaking of a bill for an injunction, said: "The bill may abound in imperfections, may be fatally wanting in necessary averments, or may be instituted in a district in which the defendants were not liable to be sued. These, if they exist, are proper matters of defense, and cannot be reached by this extraordinary process."

And in *Ex parte Roundtree*, 51 Ala. 51, the court says: "If the court is one of established jurisdiction, a plea that the subject-matter of a particular suit lies without its jurisdiction, or that the party is not amenable to its cognizance, will ordinarily afford full relief. But when the question involves the legal existence and construction of a court,—a denial of all jurisdiction, and not of the particular jurisdiction proposed to be exercised,—a prohibition, it seems to us, is the only adequate remedy."

This, it appears to us, is a clear and explicit statement of the law, and the language is peculiarly applicable to the case at bar. We are all of the opinion that the relators have a complete remedy by appeal from any final judgment that may be rendered by the superior court, and that there is therefore no necessity for resorting to the extraordinary remedy of prohibition: See *Powelson v. Lockwood*, 82 Cal. 613; *Murphy v. Superior Court*, 84 Cal. 592; *People v. District Court*, 11 Col. 574; *Strouse v. Police Court*, 85 Cal. 49; *Ex parte Broadbent*, 2 Hill, 367; 38 Am. Dec. 593. It was suggested on the argument by the learned counsel for the petitioners that an appeal would be futile in this case, because the same questions would be presented on appeal that the court is now called upon to determine. But the fact that the same questions can be presented is a sufficient reason for withholding the writ, as the above authorities, and many others that might be cited, abundantly show.

The petition is denied, and the superior court will proceed in the matter in question.

PROHIBITION does not lie to restrain any action which can be reviewed by any of the ordinary methods: *People v. Wayne etc. Court*, 11 Mich. 393; 83 Am. Dec. 754. A writ of prohibition will not be allowed to usurp the place of a writ of error: *Nelms v. Vaughan*, 84 Va. 606. A writ of prohibition will not lie where there is a remedy by appeal: *Agassiz v. Superior Court*, 90 Cal. 191; *State v. Judges*, 40 La. Ann. 827. A writ of prohibition will not lie when there is any other remedy: *Turner v. Mayor*, 78 Ga. 683.

CASES
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA.

GUFFY v. HUKILL.

[24 WEST VIRGINIA, 42.]

LEASE, FORFEITURE OF. — If a lease of land for drilling for oil and gas provides that the lessee will commence operations within nine months after the execution of the lease, or will thereafter pay the lessor \$1.23½ per month until work is commenced, and that the failure to comply with each of these conditions shall work an absolute forfeiture of the lease, and the lessor is, by the lease, entitled to remain in possession of the land, subject to the lessee's right to bore for oil, the lease is forfeited and terminated if, after the lessee is in default, the lessor refuses to accept payment of the arrears of rent, and leases the same property for the same purpose to another person.

LEASE — WAIVER OF FORFEITURE OF A LEASE for non-payment of rent cannot be made the lessor after he has granted a lease of the same premises to another lessee.

ACTION OF UNLAWFUL DETAINER LIES IN FAVOR OF A SUBSEQUENT LESSEE against a prior lessee who has forfeited his rights by the non-payment of rent.

Keck and Son, and O. Johnson, for the plaintiff in error.

J. W. Donnan, Berkshire and Sturgis, Alfred Caldwell, and A. F. Haymond, for the defendants in error.

BRANNON, J. This was an action of unlawful detainer, in the circuit court of Monongalia by Guffy and Murphy against Hukill, for possession of thirty acres of land for drilling for petroleum oil and gas, in which there was judgment for plaintiffs, to which judgment Hukill obtained this writ of error.

The case was decided upon a demurrer to evidence, from which it appears to be a contest between those claiming under two conflicting leases made by Wise for drilling for oil and gas. Wise made to Hays a lease of this thirty acres, dated the

30th of June, 1886, for twenty years, which, on the 10th of January, 1889, was assigned to Hukill. Under this lease Hukill defends.

By lease dated the 11th of July, 1888, Wise leased the thirty acres to Rezin Calvert for twenty years, and Calvert assigned this lease to Ida C. and Vinnie Calvert on the 16th of March, 1889, and they assigned it to Guffy and Murphy on the 8th of May, 1889. Under this lease the plaintiffs claim.

It is claimed by the plaintiffs that the hostile lease to Hays became forfeited under provisions contained in it, and therefore the later lease to Calvert confers a valid right. This Hays lease contains this clause: "The parties of the second part covenant to commence operations for said purposes within nine months from and after the execution of this lease, or to thereafter pay to the party of the first part \$1.33½ per month until work is commenced, the money to be deposited in the hands of John Kennedy for each and every month, and a failure on the part of the said second parties to comply with either one or the other of the foregoing conditions shall work an absolute forfeiture of this lease." Hays's lease was recorded the 26th of October, 1886, before the execution of the Calvert lease. About the 1st of May, 1889, Hukill began boring for oil under the Hays lease, and continued the work until November, 1889, when he obtained large quantities of oil in two wells. No rent was paid under the provision for the monthly payment of \$1.33½ on the Hays lease until about the 4th of January, 1889, when, or later, Hays paid it to Wise. Kennedy, in October, 1888, offered to pay Wise this rent, but he declined to receive it then, but received it afterwards from Hays. All the rent due Wise under the Hays lease was paid him. Hukill took possession under the Hays lease, and began boring for oil with the knowledge and consent of Wise. No demand was ever made by Wise on Hays for the rent, except that he called once on Kennedy for it.

An important question in this case is whether or not the lease to Hays became forfeited and of no further force by reason of the failure to bore for oil, or pay the monthly sum of \$1.33½ in lieu thereof, and the subsequent lease by Wise to Calvert; for if the Hays lease be still in life, Hukill can defend his possession, but if dead, it affords him no defense. Such boring, or the monthly payment of \$1.33½ as its commutation, is made by the Hays lease an express condition, for non-compliance with which its life is to cease. But it is ear-

nestly contended for the appellant that such failure does not *ipso facto* end the lease, but that demand must have been made for the payment of said money as rent, and on failure of payment, re-entry on the premises by the lessor, Wise, under the principles of common law thus stated in Lomax's Digest, 710, 711: "The third remedy for rent is by re-entry. The condition of re-entry for rent was the remedy by the ancient law, afterwards changed into a distress. But it is yet allowable at law where the party provides it by deed; as if a man make a feoffment, gift, or lease, reserving rent, with a condition that if the rent be behind, it shall be lawful for the feoffer, etc., and his heirs into the lands to re-enter." When the lessor is about to re-enter for non-payment of rent, the common law requires a previous demand of rent, with circumstances of great particularity. On the very day upon which the rent becomes due, at a convenient time before sunset, the lessor must make an actual demand of the exact amount of the rent due at the particular place at which the rent may be made payable by the terms of the lease; or if there be no place stipulated in the lease, the demand must be made at the most notorious place upon the land demised, which, if there be a dwelling-house, is the front door."

Does this law apply to this lease? It declares that failure of the lessee to commence operations or pay \$1.33½ per month in lieu of so doing, "shall work an absolute forfeiture of this lease," but contains no provision for re-entry for such omission. Where there is not only a declaration that a certain act or omission shall work a forfeiture, but also that for it the landlord may re-enter, it may plausibly be said that the landlord may or may not choose to enforce the forfeiture by re-entry, and if he elects to so enforce it, he must make such re-entry, as that is the act pointed out by the express terms of the lease as the mode of enforcement of the forfeiture; whereas, when there is no provision for re-entry, it is not required. Is, then, this common-law method of enforcing a forfeiture by demand and re-entry applicable to a lease which simply provides for forfeiture for breach of its covenants, but contains no clause of re-entry? Or rather, in such case are demand and re-entry the only mode of declaring the will of the lessor to enforce the forfeiture?

Kent, in his Commentaries (vol. 4, p. 128), lays down the rule thus: "There is this further distinction to be noticed between a condition annexed to an estate for years and one annexed to

an estate of freehold, that in the former case the estate *ipse facto* ceases as soon as the condition is broken, whereas in the latter case the breach of the condition does not cause the ceasing of the estate without an entry or claim for that purpose. It was a rule of the common law that where an estate commenced by livery, it could not be determined before entry. When the estate has *ipse facto* ceased by the operation of the condition, it cannot be revived without a new grant; but a voidable estate may be confirmed, and the condition dispensed with." This rule of the common law is well settled: 1 *Lomax's Digest*, 338; 1 *Minor's Institutes*, 229. "If the estate be an estate only for years, it is otherwise. No entry (unless it be so stipulated) is necessary to determine it, for as a term of years may begin without ceremony, it may end without ceremony": 2 *Minor's Institutes*, 229; citing 2 *Bl. Com.* 155; 2 *Thompson's Co. Litt.* 3, 4, 87, 88, 95-97; see *Adams on Ejectment*, 197; *Stuyvesant v. Davis*, 9 *Paige*, 431; *Parmelee v. Oswego etc. R. R. Co.*, 6 *N. Y.* 74. The only exception to this rule was where the lease provided for re-entry, in which case there must be re-entry: *Stuyvesant v. Davis*, 9 *Paige*, 431; *Taylor on Landlord and Tenant*, sec. 492.

Taylor on Landlord and Tenant, sec. 492, states the rule as above, but says that the distinction between estates for years and freehold "has been almost, if not quite, abated by the modern decisions, which establish that the effect of a condition making a lease void upon a certain event is to make it void at the option of a lessor only, in cases where the condition is intended for his benefit, and he actually avails himself of his privilege. The English law in this respect has been generally followed in this country, and such lease is therefore held good until avoided, though the lessee is estopped to set it up against the lessor." In a note to section 492, *Taylor* says that the original rule, that breach of the condition in a lease for years *per se* forfeits it, prevails in Pennsylvania, but there have been contrariant decisions in New York, and cites decisions in a few other states that there must be some declaration by the lessor of his election to forfeit. I am not aware of any decision in Virginia to tell us whether the original rule, as above stated, prevails. But let us take the law to be as *Taylor* states it. It is only a partial modification, or, as he states, an abatement of the original rule. He says that the effect of these later decisions is to make the lease void at the option of the lessor only, in cases where the condition is intended for his

benefit, — that is, that the lessor may waive the forfeiture, and if he choose not to declare the lease forfeited, it does not lie in the mouth of the tenant, who has broken his covenant, to set up the breach of the condition as destroying the lease, but he remains liable for rent. He further says that until the lease be avoided by the landlord it continues good, though the lessee is estopped to set it up against the lessor. The lessee is in the wrong, and he cannot set up the lease as continuing against the landlord who elects to insist on the forfeiture. Under the law as it had stood, so dead was the lease upon the mere breach of the condition, that the landlord could not recognize it as existing, or revive it but by a new lease, but it was dead as to both him and his tenant; but under the modification of the rule wrought by the later decisions, the lease continued good until the landlord avoided it, but so far as the tenant's rights were concerned, it was void, and he could not set it up against the landlord. The cause of forfeiture only renders the lease void as to the lessee, and it may be affirmed by the lessor, and the rights and obligations of both parties will continue in that case: *Clark v. Jones*, 1 Denio, 516. Thus no re-entry is necessary in case of a lease for years which contains a clause of forfeiture for breach of covenant, but no clause of re-entry.

There is in this case another reason why no re-entry was necessary. The lease let to Hays only the right to bore for oil and reserved the use of the land to Wise for tillage; and he was in actual possession. No man can enter upon himself. A man need not make a re-entry when he is in possession himself: 1 *Smith's Lead. Cas.* 109, notes; *Dumpro's Case*, 4 Coke, 119; *Hamilton v. Elliott*, 5 Serg. & R. 375; Co. Litt. 316 b, 218 b; *Sheaffer v. Sheaffer*, 87 Pa. St. 525; *Alleghany Oil Co. v. Bradford Oil Co.*, 21 Hun, 26; 86 N. Y. 638. If it be said that though re-entry is not necessary, yet demand for payment is, I respond that demand is only necessary as a prerequisite to re-entry, for there must be re-entry. Wise did go to Kennedy, to whom Hays had contracted to pay, and asked him if any money had been left with him for him, but none had been left. Were any demand necessary, it might be said, not without force, that this was a demand. Thus this rule as it exists to-day, as stated by Taylor, recognizes the power of the lessor to treat the lease as void. In what way shall he do so? Taylor on Landlord and Tenant, sec. 488, says: "The relation of landlord and tenant will also be dissolved when the tenant incurs a forfeiture of his lease in consequence of the breach of

some condition therein contained, and the landlord re-enters upon the premises, or signifies his intention to treat the lease as void, if it is so expressed in the lease."

So where no re-entry is required, he may signify his intention. What did Wise do to manifest his intention to avoid the lease? He refused back rent, and executed a subsequent lease of the land for oil purposes to Calvert, thus in a signal and unmistakable manner declaring his purpose to end the Hays lease. The common-law rule above stated required no re-entry, and its modification, as stated by Taylor, and also the last quotations given above from Taylor, only required a declaration of the landlord to treat it as forfeited. And in the case of *Allegany Oil Co. v. Bradford Oil Co.*, 21 Hun, 26, 86 N. Y. 638, it was held by both the supreme court and the court of appeals of New York that where a lease for boring for oil provided that unless the lessee commence a well within nine months, the lease was "to become void, and cease to be of any binding effect," and there was failure to commence, no re-entry was necessary, as the lessor was in possession; and that no notice of the landlord's intention to enforce the forfeiture was necessary; and that even if any overt act or notice was necessary, the execution of a second lease to another party was a sufficient declaration of the landlord's intention to enforce the forfeiture. The deed of an infant is voidable, not void, but requires an act to disaffirm it. A deed for the land to a second purchaser is a destruction of the first deed, and vests title in the second purchaser: *Mustard v. Wohlford*, 15 Gratt. 329; 76 Am. Dec. 209. For these reasons, I hold that by reason of the failure to either bore for oil, or to pay money in lieu thereof, under the Hays lease, and the execution of the lease to Calvert, the former lease to Hays was at an end.

The case of *Bowyer v. Seymour*, 18 W. Va. 12, is urged upon us as decisive in favor of Hukill. The lease in that case was made for coal-mining, and provided that a failure to pay money, which it stipulated was to be paid for coal, should be considered an abandonment of the lease; and it was held that notwithstanding non-payment of such money, the lessor must make a demand for the rent and a re-entry to make the forfeiture complete. But there is a marked line of distinction between that case and this, in the fact that Judge Haymond says that was a lease in fee, or at least for life, and under the original common-law rule above given, a freehold estate could not be forfeited for breach of a condition without demand and

re-entry; whereas the lease in this case is a lease for years, which under said rule does not require re-entry. Anything said in that case as to a lease for years would be *obiter*. I think that case was decided correctly.

The reasons given above are sufficient, I think, to show that the Hays lease is forfeited, and to render it unnecessary for us to pass on the question discussed in argument as to the effect of a lease for years for the purpose of producing petroleum oil or gas, containing provision for its forfeiture on breach of condition and a clause of re-entry, or to say whether we would approve the decision of the supreme court of Pennsylvania in *Brown v. Vandergrift*, 80 Pa. St. 142, so confidently relied on by appellee.

That lease provided that the lessee should begin to bore for oil in sixty days, and that if he should not commence within the time specified, he should pay thirty dollars per month, until drilling should commence, and that a failure of the lessee to comply with any of its conditions and agreements should work a forfeiture of his rights, and the lessor might enter upon the land and dispose of it as if the lease had not been made. The lessee failed to commence work or pay money, and the land-owner made a subsequent lease to other parties. The court held that the covenant of forfeiture was modified, not abrogated, by the clause for payment of rent; that the landlord might refuse payment of back rent, and insist on the forfeiture; that time was of the essence of the contract, and equity would enforce the forfeiture. The lessor, as here, remained in possession, and it does not appear that any such thing as re-entry was insisted on, and the court below said that no demand of the commutation money was necessary; and this was held no error. Chief Justice Agnew, in his opinion, says: —

“The discovery of petroleum led to new forms of leasing land. Its fugitive and wandering existence within the limits of a particular tract was uncertain, and assumed certainty only by actual development found upon experiment. The surface required was often small compared with the results, when attended with success, while these results led to great speculation by means of leases covering the lands of a neighborhood like a flight of locusts. Hence it was found necessary to guard the rights of the land-owner, as well as public interest, by numerous covenants, some of the most stringent kind, to prevent their lands from being burdened by unexecuted

and profitless leases, incompatible with the right of alienation and the use of the land. Without these guards, lands would be thatched over with oil leases by sub-letting, and a farm riddled with holes and bristled with derricks, or operations would be delayed so long as the speculator might find it hopeful or convenient to himself alone. Hence covenants became necessary to regulate the boring of wells, their number and time of succession, the period of commencement and of completion, and many other matters requiring special regulation. Prominent among these was the clause of forfeiture to compel performance and put an end to the lease in case of injurious delay or want of success. These leases were not valuable, except by means of development, unlike the ordinary terms for the cultivation of the soil."

If that case was correctly decided, it follows *a fortiori* that our decision upon this lease, having no clause of re-entry, is correct.

In *Munroe v. Armstrong*, 96 Pa. St. 307, the opinion says: "What is there in the circumstances calling for a fiction to defeat the covenant against delay in searching for or producing oil? The subject of the lease was a fluid likely to flow for a considerable distance through the crevices and loose sand where it is found. A small tract of land could be nearly or entirely drained by wells on adjoining lands, and it is common that leases contain covenants for diligent operation and for forfeiture in case of suspension. An oil lease yields nothing to the land-owner when not worked, and is an incumbrance on his land, tying his hands against selling or leasing to others; but when idle it costs the lessee nothing, and is valuable, or may prove valuable, if he can hold it awaiting developments in its vicinity."

These cases draw a distinction between oil leases and leases of other kinds. The payment of the rent or commutation money to Wise, and his consent to Hukill's taking possession under the Hays lease, could have no effect to waive the forfeiture, because such payment and taking possession occurred after the execution by Wise to Calvert of the second lease, which operated as a declaration of forfeiture, and to divest all estate under the Hays lease and invest it in Calvert; and the after act of payment did not destroy Calvert's rights.

It is said that the lease of the plaintiffs is itself forfeited because of non-payment and failure to bore for oil within the time specified in it; but that lease is dated the 11th of July,

1888, and provides for boring a well within six months, and on failure, then payment of fifty cents per acre, payable within six months "from the time of completing such well." A tender of seven dollars and fifty cents was made the 10th of July, again on the 11th of July, 1889, and refused by Wise, and a tender of fifteen dollars was made the 10th of January, 1890, and refused. The only acts of disaffirmance by Wise of said lease were such refusals and assent to the entry under the Hays lease. Forfeiture of this lease could not re-vest title under the Hays lease, though it might show that the plaintiffs had no title on which to maintain their action; but there was no forfeiture, as the tenders saved it. The contention that chapter 93, Code 1887, provides the only means of enforcing a forfeiture for non-payment of rent or breach of condition is not tenable in my opinion. I think the action of ejectment therein provided for is remedial, and a cumulative remedy to dispense with demand and re-entry, and that it does not destroy the common-law mode of demand and re-entry. But however that may be, it applies only where there is necessity to make demand and re-entry; and in this case, for reasons above given, there was no duty on the lessor to re-enter. I think the action of unlawful entry lies. It is true, it is designed to protect the actual possession. It applies when a tenant holds over after his right has expired. After a declaration of forfeiture by Wise, he could have maintained such an action against Hukill, because he would have held after his right expired; and he having let to Calvert the right to possession for oil purposes, I do not see why the action does not lie for the plaintiff.

It seems hardly necessary to say that the contention that plaintiffs are estopped by standing by and seeing Hukill spend money in developing oil without setting up claim is not good. Hukill began operations early in May, 1889, and it is admitted that on the 5th of July, Guffey and Murphy sent him a formal notice in writing that they had the sole right to drill for oil under their lease, telling him the very page and book where he would find it on record, and warning him not to drill. He did not produce oil until November.

The evidence offered by defendant of the amount of money expended by him in developing oil was properly rejected, as the question was one of right between the parties under their respective claims, and the proposed evidence was immaterial. As to the complaint that plaintiffs were allowed to give evidence that when they acquired their right they had no notice

of defendant's claim, I think it immaterial. If the Hays lease had become forfeited, there was no right under it of which they could have notice: *Central Land Co. v. Laidley*, 32 W. Va. 134; 25 Am. St. Rep. 797. As to the exclusion as evidence of the deed of the 14th of May, 1889, from Wise to Hukill, conveying absolutely all the oil and gas under said tract, it could not affect the right of plaintiffs under the Regin Calvert lease, made and recorded long before its date, and was irrelevant to the case. I am of opinion that the evidence sustained the plaintiffs' case, and that the court below properly refused to exclude their evidence, and rendered judgment for them. Judgment affirmed.

IN A SUBSEQUENT CASE determined in the same state, where the lessor had given a second lease after a default had occurred under the first lease, the right of the second lessee to recover was resisted, on the ground that the lease to him was given and accepted with the understanding that it was not to become operative if the lessee under the prior lease should object. Evidence offered for the purpose of establishing this understanding having been rejected by the trial court, its judgment was reversed, and the opinion of the appellate court shows that it intended to limit the doctrine of the principal case to actions in which the circumstances were precisely identical. So far as material to the question here considered, the opinion was as follows:—

"Defendant then asked witness Core the following questions, which the court refused to permit him to answer:—

"'1. How did it come you executed the lease to O. B. Ryall?

"'2. State whether or not that second lease was executed with intent on your part to forfeit the first lease executed by you to Kennedy and Long.

"'3. State whether or not Ryall was notified of the existence of the lease to Kennedy and Long.

"'4. How long was Ryall trying to get that lease from you?

"'5. What promise, if any, did the said Ryall at that time make to you with regard to the matter if you would let him have that lease?

"'6. State whether or not Ryall did or did not tell you, at the time of the execution of the said second lease, that if you would let him have the lease that he would take it subject to the Kennedy and Long lease, and if they, Kennedy and Long, objected, or their assignee, E. M. Hukill, objected, he, Ryall, would return his, Ryall's, lease to you, or words of that effect."

"Mere matter of form is to be disregarded, and the most favorable answer taken as true, provided it be competent; then, if competent for any purpose, we are to assume that Core delivered the second lease to Ryall on condition that it was not to take effect if Hukill objected. In leases of this kind, the law seems to be fairly well settled, that when a forfeiture for the benefit of the lessor is contracted for in case of default on the part of the lessee, before the lease can be regarded as at an end, the lessor must, by word or deed in some unequivocal way, manifest a purpose to treat the lease as forfeited. Otherwise the lessee would have it in his power to make default for his own benefit, and thus escape the performance of one duty by willfully failing to perform another. In *Wills v. Manufacturers' Nat. Gas Co.*, 130 Pa. St. 22', Clark, J., says: 'We have, by slow approaches, at last apparently turned into the general current of cases in which is found, without doubt, the great weight

of authority both in England and in this country.' See also *Westmoreland etc. Gas Co. v. De Witt*, 130 Pa. St. 235. I do not understand *Guffy v. Hukill*, 24 W. Va. 49, ante, p. 901, to lay down a different doctrine; and read by the light of its own facts, it does not profess to treat of leases generally, or to say that even in these cases the lessee in a proper case would be deprived of his remedy for relief from the forfeiture in a court of equity by the lessor executing a new lease to some third party. Therefore it becomes material to ascertain the purpose in that respect manifested by the lessor when he executed the new lease.

"The execution of the second lease cannot be taken as conclusive evidence of a purpose to declare the first one forfeited, when its own terms show that such is not the purpose. But if silent on the subject, as this one is, can it not be shown that the lessor executed and delivered the new lease to the lessee himself on condition that it was to be given back if the first lessee objected? This court, in the case of *Stuart v. Livesay*, 4 W. Va. 45, and in *Newlin v. Beard*, 6 W. Va. 110, following the case of *Ward v. Churn*, 18 Gratt. 812, 98 Am. Dec. 749, would seem to hold such conditions valid when made known to the obligee. The admissibility of this evidence is also rested upon the doctrine of the cases of *Lawrence v. DuBois*, 16 W. Va. 443; *Davis v. Demming*, 12 W. Va. 246; *Vangilder v. Hoffman*, 22 W. Va. 1, and cases cited. "The efficacy of the parol evidence is not to establish an agreement to reconvey, the specific performance of which the courts will enforce, but to establish the true nature and effect of the instrument by showing the object with which it was made": *Sweet v. Parker*, 22 N. J. Eq. 457. In this case, it is not to add to or take from the language of the lease, or to impair its legal effect, but to rebut the inference of a collateral purpose to declare a forfeiture which otherwise would be drawn": *Thomas v. Hukill*, 34 W. Va. 396.

FORFEITURE OF LEASE FOR BREACH OF CONDITION BY LESSOR. — *Forfeiture not Favored, but Lessor may Elect to Forfeit.* — Forfeiture clauses in a lease, for breach of condition by the lessee, are not favored by the courts, and their effect will be restricted as far as possible; but the authorities agree that a provision in a lease that a failure by a lessee to perform one of his covenants shall work an absolute forfeiture, and the lease shall thereupon become null and void, being intended for the benefit and protection of the lessor, he has the option, upon a breach, either to declare the forfeiture or to affirm the continuance of the contract. In other words, a clause in a lease providing for a forfeiture thereof, in the event of a default by the lessee in the performance of his covenants, is not self-operating, so as to make the forfeiture take place, *ipso facto*, upon the occurrence of the default; but being for the benefit of the lessor, it rests with him to enforce or to waive it. A distinction in relation to the effect of a forfeiture clause was formerly taken between leases for lives and those for a term of years. In the latter, it was said that on the breach of the condition, the lease absolutely determined, and could not be again set up by the acceptance of rent, or any other act on the part of the lessor. But this doctrine no longer prevails, and it is now well settled that in any lease the happening of the cause of forfeiture only renders the lease voidable at the election of the lessor; and that his election to treat the lease as void for the breach dissolves the relation between him and his lessee: *Arnaby v. Woodward*, 6 Barn. & C. 519; *Rede v. Farr*, 6 Maule & S. 121; *Reid v. Parsons*, 2 Chit. 247; *Miller v. Havens*, 51 Mich. 482; *Clark v. Jones*, 1 Denio, 616; 43 Am. Dec. 706; *Western Bank v. Kyle*, 6 Gill, 343; *Beach v. Nixon*, 9 N. Y. 35; *Wills v. Manufacturers' etc. Gas Co.*, 130 Pa. St. 222; *Westmoreland etc. Gas Co. v. De Witt*, 130 Pa. St. 235; *Ray v. Western etc. Gas Co.* 138 Pa. St. 576;

21 Am. St. Rep. 922; *Walker v. Engler*, 30 Mo. 130; *Creswell v. West End Iron Co.*, 51 N. J. L. 34; *Smith v. Miller*, 49 N. J. L. 521; *Baeyer v. Seymour*, 13 W. Va. 12; *Bowman v. Foot*, 29 Conn. 331; *Read v. Tuttle*, 35 Conn. 25; 95 Am. Dec. 216. Where the parties have voluntarily entered into a contract, the fact that the condition is a harsh one will not prevent a forfeiture by the lessee upon non-performance. *Pattin v. Read*, 50 Iowa, 508.

Forfeiture must be Promptly Enforced. — A forfeiture of a lease for breach of condition by the lessee must be enforced promptly by the lessor by affirmative action on his part; and slight circumstances will be treated as a waiver of the right of forfeiture: *Allen v. Dent*, 4 Lea, 678; *Cutler v. Wrigk*, 13 Nels. 558; *Bowman v. Foot*, 29 Conn. 331-340, where the court said: "Where a lease is thus voidable, the landlord's option to avoid it should be exercised at the proper point of time and in the proper place." So in *Walker v. Engler*, 30 Mo. 130-133, the court said: "By the terms of the lease, the term is not void by reason of a violation of the covenants *ipse facto*, but is voidable only at the option of the lessor. He may or may not insist upon a forfeiture, and until he exercises the option reserved to declare or claim a forfeiture, the term continues. It is by his own act, and not that of the lessee, that the lease is terminated, and it is of course by his own omission to insist upon a forfeiture immediately upon the violation of the covenant, or as soon as he has knowledge of it, that he is placed in a situation in which he may waive a forfeiture by accepting rent."

Lessor must Elect to Forfeit by Some Positive Act. — Although a forfeiture clause in a lease is not self-operative in favor of or against the lessee, it makes the lease voidable at his election; but in order to take advantage of the forfeiture, active measures are required of him. While it is not necessary in all cases that he make a formal demand for rent, or a re-entry upon the premises, still he must do some open, positive, and unequivocal act that will signify to the lessee, in a decisive manner, his determination and election to terminate the lease, else the right of forfeiture will be deemed to have been waived: *Walker v. Engler*, 30 Mo. 131; *Bowman v. Foot*, 29 Conn. 231; *Read v. Tuttle*, 35 Conn. 25; 95 Am. Dec. 216; *Thomas v. Huell*, 34 W. Va. 385; *Ray v. Western etc. Gas Co.*, 138 Pa. St. 576; 21 Am. St. Rep. 922, and cases cited therein; *Westmoreland etc. Gas Co. v. De Witt*, 130 Pa. St. 235.

Acts Showing Election to Forfeit. — Where a lease contains a clause of forfeiture for breach of condition to pay rent or other covenant, and provides for a re-entry before the forfeiture can be claimed, of course re-entry is necessary before the forfeiture can be enforced; but when the lease contains no clause of demand or re-entry for such forfeiture, it seems that the lessor may elect to claim a forfeiture by demand and re-entry, or by any other positive act disaffirming the lease, and giving the lessee notice of his intention to claim a forfeiture. In some states, it is maintained, however, that where a lease provides for a forfeiture upon the non-payment of rent, the landlord is required, before he can declare a forfeiture, to make a demand for the rent on the day it falls due, for the precise amount, and at a convenient hour before sunset, at the place where payment is specified to be made in the lease, or on the premises, if no place is named: *Jenkins v. Jenkins*, 63 Ind. 415; *Gage v. Biss*, 40 Cal. 384; *Read v. Tuttle*, 35 Conn. 25; 95 Am. Dec. 216; *Bowman v. Foot*, 29 Conn. 334; *Chapman v. Kirby*, 42 Ill. 211; *Woodward v. Cune*, 73 Ill. 241; *Henderson v. Carbondale Coal etc. Co.*, 140 U. S. 25. When a lease provides that non-payment of rent without demand shall constitute a forfeiture, no demand is necessary, and the forfeiture may

be claimed by the landlord by any other positive act evincing an intention to terminate the lease: *Sweeney v. Garratt*, 2 Den. 601. It is generally maintained that the lessor may declare a forfeiture without previous demand for the rent due. Thus he may elect to enforce a forfeiture by bringing ejectment to recover the possession on default: *Clark v. Jones*, 1 Denio, 516; 43 Am. Dec. 706; or by bringing an action to recover the rent due: *Smith v. Miller*, 49 N. J. L. 521; or by refusing a tender of the rent in arrears, and insisting on a forfeiture: *Brown v. Vandergrift*, 80 Pa. St. 142; or by giving a second lease to a third party upon default by the lessee: *Mumros v. Armstrong*, 96 Pa. St. 307. Thus in *Allegany Oil Co. v. Bradford Oil Co.*, 21 Hun, 28, affirmed, 86 N. Y. 638, it was decided that where the lessor was left in possession under the terms of the lease, no re-entry was necessary to enforce the forfeiture, that no notice of the landlord's to enforce the forfeiture was required, and that even if any overt act or notice was necessary, the execution of a second lease to a third party was a sufficient declaration of intention by the lessor to enforce the forfeiture. So in *Ray v. Western etc. Gas Co.*, 138 Pa. St. 576, 21 Am. St. Rep. 922, it was decided that where, by the terms of a lease, the lessor was to remain in possession, he need not make a formal demand for rent due, nor a re-entry, in order to take advantage of forfeiture clause inserted in the lease for his benefit. His election to enforce the forfeiture, evinced by some other positive act, as by bringing action to recover the rent due, while he is in possession, is a constructive re-entry under his title. Of course the relation of landlord and tenant will also be dissolved when the tenant incurs a forfeiture of his lease in consequence of the breach of a condition contained therein, and the lessor has re-entered upon and gained peaceable possession of the leased premises: *Abrahams v. Tappe*, 60 Md. 317.

Lessee Entitled to Set up Forfeiture against Lessor. — When a lease provides that in default of the performance of a condition contained therein the lease shall become null and void, the landlord has the option either to declare a forfeiture or to affirm the continuance of the contract after a breach of the condition, and if he does not elect to claim a forfeiture, the tenant cannot set up his own default as a cause of forfeiture, nor set up the forfeiture as a defense to an action in affirmance of the lease: *Bowyer v. Seymour*, 13 W. Va. 12-21; *Wills v. Manufacturers' etc. Gas Co.*, 130 Pa. St. 222; *Smith v. Miller*, 49 N. J. L. 521; *Ray v. Western etc. Gas Co.*, 138 Pa. St. 576; 21 Am. St. Rep. 922; *Clark v. Jones*, 1 Denio, 516; 43 Am. Dec. 706.

McKAY v. OHIO RIVER RAILROAD COMPANY.

[34 WEST VIRGINIA, 65.]

ACTION, WHETHER EX CONTRACTU OR EX DELICTO. — An action should be regarded as in trespass on the case, and not in assumpsit, where the declaration, after setting out a contract for the transportation of plaintiff as a passenger on defendant's cars, and that plaintiff had taken his seat in one of such cars as such passenger, that the defendant, disregarding its undertaking, did not convey plaintiff as it agreed to do, but instead thereof violently and with force ejected him from the car, and compelled him to walk a long distance to a hotel, etc.

TRACTION — ACTION OF TRESPASS ON THE CASE FOR VIOLENTLY EJECTING plaintiff from railway car cannot be sustained where the evidence shows that no violence was used toward him, and that he merely got off the car when told by the conductor that he must do so. The plaintiff's remedy, if any he has, is by an action on the case in *assumpsit*, based on the breach of the defendant's contract to carry him.

RAILWAYS — RIGHT TO EJECT PERSON WHO HAS BEEN GIVEN WRONG TICKET BY MISTAKE, OR WHOSE TICKET HAS BEEN IMPROPERLY TAKEN UP. — As between a passenger and a conductor, the ticket is conclusive evidence of the passenger's rights, and if it does not entitle him to ride he may be ejected from the train without giving him any cause of action in tort, though the company, through mistake of its agent, has given the passenger a wrong ticket, or has taken up his ticket when not entitled to do so. In such circumstances, his remedy is by an action on the contract for giving him a wrong ticket, or for wrongfully taking up his ticket, and not by an action for his wrongful removal from the train.

V. B. Archer, for the appellant.

R. White, for the plaintiff in error.

J. O. Pendleton, for the defendant in error.

BRANNON, J. This was an action of trespass on the case, in the circuit court of Ohio County, brought by Winfield S. McKay against the Ohio River Railroad Company, resulting in a verdict and judgment for the plaintiff for \$539.17, to which judgment this writ of error was granted, on the petition of said company.

An inspection of the declaration raises the question whether it states a cause of action *ex contractu* or *ex delicto*; whether it is in *assumpsit* on a contract for transportation, or for tort for the ejection of the plaintiff from a car. It avers that the defendant company undertook and promised for certain hire and reward paid to it to safely and securely convey the plaintiff in its cars from the town of Ravenswood to Wheeling, and back again to Ravenswood, and that the plaintiff, confiding in such promises and undertaking of defendant, did take a seat as a passenger in the defendant's car and was conveyed to Wheeling, and that afterwards, still confiding in such promise and undertaking of the defendant, he took a seat as a passenger in one of its cars, to be conveyed back from Wheeling to Ravenswood; but the defendant, not regarding its promise and undertaking, but contriving to injure the plaintiff, did not convey him from Wheeling to Ravenswood, but neglected and refused so to do. Thus far the declaration seems to be based on the contract of conveyance made by the defendant as a carrier with the plaintiff. But it then immediately avers that instead of so conveying the plaintiff, the defendant, by its ser-

vanta, violently and with great force caused the plaintiff, against his will and protest, to be ejected from said car, and to be pushed and hurled from it upon the ground, and to be prevented from going to Ravenswood on that day, by means whereof he was compelled to walk a long distance to a hotel, was greatly humiliated in his feelings and hurt in his pride by being exposed to other passengers on the car, and was compelled to remain in Wheeling from his business and home, and to pay hotel-bills, and spend three or four dollars for telegrams sent to his wife, to allay her uneasiness on account of his failure to reach home when expected, and to spend money to purchase a ticket to reach home, and to borrow money for that purpose; and that his wife was ill, and her alarm from his failure to reach home when expected injured her, and protracted her illness, causing him to pay large medical bills, and that his business was damaged by his detention from home, and he sustained numerous other injuries, to his damage ten thousand dollars. The most of this matter relates to the tort of ejecting the plaintiff from the cars, and looking to that as the cause or *gravamen* of the action.

The declaration thus contains matter based on the contract and matter based on the tort; and it is somewhat difficult to say whether it aims to state the breach of the contract to convey or the tort in ejecting him from the car as the *gravamen* of the action. But it cannot be treated as double in nature. It must be classed either as an action *ex contractu* or *ex delicto*. The writ summons the defendant to answer an action of trespass on the case, and the declaration denominates the action as trespass on the case; and I conclude to regard the statement of the contract of conveyance as a passenger as matter of inducement explanatory of the reason of the plaintiff's presence on the car, and the ejection of the plaintiff from the car with force and arms as the *gravamen* of the action, and shall treat the action as trespass on the case. This classification of the action is necessary in passing on the motion to exclude the plaintiff's evidence; for if we regard the declaration as in *assumpsit*, the evidence would go to sustain the action, and the motion to exclude it would consequently be overruled; but if we regard it as in case, the evidence is not sufficient to sustain the action, and the motion to exclude it should have been sustained.

The plaintiff's evidence shows that he purchased from the defendant's agent at Ravenswood what was regarded a round-

trip ticket from Ravenswood to Wheeling and return, and paid \$7.35 for it, and under it went to Wheeling, and when he started to return to Ravenswood, found that his ticket was stamped on each end from "Ravenswood to Wheeling," instead of being stamped, as it should have been, on one end for passage from Ravenswood to Wheeling, and on the other from Wheeling to Ravenswood; that he did not notice the mistake when he purchased the ticket, and first noticed it when he boarded the train at Wheeling to return to Ravenswood. The conductor on the train to Wheeling tore off one end or coupon of the ticket, and when, on his return, the plaintiff presented his ticket to the conductor, he refused to receive it, because it called for a passage from Ravenswood to Wheeling, not from Wheeling to Ravenswood, and said to plaintiff: "This ticket is no good. You will have to pay your fare, or get off,"—and the plaintiff replied, "I'll be damned if I do." The conductor pulled the bell-rope to stop the train, and as the train was stopping, plaintiff asked the conductor what was the matter with the ticket, and he said it was not good. The plaintiff informed him that he had come up on it the day before with Conductor Patrick; and the conductor, Rice, then said, "He gave you the wrong end," and said further, "You will have to pay your fare." Plaintiff then said to him that he had no money, and that if the conductor had given him the wrong end of the ticket, it was a mistake, and it did not cost any more to take him back than to bring him up, to which Conductor Rice replied, "It don't make a damned bit of difference," and that plaintiff must pay fare or get off. When the train stopped, the plaintiff said: "If I get off here, somebody will have to pay for it. I want to get home on this train." Plaintiff says he then got off the train down upon the street in the city of Wheeling. He further says: "Of course the passengers could not hear what was said between the conductor and myself, and they did not know what I was put off for."

There is no act of trespass shown by this evidence. There is not the slightest evidence of force or violence used by any of the defendant's employees upon the plaintiff. He was not, as alleged in the declaration, violently and with great force ejected and pushed and hurled from the car, but walked from it himself, without the slightest battery or assault upon his person. He does not himself say so, and other evidences make it quite clear that no force or violence was used. The

evidence does show a breach of the company's contract to convey the plaintiff as a passenger, or an agreement to sell a different ticket, but not a trespass, for which an action based on a tort can be maintained. It is simply the case of a refusal and failure to carry out its contract of conveyance, for which an action of trespass on the case in *assumpsit* based on that contract might be maintained. The mere manner of his expulsion would not sustain the action as one based on tort. The plaintiff's evidence is, that the conductor "talked short" to him, and he to the conductor, and when he was presenting his views as to the validity of the ticket, the conductor said, "It don't make a damned bit of difference"; that he had to get off or pay fare.

In the late case in the supreme court of North Carolina (*Rose v. Wilmington etc. R. R. Co.*, 106 N. C. 168), an action for putting plaintiff and her husband off a train, it appeared that, their ticket not being stamped as required, the conductor told the husband they must pay fare or get off, and afterwards, at the next station, said, in a brusque, decided manner, "This is H., if you are going to get off," and they saying they had no intention of getting off unless ordered, he said, "Then I order you off," and they got off, and returned and paid fare, and it was held that the company was not liable for damages, though plaintiff was lying on pillows, and apparently an invalid. But had force been used, if no more than was necessary to remove the plaintiff from the car, or if it be said that actual force is not necessary to sustain the action, but that threatened expulsion, and departure of the passenger from the car by reason of it, shall stand in lieu of it, I do not think the action can be maintained."

In *Frederick v. Marquette etc. R. R. Co.*, 37 Mich. 342, 26 Am. Rep. 531, it is said that the uniform and universal practice is for railroad companies to issue tickets with the places designated from and to which the passenger is to be carried, and that these tickets are unhesitatingly accepted by the conductor as evidence of the contract between the company and passenger, and that the conductor has seldom any other means of ascertaining or learning, within time to be of any avail, the terms of the contract, unless he relies on the statement of the passenger, contradicted perhaps by the ticket, and that there will be cases where a ticket is lost, or where, by mistake, the wrong ticket was delivered to the passenger, and he will be obliged to pay his fare a second time to pur-

sue his journey, and if he is unable to do so, great delay and injury may result. Such delay and injury would be the natural result of the loss of the ticket or breach of the contract, but would, in part at least, be in consequence of the pecuniary circumstances of the party; that such cases are exceptional, and however unfortunate the party who is so situated, yet no rule has ever been devised that would not at times injuriously affect those it was designed to accommodate. The judge then asks: "How, then, is the conductor to ascertain the contract entered into between the passenger and the railroad company, where a ticket is purchased and presented to him? Practically, there are but two ways,—one, the evidence afforded by the ticket; the other, the statement of the passenger, contradicted by the ticket. Which should govern? . . . There is but one rule which can safely be tolerated with any decent regard to the rights of railroad companies and passengers generally. As between the conductor and passenger and the right of the latter to travel, the ticket produced must be conclusive evidence; and he must produce it, when called upon, as the evidence of his right to the seat he claims. Where a passenger has purchased a ticket, and the conductor does not carry him according to its terms, or if the company, through the mistake of its agent, has given him the wrong ticket, so that he has been compelled to relinquish his seat, or pay his fare a second time in order to retain it, he would have a remedy against the company for a breach of the contract; but he would have to adopt a declaration differing essentially from the one resorted to in this case."

In that case the passenger had paid to a point beyond that called for by the ticket, and refusing to pay fare, was ejected, and was denied a recovery in an action on the case. The principle enunciated in this case in Michigan, that as between the passenger and the conductor the ticket is the conclusive evidence of the passenger's rights, is sustained in several well-considered cases: *Townsend v. New York etc. R. R. Co.*, 56 N. Y. 295; 15 Am. Rep. 419; opinion by Chief Justice Cooley in *Hufford v. Grand Rapids etc. R'y Co.*, 53 Mich. 118; *Chicago etc. R. R. Co. v. Griffin*, 68 Ill. 499; *McClure v. Philadelphia etc. R. R. Co.*, 34 Md. 532; 6 Am. Rep. 845; *Shelton v. Lake Shore etc. R'y Co.*, 29 Ohio St. 214; *Downs v. New York etc. R. R. Co.*, 36 Conn. 287; 4 Am. Rep. 77; *Petrie v. Pennsylvania R. R. Co.*, 42 N. J. L. 449; *Yorton v. Milwaukee etc. R'y Co.*, 54 Wis.

234; 41 Am. Rep. 23; *Bradshaw v. South Boston R. R. Co.*, 135 Mass. 407; 46 Am. Rep. 481.

In the Ohio case of *Shelton v. Lake Shore etc. R'y Co.*, 29 Ohio St. 214, it was held that the fact that a ticket had been purchased, which was afterwards wrongfully taken up by a conductor on one train, will not relieve a passenger from the duty of buying a ticket or paying fare on another train of the defendant, and that in such case the right of action would be for wrongfully taking up the ticket, and not for removal from the train for failure to pay fare.

In the Illinois case above cited (*Chicago etc. R. R. Co. v. Griffin*, 68 Ill. 499), it was held that if a passenger pay fare to a certain station, and the agent inadvertently give him a ticket to an intermediate station, the demand of a second fare will be a breach of the implied contract on the part of the company to carry him to the proper station. By paying a second time, his action will be as complete as if he resist the demand and suffer himself to be ejected; and his ejection will add nothing to his cause of action. It is his duty to pay the second fare; and if the company fail to make reparation, he can maintain his appropriate action. This case recognizes the contract as the proper ground of action: *Hall v. Memphis etc. R'y Co.*, 9 Fed. Rep. 585.

In *Yorton v. Milwaukee etc. R'y Co.*, 54 Wis. 234, 41 Am. Rep. 23, the passenger desiring to stop over, and having the right to a stop-over ticket, was given instead a trip-check, through the conductor's fault. It was held that a second conductor may demand additional fare, and may, on refusal to pay, eject the passenger from the train, using no unnecessary force, and that such ejection will be no ground of recovery against the company, though it will be liable for the fault of the first conductor.

In *Townsend v. New York etc. R. R. Co.*, 56 N. Y. 295, 15 Am. Rep. 419, it was held that a regulation of a railroad company requiring passengers to present evidence to the conductor of a right to a seat, or pay fare, is reasonable, and for non-compliance a passenger may be put off, and the wrongful taking of the passenger's ticket by a conductor of a previous train, on which the passenger had performed part of his journey, does not exonerate him from compliance with the regulation, and that for the wrongful act of the former conductor the company is liable. It does not justify the passenger in violating the company's lawful regulation on another train.

In *Hibbard v. New York etc. R. R. Co.*, 15 N. Y. 455, it was held that a passenger who had a ticket in his pocket, and had exhibited it once to the conductor, and refused to exhibit it again when called on, was properly ejected for refusing to exhibit his ticket.

Here the plaintiff had a ticket not good for the trip he was making, and declined to pay fare. He cannot maintain an action for ejectment or a threatened ejectment from the train, but must look to the breach of contract, or the act of receiving money for the round trip and giving a wrong ticket. If the passenger have a ticket good for the passage, and the conductor should refuse to recognize it, and expel the passenger, the act would be a tort, and an action as for a tort could be maintained. Judge Cooley said, in *Hufford v. Grand Rapids etc. R'y Co.*, 58 Mich. 118, that all the judges of the Michigan supreme court agreed that if the ticket was apparently good, the passenger need not leave the car. But here the ticket was very apparently not good. Therefore the motion of the defendant to reject plaintiff's evidence as not sustaining his action should have been sustained, not overruled. As the evidence should have been excluded, it becomes unnecessary to pass on the instructions. The judgment is reversed, the verdict of the jury set aside, and the case is remanded for a new trial in accordance with principles herein indicated.

RAILROADS—DAMAGES FOR WRONGFULLY EJECTING PASSENGER.—Where a passenger has lost his ticket, and has given evidence of the fact to the conductor, who thereupon ejects him without violence, he may recover compensatory damages, but not exemplary: *Pullman etc. Co. v. Reed*, 75 Ill. 125; 20 Am. Rep. 232. Punitive damages may be awarded for unlawfully expelling a passenger from a train, but the circumstances should be considered: *Georgia R. R. etc. Co. v. Baskin*, 86 Ga. 641; 22 Am. St. Rep. 490, and note; *Georgia R. R. etc. Co. v. Dougherty*, 86 Ga. 744; 22 Am. St. Rep. 499; *Head v. Georgia etc. R'y Co.*, 79 Ga. 358; 11 Am. St. Rep. 484, and note; *Pennsylvania Co. v. Brey*, 125 Ind. 229. *Pembrey v. Oregon R'y etc. Co.*, 21 Or. 121, is a case in which it is held that if one had not the proper ticket entitling him to be on the train, and did not leave when ordered to do so, he cannot recover for an ejection therefrom.

DENT v. PICKENS.

[3d WEST VIRGINIA, 290.]

PLEADING — MARRIAGE, ACTION FOR BREACH OF PROMISE OF. — The seduction of plaintiff by defendant may be proved in an action for a breach of promise to marry, though not alleged in the complaint.

MARRIAGE — DAMAGES FOR BREACH OF PROMISE OF. — **EVIDENCE OF THE WEALTH** of defendant is admissible, in an action for a breach of promise to marry, for the purpose of showing the loss which the plaintiff had sustained from the non-fulfillment of the contract; but as no evidence should be received of any fact tending to aggravate or diminish damages, occurring after the commencement of the action, evidence of the defendant's financial condition at the time of the trial should be rejected, unless followed by testimony connected with his previous circumstances.

EVIDENCE OF THE PLAINTIFF'S GOOD REPUTATION is admissible, in an action for a breach of promise to marry, if the defendant has previously introduced evidence intended to cast a cloud on her character.

EVIDENCE THAT A WITNESS HAS HEARD that the defendant has married since the commencement of an action against him for the breach of his promise to marry plaintiff is not admissible in such action, both because it is hearsay, and because evidence of matters occurring after the institution of suit cannot be admitted to aggravate damages.

APPELLATE PRACTICE. — **IF IMPROPER EVIDENCE HAS BEEN ADMITTED**, and the court is not able to say that it did not injure the appellant, the verdict must be set aside.

J. J. Davis, J. Bassell, and Dayton and Dayton, for the appellant.

J. H. Woods and S. V. Woods, for the appellee.

LUCAS, P. This was an action of *assumpsit* for breach of marriage promise, brought by the plaintiff in the circuit court of Barbour County. The jury found for the plaintiff, and awarded her damages to the amount of ten thousand dollars. The defendant moved to set aside the verdict and for a new trial, but the court overruled his motion, and gave judgment against him in accordance with the finding of the jury. Nine bills of exceptions were reserved during the trial, involving sundry interesting questions of law, which we will now proceed to consider.

The first assignment of error in this case is, that the circuit court overruled the demurrer to the declaration. No defect in the declaration, which seems to be in the usual form, has been pointed out in the petition or brief of counsel, and I see no valid objection to its sufficiency.

The second objection to the action of the circuit court which I shall notice is the admission of evidence proving the seduction of the plaintiff by the defendant, nothing of the kind

having been alleged in the declaration. Upon the question, that in an action for breach of promise, seduction, when averred in the declaration, may be proved, this court has already decided: *McKinsey v. Squires*, 32 W. Va. 41. In that case, however, the seduction was distinctly averred in the complaint. The more difficult question is, whether such proof can be admitted where there has been no such averment. Upon this question there is a conflict of authorities. Those who hold such averment a necessary prerequisite go upon the well-settled doctrine that two causes of action cannot be combined and prosecuted in one suit, and that any special circumstance in aggravation of damages should be alleged in the declaration. The other and weightier class of authorities proceed upon the idea that when a contract for future marriage has been entered into, the relation between the parties is in the nature of a trust, and that the seduction of the female, while thus engaged, is in itself a breach of the promise of marriage, which is held to embrace an obligation and undertaking to protect and respect until the marriage is lawfully consummated; hence the evidence of seduction is admitted (whether directly averred or not in the declaration) as proof of the violation of his promise by the defendant: See 3 Sutherland on Damages, 316, 317; 2 Sedgwick on Damages, 147, and notes.

Various exceptions were taken upon the trial to the admission of certain testimony as to the pecuniary condition or wealth of the defendant. That offered upon this subject by the plaintiff all tended to prove the estate of the defendant at the time of his breach of promise, or during the time when he might reasonably have been expected to fulfill it. Although some of it consisted of instruments executed after suit was instituted, yet those instruments contained admissions by the defendant, who executed them, throwing light upon his pecuniary condition during the period named and before suit. Such testimony is admissible for the purpose of showing the loss which the plaintiff has sustained by the non-fulfillment of the contract. The jury should take into consideration the rank and condition of the parties and the pecuniary standing of the defendant, as tending to illustrate the advantage which the plaintiff would have secured by the marriage: See *Riddle v. McGinnis*, 22 W. Va. 253; 3 Sutherland on Damages, 323; *Clem v. Holmes*, 88 Gratt. 726; 86 Am. Rep. 793. The general rule, however, in all such cases is, that no evidence can be given of

any fact having a tendency to aggravate or diminish the damages, which has occurred after the commencement of the suit. This rule would properly preclude evidence of the defendant's pecuniary condition at the time of trial, unless followed up by testimony connecting it with his previous circumstances. Hence there was no error in excluding such evidence from the jury.

Neither did the court err in admitting evidence of plaintiff's good character, because the defendant had previously introduced certain letters, and marked and examined the plaintiff upon certain passages thereof intended to cast a cloud upon her character; and character, when attacked, can always be sustained by reputation, and seldom in any other way. The rule that nothing is admissible in aggravation of damages occurring after suit commenced, as laid down by Mr. Sedgwick (2 Sedgwick on Damages, 150), is subject to the exception that the nature of the defense at the trial may, in certain instances, aggravate the damages: 8 Sutherland on Damages, 320. But I know of no exception to the rule that would render admissible the evidence excepted to by the defendant, as set out in his eighth bill of exceptions. The court permitted the plaintiff to introduce a witness, who, in reply to the question whether the defendant was married or not, answered: "I heard he was married since this suit was brought." This testimony was objected to, and should have been excluded as objectionable in a double aspect: 1. It was hearsay; and 2. It was a violation of the rule laid down above. Another witness was allowed to testify that the defendant "was reported to be married to Miss Minnie Coburn." Now Miss Coburn's name figures to a considerable extent in the correspondence between plaintiff and defendant, as introduced on the trial; and this evidence, embraced in the eighth bill of exceptions respecting the defendant's subsequent marriage, may have influenced the jury in estimating the damage as placing defendant's conduct in a more deceitful and unfavorable light. It is impossible for us to say, therefore, that the defendant may not have been injured by the failure to exclude this improper evidence, and on this ground the verdict must be set aside, and the judgment of the circuit court reversed: See *Taylor v. Baltimore etc. R. R. Co.*, 38 W. Va. 40. Having reached this conclusion, it is unnecessary, and would be improper, to pass on the question as to whether the damages awarded were excessive.

Reversed.

MARRIAGE AND DIVORCE—BREACH OF PROMISE OF MARRIAGE—EVIDENCE—SEDUCTION.—Evidence of plaintiff's seduction by the defendant is admissible in an action for breach of promise to marry: *Daggett v. Wallace*, 75 Tex. 352; 16 Am. St. Rep. 908, and note; *Kurtz v. Frank*, 76 Ind. 504; 40 Am. Rep. 275. This evidence is admissible in aggravation of damages: *McKinsey v. Squires*, 32 W. Va. 41; *Muscheman v. Barker*, 28 Neb. 738; *Goss v. Schultz*, 60 Wis. 521; *Bird v. Thompson*, 96 Mo. 424; *Bennett v. Baum*, 42 Mich. 346; 36 Am. Rep. 442, and note.

MARRIAGE AND DIVORCE—BREACH OF PROMISE TO MARRY—EVIDENCE OF DEFENDANT'S WEALTH.—In an action for breach of promise to marry, evidence of defendant's wealth is admissible in computing the damages suffered by the plaintiff: *Daggett v. Wallace*, 75 Tex. 352; 16 Am. St. Rep. 908, and note; *Bennett v. Baum*, 42 Mich. 346; 36 Am. Rep. 442; *O'Neill v. Chapman*, 125 N. Y. 214; *Olsen v. Solomon*, 71 Wis. 664.

MARRIAGE AND DIVORCE—BREACH OF PROMISE TO MARRY—EVIDENCE.—Where defendant is permitted to testify as to rumors calculated to bring the plaintiff into disrepute before the jury, she may introduce evidence as to her good character for virtue and chastity: *Jones v. Layman*, 123 Ind. 508.

THOMAS v. TOWN OF GRAFTON.

[84 WEST VIRGINIA, 222.]

EXECUTION.—FOR A LEVY ON THE GOODS OF A STRANGER to the writ the execution creditor is not liable, unless he was present at such levy, or otherwise directed, aided, or abetted it. This rule was held applicable where the judgment creditor was a municipal corporation, and the net proceeds of the sale were paid to the mayor, though it was further held that such proceeds might be recovered.

MUNICIPAL CORPORATION.—A TOWN SERGEANT IN LEVYING EXECUTIONS IN FAVOR OF THE TOWN is not performing a corporate function, nor acting as its servant, and therefore the town is not answerable for his levying on the property of a stranger to the writ.

W. H. Dent, for the plaintiff in error.

No appearance for the defendant in error.

LUCAS, P. The mayor of the town of Grafton having imposed fines upon one A. Thomas, executions therefor went into the hands of the town sergeant, who levied them upon certain personalty claimed by Phoebe Thomas as her separate property, and having kept said property for a considerable period sold it at a depreciated value. Phoebe Thomas brought suit against the town before a justice, and a jury being demanded, they rendered a verdict for \$250, and the justice gave judgment accordingly. The town then applied to the circuit court of Taylor County for a writ of *certiorari*, which was refused.

The law is well settled that an action of trover and conver-

sion can be maintained against a sheriff or other officer, who, having an execution against A, seizes and converts the property of B: *Wustland v. Potterfield*, 9 W. Va. 438. But in order to make the execution creditor liable, he must have been present at the levy and seizure, or otherwise have directed, aided, or abetted the same: *Collins v. Mann*, 15 W. Va. 171; *Cooley on Torts*, 458, with notes; *Addison on Torts*, sec. 712.

In the present case, I do not find any sufficient evidence of such direction or connivance on the part of the defendant, the town of Grafton. The only evidence on the subject is the testimony of the town sergeant, as follows: "I was sergeant of the town of Grafton for the year 1882, and had executions against Doc. A. Thomas for fines imposed by the mayor, by virtue of which I levied on the following property, to wit, eleven sacks of flour, one show-case and contents, five part boxes of tobacco, one barrel of cider, one barrel of sugar, one keg of lard, one lot of brooms, twenty-seven candy jars, fifty pounds of coffee, all of which Mrs. Thomas, the plaintiff, claimed, but I levied on it as the property of Doc. A. Thomas, I kept the property for a long time in the building of Thomas McGraw, occupied by Phoebe Thomas as a storehouse, and for which the town afterwards paid the rent. Some of the town authorities instructed me to sell the property, but I do not remember who, and I sold it and turned the proceeds, after deducting costs and expenses, over to John W. Deck, mayor of the town."

Cross-examined: "After deducting the costs, I paid John W. Deck from forty-five to forty-seven dollars. The goods levied on brought from fifty-one to fifty-two dollars at public auction, after notice of sale. I offered to return the property to Mrs. Thomas before sale, but she would not receive it at that time. Mrs. Thomas had notice of sale."

"Some of the town authorities" is a very vague and loose expression, and cannot by any sort of intendment, however liberal, be made to amount to proof that the council of the town, or even its chief executive officer, the mayor, ever directed this seizure or sale. The sergeant, being cross-examined, testified that he sold the property seized, and turned over the net proceeds, amounting to forty-seven dollars, to the mayor. For this amount, in any action *ex contractu*, for money had and received, there can be no doubt the town would be liable. But this liability would not support the present verdict, which was for \$250.

There is another view, which counsel for the defendant in error have advanced, which it is proper to dispose of, and that is, that the illegal seizure by the town sergeant was an act for which his superior, the town itself, was responsible. But it will be observed that for the purposes of executing writs the sergeant is not, strictly speaking, a "municipal officer," but is acting rather as a civil officer of the state, just as a constable or sheriff. Many officers occupy this double relation. "In this country," says Mr. Dillon, "the officers of municipal corporations are in many respects public officers, being charged by legislative enactment with duties which concern both the corporation and the public at large": 1 Dillon on Municipal Corporations, sec. 237 (1876). The sergeant, in serving a summons or levying an execution, which runs in the name of the state, cannot be said to be performing any corporate functions, nor to be acting as a servant of the municipal corporation: See Const. W. Va., art. 2, sec. 8. The code recognizes a town sergeant as a public officer, and provides, in the chapter on justices and constables, that "when, for any cause, it is unfit for an execution or order of sale to be directed to a constable, it may be directed to the sheriff or sergeant of a town or village": Code, c. 50, sec. 186. We hold, therefore, that in levying and enforcing this execution, the sergeant was acting, not as a municipal officer strictly, but as a public civil officer, and hence the doctrine of *respondet superior* has no application: See *Fry v. Albemarle Co.*, 86 Va. 195; 19 Am. St. Rep. 879, cited in a note to section 963, Dillon on Municipal Corporations (1890).

In accordance with the views, and for the reasons above set out, we think the circuit court erred in refusing the writ of *certiorari*; and its judgment in that matter is reversed, and it is ordered that said circuit court do issue the writ as prayed for in the petition, and do hear and determine the matter at its own bar, as provided by chapter 110 of the code of 1887. The summons in the justice's court having issued "for the recovery of money for the conversion of personal property," should the evidence establish that any of the proceeds of property properly belonging to the plaintiff was received by the defendant, the town of Grafton, its mayor or treasurer, I see no reason why the circuit court should not give judgment for the same in this proceeding, as above indicated.

Cause reversed and remanded.

EXECUTION — LIABILITY OF JUDGMENT CREDITOR FOR OFFICER'S LEVY ON WRONG PROPERTY. — Where an officer levies upon exempt property, the judgment creditor will not be responsible when he is not present and neither directs nor assents to the levy: *Russell v. Walker*, 150 Mass. 531; 15 Am. St. Rep. 239, and note; *Lewis v. Chambers*, 5 Ired. 557; 44 Am. Dec. 63, and note; note to *Kittredge v. Breaud*, 30 Am. Dec. 512.

MUNICIPAL CORPORATIONS — LIABILITY FOR ACTS OF AGENTS. — A municipal corporation is not liable for the misconduct or omissions of the agents employed to carry out its political, discretionary, and legislative functions. The rule is otherwise, when such agents are in the discharge of ministerial or specified duties assumed in consideration of privileges conferred by the municipal charter: *Richmond v. Long*, 17 Gratt. 375; 94 Am. Dec. 461, and note. A municipal corporation is liable for the seizure by its officers of property, in pursuance of its ordinances, when such seizure has been vitiated by the subsequent conduct of its officers: *Baumgard v. Mayer*, 9 La. 119; 20 Am. Dec. 437, and note.

WILLIAMSON v. NEWPORT NEWS AND MISSISSIPPI - VALLEY COMPANY.

[34 WEST VIRGINIA, 657.]

PRACTICE — DEMURRER TO EVIDENCE admits all that may be reasonably inferred from the evidence given by the adverse party, and waives all evidence in conflict therewith, or the credibility of which is impeached, and all inferences from the evidence of the party demurring which do not necessarily follow from it.

RAILWAY CORPORATIONS — ASSUMPTION OF RISKS BY EMPLOYEES. — An employee accepting service on a railway, with knowledge of the character and position of structures from which he is liable to receive injury, cannot call upon his employer to make alterations to secure his greater safety, nor to respond in damages for injuries received from his want of care while passing under or through such structures.

RAILWAY CORPORATIONS. — If a BRIDGE OR TUNNEL through which a brakeman must pass is too low to permit his passage in safety while standing upright on the car, and he is warned of this fact at or before he entered into the service of the corporation, he cannot recover damages because of injuries inflicted upon him by such bridge or tunnel by his coming in contact with it when standing upright on the car.

L. N. Tavenner, Vinson and McDonald, and Gibson and Michie, for the plaintiff in error.

Simms and Enslow, for the defendant in error.

ENGLISH, J. This is a writ of error to a judgment of the circuit court of Cabell County, rendered on the fifteenth day of March, 1889, in an action of trespass on the case, in which B. Williamson, administrator of the estate of J. F. Williamson, deceased, was plaintiff, and the Newport News and Mis-

Mississippi Valley Company, a corporation, was defendant. The plaintiff in said action sought to recover from the defendant company damages to the amount of ten thousand dollars for causing the death of the plaintiff's intestate, J. F. Williamson, by the negligence of the said defendant, and, as the plaintiff alleges, without any negligence on the part of said J. F. Williamson. The case was decided upon a demurrer to the evidence in the court below, which evidence is set forth in the record, under the rule of practice which prevails in such cases; and in considering the propriety of the action of the court below in sustaining the demurrer to the evidence, the practice requires us "to consider the demurrant as admitting all that may be reasonably inferred by the jury from the evidence given by the other party, and as waiving all the evidence on his part which contradicts that offered by the other party, or the credit of which is impeached, and all inferences from his own evidence which do not necessarily flow from it": *Muhleman v. National Ins. Co.*, 6 W. Va. 508; *Lee's Ex'rs v. Virginia etc. Bridge Co.*, 18 W. Va. 209; *Allen v. Burtlett*, 20 W. Va. 46; and *Garrett v. Ramsey*, 26 W. Va. 345.

It appears, from an examination of the evidence under this rule, that the plaintiff's intestate was employed by the Chesapeake and Ohio Railway Company for about six months in the year 1885, and that he was employed by that company from the fourth day of April, 1886, until the 12th of August, 1886, each time acting as brakeman, and that while he was so employed in the year 1886, he was running on said freight trains between Huntington and Canneltown, West Virginia; that some time in July, 1886, said railway company commenced doing business in the name of the Newport News and Mississippi Valley Company, and was so operating said road at the time the plaintiff was injured. It also appears that at the time the plaintiff entered the service of the Chesapeake and Ohio Railway Company, on the 4th of April, 1886, that he agreed to study the rules governing employees on said road carefully, to keep posted and obey them; and on examination at that time, when asked, "Do you know that bridges, including highway bridges and tunnels, on this line, are too low to clear a man standing on a box-car?" answered, "Yes." So far as the employees of said railroad were concerned, no changes appear to have been made in the rules, management, and regulations. The name of the company managing the road was changed, and the vouchers were paid them, after

July, 1886, by the Newport News and Mississippi Valley Company.

How the plaintiff's intestate came to his death does not affirmatively appear, but circumstances would seem to indicate that his death ensued from coming in contact with a bridge which spans said railroad at a point between Hurricane and Milton stations. This is the theory claimed by the plaintiff, and assuming it to be the correct one, it appears from the testimony of the engineer, Poindexter, who was introduced by the plaintiff, that he saw the plaintiff's intestate at Hurricane; that he got up on his engine, and set his lantern down, about five o'clock in the morning, on the twelfth day of August, by standard time, which is twenty-four minutes faster than sun time, and according to the evidence, it would take about twelve minutes to run from Hurricane to the bridge. When the bridge was reached, then, it lacked twelve minutes by sun time of being five o'clock; and the court will take judicial cognizance of the fact that on the 12th of August, 1886, the sun rose at that place at seven minutes after five o'clock, so that it lacked about nineteen minutes of sunrise at the time said freight train passed under said bridge. He did not need his lantern, for the engineer, Poindexter, testifies that he left it sitting on the engine. He also states that it was a damp, cloudy morning; that the bridge was on a straight line, and, going west, it could be seen for a half-mile. Mr. Keasel, who was a fireman on the train at the time, testifies that plaintiff's intestate said he was going on top of the car; that as he went out, some cinders got in his eyes. He stopped and rubbed them; then came back down; then he started back again; that nothing was said to him about going out, only he told him to look out for the overhead bridge; that he said something in reply, but witness did not know what it was; that he got upon the car, and stood for a minute in sight; then he disappeared; and that from his position he could see a man on the cars ten or fifteen feet; that deceased was found lying about fifteen feet from the other end of the car.

As this unfortunate accident occurred in the day-time, and not at night, I do not regard the question as to whether the guards or whipping-strings were in proper order at the time the injury occurred as material, because the office of these guards is to give warning of the fact that a bridge is near when it cannot be seen; but if the question was material, it

is clearly shown by the evidence of the plaintiff's witness Nugent that the guards were in proper condition at the time of the accident. It also shows that said bridge, although not a county bridge, was used by the public, and that a county road passes over it. The greater portion of the rest of the evidence bears upon the question as to whether the plaintiff's intestate came to his death by coming in contact with said bridge, and in my view of the case, must be regarded as immaterial. The plaintiff, in his declaration, avers that the fact that the bridge under and through which said train passed was low and unsafe was unknown to said J. F. Williamson, but he utterly fails to sustain said averment by proof; while, on the contrary, said Williamson acknowledged at the time he took service from said company that he knew that bridges, including highway bridges and tunnels, on this line were too low to clear a man standing on box-cars; and at the very time he was approaching the bridge where he lost his life, the witness Keasel called his attention, and told him to look out for the low bridge. How this unfortunate accident occurred must, to some extent, always remain a subject of conjecture. The evidence discloses that when he left the engine to go on top of the cars, some cinders got in his eyes; that he stopped, and rubbed them; then came back down; then he started back again; that he got on top of the car, and stood for a minute in sight; then he disappeared. He may have gotten more cinders in his eyes. At any rate, he was delayed in returning to the engine, and rubbing his eyes, and standing again for a minute, after he reached the top of the cars again. And all this time the train was rushing on towards the bridge on a down grade, with no brakes applied; although Mr. Poindexter, when asked, "At what point was it the duty of the brakeman to put on brakes?" replied, "Generally about a mile beyond the bridge"; meaning, as I suppose, east of the bridge, as he was testifying in Huntington. The train was running towards the bridge, and, as a matter of course, the smoke and cinders from the engine would be between said Williamson and the bridge; and suffering from the cinders which had lodged in his eyes, it is but natural to suppose he would turn his side or his back to the smoke, and in this manner he failed to look out for the bridge, and was prostrated by it. Be this, however, as it may, the question presented for our consideration and determination is, whether, under the circumstances detailed in the evidence, the

court below acted properly in sustaining the demurrer to the evidence.

In the case of *Sheeler's Adm'r v. Chesapeake etc. R. R. Co.*, 81 Va. 188, 59 Am. Rep. 654, there was but one count in the declaration, the *gravamen* of which was, that the deceased, a fireman in the employment of the defendant company, lost his life while in the discharge of his duty as such fireman by reason of the defendant's negligent and careless construction, at a point in the line of its road, of a bridge, the upright sides of which were not sufficiently distant from the engines and cars, when passing over same, to allow and permit the plaintiff's intestate, as such fireman, to properly discharge his duties as fireman without incurring unreasonable risk and danger to his life and limbs; and also that by reason of the defendant's carelessness and negligence in not properly constructing said bridges, and the upright sides thereof, etc., the plaintiff's intestate, while in the faithful discharge of his duty to said defendant, was thrown against a certain bridge, and the upright sides thereof, etc., and was killed by means thereof; and it was also averred that he did not know, and had no means of knowing, of the defects and dangers of said bridge, although the same were well known to the defendant. It appears from the evidence in the case that Sheeler, without orders and unnecessarily, got down on the side of the engine and tender, holding with his right hand a hand-holder on the engine, and holding in his left hand a small hose attached to a spigot on tender, swung his body out and forward in a stooping posture, and attempted to extinguish some greased woolen ravelings that were blazing on the box of the driving-wheel, when he was struck by the side of the bridge and was killed. The court, in its opinion, says: "The settled doctrine is, that 'in order to maintain an action against a railroad company for injuries received, etc., it must be proved that the injury was caused by the negligence of the defendant or his agents; and it must not appear from the evidence that want of ordinary care and prudence on the part of the person injured directly contributed to the injury'"; referring to 17 Am. Railway Rep. 253, and cases cited; also to *Norfolk etc. R. R. Co. v. Furguson*, 79 Va. 248. And the court arrived at the conclusion that said Sheeler's administrator was not entitled to recover.

In the case of *Clark's Adm'r v. Richmond etc. R. R. Co.*, 78 Va. 709, 49 Am. Rep. 394, the facts are very similar to the one under consideration. Clark was employed as a brakeman on

a freight train, and while in the performance of his duty on top of a car, by moonlight, he was killed by striking a highway bridge, not high enough for a man standing erect on the car-top to pass under. When he was employed, he had notice of highway bridges which were too low to pass under without stooping; and on that night, leaving the station next the bridge, he was warned to look out for the bridge. On nearing the bridge, a co-brakeman, seeing him standing erect on the car-top, shouted to him to stoop; but he did not stoop. In that case, as in this, there was a demurrer to the evidence; and the court sustained the demurrer, holding that "though defendant may have been culpable for lowness of bridge, yet Clark's carelessness contributed to the injury, and defendant was not liable"; and also that "the risk of collision with such bridges was incident to the employment. Clark had opportunity to know of their dangerous character, which must have been contemplated when he accepted employment."

In the case of *Owen v. Railroad Co.*, 1 Lans. 108, it was held that a brakeman in the employ of a railroad company, while discharging duties in the line of his employment, upon the roof of a freight-car, who was carried against a highway bridge and sustained injuries, for which he brought an action against his employer, the bridge being three and a half feet higher than the top of the highest freight-car in use by the company, and had so remained for many years, and since the construction of the railroad, the brakeman having entered into the employment of the company with knowledge of the position and height of the bridge, and having had opportunity of informing himself as to its continuance in the same position, he should have been nonsuited, the danger from the bridge being clearly incident to the labor he undertook to perform; and that "in view of the brakeman's knowledge as to the bridge, his omission to avoid the accident by stooping was such want of ordinary care and caution as would have defeated his action, if otherwise maintainable."

In 3 Wood's Railway Law, 1481, the author says: "But where the servant knows, or ought to know, of the obstruction, he cannot recover for an injury received therefrom, because by reason of his failure to guard against it, and neglecting to do so, he is treated as guilty of contributory negligence"; citing *Baylor v. Delaware etc. R. R. Co.*, 40 N. J. L. 23; 29 Am. Rep. 208. The author also says, on the same page: "Thus in the case last cited, a brakeman, called upon suddenly to apply the

brakes to a train, was hit by the roof of a bridge over the road, and injured. The bridge was not high enough to permit a person to stand upright on the cars in passing through it, and it appeared it was not usual or customary for railroad companies to build their bridges with an elevation sufficient to enable a person to stand upright on the top of the cars in passing through them; and the court held there could be no recovery for the injury, upon the ground that the plaintiff was chargeable with knowledge of the method of building such bridges, and assumed the risk incident thereto": See *Gibson v. Erie R'y Co.*, 63 N. Y. 449, 20 Am. Rep. 552, where it is held that "where a servant enters upon employment from its nature necessarily hazardous, he assumes the usual risks and perils of the service, and also those risks which are apparent to ordinary observation. If he accepts service with knowledge of the character and position of structures from which employees might be liable to receive injury, he cannot call upon his master to make alterations to secure greater safety, or in case of injury hold him liable." See also the case of *Rains v. St. Louis etc. R'y Co.*, 71 Mo. 165, 36 Am. Rep. 459, third section of syllabus, where it is held: "If a brakeman knows that a foot-bridge over the railroad upon which he is employed is too low to permit a man standing erect on the top of a freight-car to pass under it in safety, and nevertheless remains in the service of the company, and while passing under the bridge on the top of a freight-car, standing erect, and is killed by coming in contact with the bridge, the company is not liable." See also *Pittsburgh etc. R. R. Co. v. Sentmeyer*, 92 Pa. St. 276; 87 Am. Rep. 684; *Baltimore etc. R. R. Co. v. Stricker*, 51 Md. 47; 34 Am. Rep. 291.

That the plaintiff intestate had ample opportunity to become acquainted with this portion of said railroad, and with this particular bridge, is clearly shown by the evidence. When he made application for service as freight brakeman, on the 4th of April, 1886, he was asked, "Were you ever employed by this road? Where and in what capacity?" and answered, "Yes, sir; in the year 1885, about six months as brakeman"; and P. O. Pine, a witness for the plaintiff, when asked, "How long did Williamson run on this road?" answered, "I don't know; he was here twice"; and when asked, "Where did he run from?" answered, "From Huntington to Cannelton." The bridge at which it is claimed the injury was received is shown to be on the road between these two points; and Mr. Poindex-

ter, a witness for the plaintiff, stated that he was running a freight train between Huntington and Cannelton, and when asked how often he passed under said bridge, answered: "I could n't say. I pass under it sometimes twice every twenty-four hours," — clearly showing that employees on the freight trains between these points were not lacking in opportunity to become acquainted with this bridge. Counsel for the plaintiff in error rely upon the case of *Baltimore etc. R. R. Co. v. Rowan*, 104 Ind. 88; but it is clearly apparent that that case is very different from the one at bar. The second section of the *syllabus* reads as follows: "Where a railroad company has constructed and maintains a bridge over its track, with knowledge that it is of insufficient height, and dangerous to its employees in the discharge of their duties, it is liable to a brakeman, ignorant of the danger, who is injured while passing under such bridge in the performance of his duties." And so with the case of *Kans v. Northern Cent. R'y Co.*, 128 U. S. 91. The facts in that case are very different from the case under consideration. In that case, a brakeman was injured by reason of a broken step to one of the cars, which caused him to fall from the train. The plaintiff ascertained the fact that the step was broken after the cars had started, and the conductor promised to drop the car out that had the broken step, during the night, but failed to do so. The cars were similar, and the plaintiff was easily deceived as to the fact whether the car with the broken step had been dropped or not; and the court held it error, on account of the peculiar facts connected with the case, to strike out the testimony from the jury.

In the case of *Cooper v. Pittsburg etc. R'y Co.*, 24 W. Va. 51, relied upon by counsel for plaintiff in error, while it holds that the master is bound to use ordinary care in supplying and maintaining suitable instrumentalities for the work required to be done, it also is held in that case that "the ordinary risks and perils incident to the employment, which the servant can foresee or shun or avoid or guard against by prudence, skill, and forecast, are assumed by him, and they are supposed to enter into the consideration to be received by him for his services." And while it is true that in Illinois, and perhaps several other of the western states, it has been held that it is the duty of a railroad company to so construct overhead bridges as to prevent them from being dangerous to employees walking on the top of the cars in the performance of

their duties, yet the great weight of authority in Virginia, New York, Iowa, Minnesota, Missouri, Maryland, Massachusetts, and New Jersey hold in accordance with the passage above quoted from 24 West Virginia, in regard to assuming the risks and perils incident to the employment; and we must hold that by continuing in the employment of the defendant, after he had every opportunity of becoming acquainted with its dangers, he assumed the risks incident thereto.

Looking, then, at the facts disclosed by the evidence in this case, and applying the rules which requires us to disregard the evidence of the defendant which is in conflict with that of the plaintiff, and admitting all that might be reasonably inferred by the jury from the evidence of the plaintiff, my conclusion is, that the court below committed no error in sustaining the demurrer to the evidence, and the judgment complained of must be affirmed, with costs to the defendant in error.

RAILROADS — LOW BRIDGE — INJURY TO BRAKEMAN FROM. — If a brakeman is reasonably notified of a low bridge, this puts him on his guard, and if he fails to exercise proper care to avoid coming in contact with it, he is guilty of contributory negligence, and cannot recover for injury received on account thereof: *Louisville etc. R. R. Co. v. Hall*, 91 Ala. 112; 24 Am. St. Rep. 863, and note; note to *Louisville etc. R. R. Co. v. Hall*, 13 Am. St. Rep. 93; note to *St. Louis etc. R. R. Co. v. Irwin*, 1 Am. St. Rep. 274; *Williams v. Delaware etc. R. R. Co.*, 116 N. Y. 623.

RUMSEY v. LAIDLAY.

[24 WEST VIRGINIA, 721.]

A PLEDGER OF NON-NEGOTIABLE CHOSES IN ACTION IS REQUIRED to exercise reasonable care and diligence in their collection, and is liable for the face value of such choses if they are lost by reason of his inexcusable default.

THE HOLDER OF COLLATERAL SECURITIES MUST USE REASONABLE CARE AND DILIGENCE to make them available, and if, by negligence, wrongful act, or omission on his part, loss is sustained, it must be borne by him.

COUNTERCLAIM. — **COLLATERAL SECURITIES HAVING BEEN GIVEN TO SECURE THE PAYMENT** of a debt, the amount thereof will be deducted from it, where the creditor permitted them to be lost by not exercising ordinary diligence towards their collection.

Simms and Enslow, for the plaintiffs in error.

W. S. Laidley, for the defendant in error.

ENGLISH, J. George S. Laidley, being indebted to James M. Rumsey, Josiah Roads, and Joseph G. Reed, partners,

doing business as Rumsey, Roads, and Reed, executed to them four notes, all dated the fourth day of November, 1867, — one for \$646.36, payable ninety days after date, to their order, at their counting-room, Portsmouth, Ohio; one for \$181.50, payable thirty days after date, to their order, at the same place; one for \$182.40, payable sixty days after date, to their order, at their said counting-room; and another for \$180.68, payable to their order sixty days after date, at their counting-room aforesaid.

On the fourteenth day of April, 1868, the following paper was signed by said firm of Rumsey, Roads, and Reed, and said George S. Laidley: "Received of Mr. George S. Laidley as follows: His claim of a certain note of John Morris and James R. Morris, to order of C. T. Everett, dated December 1, 1861, payable on or before January 1, 1864, calling for (\$500) five hundred dollars, and drawing interest from its date, accompanied with a copy of said note, certified by Joseph S. Miller, master commissioner, circuit court, Cabell County, West Virginia, said document being indorsed by George S. Laidley; also a note of A. C. Handley to order of and indorsed by John Laidley, Jr., and indorsed by George S. Laidley, also dated April 6, 1868, and payable on or before July 1, 1863, calling for three hundred dollars (\$300). The condition of this receipt is, that the proceeds of the same, when collected, are to be applied to the said George S. Laidley's indebtedness to us, he to indemnify us for all costs and expenses in the collection of the same, and we to return to him all that may be over and above the said Laidley's indebtedness to us, and he to make good to us any deficiency in the same."

On the 5th of January, 1876, James M. Rumsey inclosed to said George S. Laidley a statement showing that \$404.07 had been collected as proceeds of the Handley note assigned to said Rumsey, Roads, and Reed, upon the condition mentioned in the above receipt, which had been applied in extinguishment of said Laidley's note for \$181.50, dated November 4, 1867, and also in extinguishment of his note for \$182.40, dated November 4, 1867, and the interest on same \$29.59, aggregating \$393.49, leaving a balance of \$10.58, which was applied as a credit on said Laidley's \$646.36 note, held by said Rumsey, Roads, and Reed. On the second day of June, 1875, said firm of Rumsey, Roads, and Reed brought an action of *assumpsit* in the county court of Cabell County against said George S. Laidley on said note for \$646.36, executed by said George S.

Laidley, and payable to their order ninety days after date, which note bears date November 4, 1867, which action was subsequently transferred to the circuit court of said county. The defendant demurred to the plaintiff's declaration, which demurrer was sustained, and on leave the plaintiffs amended their declaration, and the defendant again demurred, and his demurrer to the amended declaration was overruled; and on the fourteenth day of May, 1890, the parties waived a trial by jury, and the questions of law and fact arising on the issues therein were submitted to the judgment of the court in lieu of a jury; and the court, having heard the evidence, found for the plaintiffs, and assessed their damages at \$200.70, and rendered judgment for that amount, with interest thereon from the fifteenth day of May, 1890, until paid, and costs.

The following facts were agreed to by the parties, which were submitted to the court: "There was pending in the circuit court of Cabell County a creditors' bill against the estate of Morris, the maker of the five-hundred-dollar note spoken of in the above receipt or agreement in 1868, at the time when that agreement was entered into. The original note was on file in that suit as a charge against the estate of Morris at the time of the transfer spoken of. Out of the proceeds of the sale of the Morris estate was realized by the plaintiffs \$191.70, in 1868, which was credited on the \$646.36 note. Said suit is still pending in the circuit court of Cabell County, and this amount was all that was ever realized or could be realized from the Morris estate. The plaintiffs took no steps at any time to collect or attempt to collect said five-hundred-dollar note, or any part thereof, from C. T. Everett, the payee and indorser thereof in his lifetime, or against his estate after his death. C. T. Everett died in 1867, leaving an estate amply sufficient to pay off the whole of said note. In 1872, his executor disbursed and distributed his estate to his children. In 1888, when the Morris estate was finally cleared up and settled, the estate of C. T. Everett had been so completely wound up and distributed that nothing remained of said estate that had not passed into the hands of his children."

These were all the facts before the court, and the court found that the \$100, the \$181.50, and \$182.40 notes had been paid by the defendant; and that the \$646.36 note, with its interest, was due to the plaintiff from the defendant, subject, however, to be credited with the full amount of the \$500 note first spoken of in said agreement, with interest, which left a balance due on

said note of \$140; also that the plaintiffs were entitled to a reasonable fee for making collection, which the court fixed at \$130, making the whole amount of recovery in favor of the plaintiffs \$270; to which rulings and findings of the court the plaintiffs excepted, and moved the court to set aside the said rulings and judgment, and grant them a new trial, which motion the court overruled, and entered judgment upon said finding for said sum of \$270, and the plaintiffs applied for and obtained this writ of error.

The question presented for our consideration in this case is, whether the plaintiffs in error used that diligence which the law requires of them with reference to the collaterals placed in their hands by George S. Laidley. As to the note against Handley, the money was collected on it and applied as a payment on said Laidley's indebtedness to the plaintiffs in error; but as to the note against John and James R. Morris, which was payable to the order of C. T. Everett, and which was by said Everett assigned to said Laidley, the plaintiffs in error, so far as the record discloses, used no diligence, and made no exertion of any kind whatever, to secure its collection. The note appears to have been executed by two parties, John Morris and James R. Morris, and it appears that at the time of its assignment to the plaintiffs in error, it had been filed before Master Commissioner Joseph Miller as a claim against the estate of John Morris, who was then dead, and whose estate was in process of administration; and it appears that in 1888, twenty years after the date of the assignment, the plaintiffs in error realized \$191.70 out of the assets of said John Morris's estate, and applied it as a credit on said note for \$646.36. What they did towards hastening its collection does not appear, but it is not reasonable to suppose that, with the use of anything like ordinary diligence, such a delay should have occurred. We do not find in the record a copy of said Morris note, but it is described in the receipt aforesaid as signed by John Morris and James R. Morris, and payable to the order of C. T. Everett, on or before the first day of January, 1864, calling for five hundred dollars, and drawing interest from date. It does not appear to have been a negotiable note, but an ordinary promissory note, payable to the order of C. T. Everett. It was shown that \$191.70 was all that ever was realized or could be realized from John Morris's estate after a delay of twenty years, but it was not shown that the plaintiffs in error ever did anything to speed the cause, or that they ever

employed an attorney to look after their interests in said suit, although the defendant in error agreed to indemnify them for all costs and expenses in the collection of the same; and although James R. Morris appears to have been a joint maker of said note, no excuse is offered for not pursuing their remedy against him. He is neither shown to have been dead or insolvent during all this time, and yet no suit was brought against him, or reason assigned for not doing so.

The plaintiffs in error had the right to withdraw said note from the file by leaving a certified copy in its place, and to have brought a proper suit against James R. Morris, but no steps of any kind were taken to enforce its collection. The record nowhere shows that the defendant in error ever had any notice of the insolvency of the estate of John Morris. Said note for five hundred dollars was filed with the commissioner at the time it was assigned to plaintiffs in error by George S. Laidley, and it may have been so filed by C. T. Everett before the same was assigned to said Laidley, for anything that appears in the record to the contrary. The plaintiffs in error not only did nothing themselves toward the collection of said note from the Morriszes, but gave the defendant in error no notice of their insolvency, or of their failure to collect said note, until the estate of C. T. Everett had been administered and distributed, and nothing was left out of which said Laidley could realize said note from his immediate assignor, and then they assert and press their original claim against said Laidley.

Did the plaintiffs in error treat the collaterals which had been placed under their management and control by assignment in such a manner as would entitle them, under the law, to return the uncollected collateral to Laidley and recover on their original claim? In *Colebrooke on Collateral Security*, section 442, page 596, the author says: "The pledgee of non-negotiable choses in action is required to exercise reasonable care and diligence in their collection"; citing *Whittaker v. Charleston Gas Co.*, 16 W. Va. 717. And in the conclusion of the same section, the author says: "The pledgee, however, is answerable for the face value of non-negotiable collateral securities, where they are lost by reason of his inexcusable default, although such loss is not presumed from mere non-collection"; citing 41 Ind. 204, where, in the case of *Reeves v. Plough*, it was held that "the holder of such collaterals is answerable for reasonable, but not extraordinary, diligence in their collection"; also that "if collaterals are lost for want of reasonable diligence,

the creditor holding them must account for the amount, but such loss can not be presumed from the mere fact of their remaining uncollected"; and that "if collaterals are held to secure the payment of a note, and before judgment on the note there has been payment on the collaterals, or such want of diligence in collecting the same as to make the holder responsible for the amount of them, this will constitute a defense to an action on the note, and it can not be set up afterwards as a payment of a judgment on the note."

In the case of *First Nat. Bank v. Kimberlands*, 16 W. Va. 555, Kimberlands gave the bank an order on the Wellsburg Manufacturing Company for a certain sum of money as collateral security for his indebtedness to said bank, and in that case, seventeenth section of the syllabus, this court held that, "if such order was received as collateral security for a debt, it would be the duty of the payee to use reasonable care and diligence to make it available, and if, by negligence, wrongful act, or omission on his part, loss was sustained on this order, such loss should be borne by the payee."

Also, in the case of *Whittleker v. Charleston Gas Co.*, 16 W. Va. 721, the court held it to be "well settled that when a chose in action, such as a bond, note, or accepted order on a third person, is transferred and delivered to a creditor as collateral security for the debt, it is the right of the debtor to sue upon such chose in action at law, and if necessary, to use the name of the legal owner of such chose in action; and it is his duty to use reasonable care and diligence to make it available; and if, by negligence or wrongful act or omission on his part, loss is sustained on such chose in action, such should be borne by the creditor."

See also *Wakeman v. Gowdy*, 10 Bosw. 208, where the court held that "a creditor receiving from his debtor as collateral security a promissory note made by a third person, past due, with the request to collect and apply the proceeds to the payment of the debt, though without any express direction to sue upon it, incurs the obligation to use diligence in its collection, and to sue, if necessary. In such case, the debtor stands in the relation of guarantor for the collection of the note, and is entitled to the exercise, on the part of the holder, of such diligence as is required of a bailee for hire or of a pledgee." And in case of *Slevin v. Morrow*, 4 Ind. 425, it was held that "a creditor who receives the notes of third persons properly indorsed to him as collateral security for a debt, knowing the

makers to be in doubtful circumstances, is bound to use reasonable diligence to collect them, or show some excuse for not doing so, but extraordinary diligence is not required. If the creditor, through his laches, fails to realize the money on the notes, the debtor has the right to treat the notes as a satisfaction, so far as they go, of the debt"; and that "the finding of the court, sitting as a jury, is conclusive, in the absence of a clear preponderance of evidence." See also *Roberts v. Thompson*, 14 Ohio St. 1; 82 Am. Dec. 465; *Powell's Adm'r v. Henry*, 27 Ala. 612; *Brandt on Sureties*, 519; *Kemmerer v. Wilson*, 31 Pa. St. 110. See also *Lawrence v. McCalmont*, 2 How. 427, where it is held that "the question whether or not the guarantor had sufficient notice of the failure of the principals to pay the debt was a question of fact for the jury"; and that "where notes are deposited for collection by way of collateral security for an existing debt, the case does not fall within the strict rule of commercial law applicable to negotiable paper. It falls under the general law of agency, and the agents are only bound to use due diligence to collect the debts." See also *Edwards on Bills*, p. 242, sec. 344; also sec. 618, p. 446. See also *Ward v. Morgan*, 5 Sneed, 79.

The question in this case, whether the note against the Morris, which was assigned as collateral to the plaintiffs in error, was lost by their negligence, or want of ordinary attention and vigilance on their part, and the degree of negligence which would fix their liability, must be determined upon the facts of each particular case, in view of the general rules upon the subject; and where the case is presented to a jury, the questions of fact are to be by them determined; and where, as in this case, the court is substituted in lieu of a jury, they are to be determined by the court; and as we have seen in the case of *Slevin v. Morrow*, 4 Ind. 425, the finding of a court, sitting as a jury, is conclusive, in the absence of a clear preponderance of evidence.

In the case of *Nutter v. Sydenstricker*, 11 W. Va. 535, part 5, syllabus, it was held: "In a case tried by the court in lieu of a jury, the plaintiff in error must be regarded as a demurrant to the plaintiff's evidence; and the judgment of the court below will not be reversed, unless it is plainly erroneous." In part 4, same case, it was held: "Upon a writ of error to a judgment rendered by the court under such circumstances, the inquiry by the appellate court is, Was there sufficient legal evidence before the court below to sustain the judgment?" In

that case, the writ of error was obtained by the defendant in the court below, and the same rule would apply where the plaintiff below is the plaintiff in error.

In *Abrahams v. Swann*, 18 W. Va. 275, 41 Am. Rep. 692, this court held: "When a case is tried by the court in lieu of a jury, it is not an error for which the appellate court will reverse to hear illegal testimony. . . . In such case, the party excepting must be regarded as a demurrant to the evidence, and the judgment of the court below will not be reversed, unless it is plainly erroneous."

Applying these rulings and principles to the case under consideration, I am of opinion to affirm the judgment of the court below, and the plaintiffs in error must pay the costs of this writ and damages, as required by law.

Affirmed.

PLEDGE—LIABILITY OF PLEDGER.—Where the value of a thing pledged depreciates, or is lost through the negligence of the pledgee, he will be liable for the loss: *Cooper v. Simpson*, 41 Minn. 46; 16 Am. St. Rep. 667, and notes; *Lamberton v. Windom*, 12 Minn. 232; 90 Am. Dec. 301, and notes; *Crocker v. Monroes*, 18 La. Ann. 553; 36 Am. Dec. 660; *Chaff v. Purdy*, 43 La. Ann. 389; *Goodwin v. Massachusetts Loan etc. Co.*, 152 Mass. 182.

GALLAHER v. CITY OF MOUNDSVILLE.

[34 WEST VIRGINIA, 729.]

RES JUDICATA.—ORDER DISSOLVING AN INJUNCTION issued to prevent the issuing and selling of certain bonds of a municipal corporation, though not followed by a final judgment dismissing the bill, is conclusive in a subsequent suit brought to restrain the levy of taxes to pay such bonds and interest thereon, when all the grounds for the issuing of the injunction in the second suit were equally available against dissolving it in the first.

RES JUDICATA, TEST OF.—If it is doubtful whether a second suit is for the same cause of action as the first, it is a proper test to consider whether the same evidence would sustain both, and what was the particular point or matter determined in the former action.

RES JUDICATA.—A JUDGMENT IS CONCLUSIVE IF ON A DIRECT POINT, though the object of the two suits is different.

RES JUDICATA.—THE PARTIES to two suits must be regarded as the same, when the complainants in both were certain tax-payers of a municipality suing on behalf of themselves and all other tax-payers, and the defendants in both, though consisting of different persons, were, in each suit, representing and acting for the municipality without any private interest.

Ewing, Melvyn, and Riley, and J. J. Jacob, for the appellant.
J. B. McLure, for the appellees.

BRANNON, J. On the fifth day of February, 1890, the council of the city of Moundsville passed an ordinance providing for the issue and sale of its bonds, to the amount of twenty thousand dollars, to enable the city to pave its streets, and submitted the question of the issue of such bonds to a vote of the people, and they ratified the proposition, and such bonds were issued and sold. The council having included in its estimate of expenditures for the year 1890 the sum of one thousand two hundred dollars to pay interest on said bonds, and levied taxes including it, J. W. Gallaher and B. W. Price, tax-payers and owners of property in the city suing for themselves and all other tax-payers and property owners of said city, upon a bill by them against the city and Robert Low, its marshal, obtained an injunction restraining the collection of a certain per centum of the taxes within the city on property, and especially that per centum of the taxes imposed on said Gallaher and Price; and the circuit court of Marshall County having overruled a motion to dissolve said injunction, the city of Moundsville has appealed to this court from the order overruling said motion.

We shall not decide the merits of this controversy, deeming it improper to do so, for the reason that we are of opinion that the defense of *res judicata* made by appellants ends this cause.

The plaintiffs in the present cause, together with three others, suing for themselves and all other tax-payers of the city of Moundsville, before the bonds were issued, obtained an injunction to restrain the issue and sale of the same, which injunction was, on the 2d of May, 1890, dissolved, but the bill was not dismissed. There was no appeal from this order, and the same stands in full force. An examination of the books has brought me to the conclusion that the essential elements of *res judicata* are present in the case to make that order an estoppel to this suit. "The essential conditions under which the plea of *res judicata* becomes applicable are the identity of the thing demanded, the identity of the cause of demand and of the parties in the character in which they are litigants": Herman on Estoppel, sec. 102. What was the thing demanded in the former suit? The bill alleged that the council of Moundsville passed an ordinance for the issue of twenty thousand dollars in bonds, submitting the question of their issue to the people, and making various provisions; that the people had approved it; that the city officers would prepare and issue the bonds, and deliver them to certain persons named by the

ordinance as commissioners to sell them; and that they would sell the same unless enjoined. It further alleged that the ordinance for the issue of the bonds was null and void, and that any bonds issued and sold under it would be void, because the ordinance was in violation of section 8, article 10, of the constitution, and also in violation of a statute entitled "An act authorizing municipal corporations to issue bonds," passed December 2, 1873; and it prayed that an injunction be awarded restraining Louis B. Purdy, the mayor, and L. G. Brock, the clerk, from preparing, signing, and countersigning and sealing and delivering the bonds to H. W. Hunter and F. W. Brown, the commissioners, and restraining the latter from selling them. The defendants demurred and answered admitting all the facts, and contesting only the contention that the ordinance and bonds were void; and on this demurrer, and a motion to dissolve, the injunction was dissolved.

What is the thing demanded in the present suit? The bill sets out the same ordinance and vote, and states that under the ordinance the bonds had been issued and placed in the hands of the commissioners for sale, and that they sold the same, and that the council made a levy of taxes for the year 1890, including one thousand two hundred dollars, to pay interest on the bonds; and charges that the levy of taxes to pay such interest is illegal, because the bonds are null and void, without saying wherein specifically, leaving it to be deduced as a matter of law from the faces of the ordinance and bond set out literally in the bill. Now invalidity of the ordinance and bonds under the law is the ground, the only ground, on which an injunction was asked against the issue of the bonds; and invalidity of the ordinance and bonds is also the only ground on which an injunction was asked against the collection of taxes levied to pay interest, for no other ground is suggested or can be gathered from the bill. The ground specified in the first bill was more specifically stated than in the second, but only in the fact that it alleged the nullity of the ordinance and bonds to consist in the violation of a particular section of the constitution and a particular statute, while the second bill alleges the ordinance and bonds to be void, without saying why, leaving it to be inferred from the ordinance and bonds set out. Invalidity of ordinance and bonds is the point of both bills,—a judicial sentence of their nullity on identically the same facts is the thing demanded, the relief sought, by both. The one was for an injunction against their issue; the other,

owing to the further facts, occurring later, that they had been issued and taxes had been levied to pay interest, was to enjoin the collection. If the parties are the same in both suits, and the decree had dissolved the injunction and dismissed the bill, thus holding the ordinance and bonds valid, could the same parties turn around and enjoin taxes levied to pay bonds so held valid? I think not. Why not? Because of the decision holding the bonds valid. It would have put on them the stamp of validity. This is just what was done by the order of dissolution in the first suit. There is identity in the subject-matter of the two suits. The question of the validity of the bonds arose and was necessarily decided in the first. This court said, in *McCoy v. McCoy*, 29 W. Va. 794, that "the conclusiveness of the judgment or decree extends, beyond what may appear on its face, to every allegation which has been made on the one side and denied on the other, and was in issue and determined in the course of the proceeding. If it appears by the record that the point in controversy was necessarily decided in the first suit, whether upon the law on demurrer or upon the facts in issue, it cannot be again considered in any subsequent suit between any of the parties or their privies." The same facts were stated in both bills. There was no issue on them. It was a decision on the law of the case on demurrer and motion to dissolve. The pith and point of the litigation was inevitably decided, for without it the order of dissolution could not have been made. The same facts sustain the claim in both bills. "If it be doubtful whether the second suit is brought for the same cause, it is a proper test to consider whether the same evidence would sustain both actions, and what was the particular point or matter determined in the former action": Herman on Estoppel, secs. 111, 1272; Bigelow on Estoppel, 79. It is the true test: Freeman on Judgments, sec. 259.

The principle runs through nearly all American cases that a judgment is conclusive if on the direct point, though the object of the two suits be different, says Freeman on Judgments, section 254. Thus I think it clear that two elements necessary under the plea of *res judicata* are here, namely, identity of the thing demanded, and identity of the cause of demand or cause of suit. Next, is there identity of parties? Certainly the plaintiffs here, having been plaintiffs in the former bill, cannot set up that there were three other plaintiffs. They ask only the same thing.

The case of *Western M. & M. Co. v. Virginia C. C. Co.*, 10 W. Va. 250, holds "that it is not necessary that precisely the same parties were plaintiffs and defendants in the two suits, provided the same subject in controversy between two or more of the parties, plaintiffs and defendants to the two suits respectively, has been in the former suit directly in issue and decided." The fact that others are concluded as well as they cannot enable the plaintiffs to escape the effect of the decision: *Herman on Estoppel*, sec. 194; *Freeman on Judgments*, sec. 160; *Thompson v. Roberts*, 24 How. 233. And outside of this, the fact that the second bill, as did the first, makes its plaintiffs sue for themselves and all other tax-payers, would include the three former plaintiffs omitted from the present bill by name. So both bills are, in law, by the same plaintiffs. As to the defendants: In the first suit they were the mayor, the clerk of the council, and two commissioners appointed by the ordinance to sell the bonds, and city officials, representing and acting for it, and it alone, without private interest; while the defendants in this bill are the city of Moundsville and Robert Lowe, its marshal, without private interest. The public interest or authority, and that only, is represented by the defendants in both bills.

In *State v. Chester etc. R. R. Co.*, 18 S. C. 290, a bill by tax-payers to enjoin county commissioners from issuing bonds was dismissed on its merits, and the decree was held a bar to an action in the name of the state, at the relation of other tax-payers, against the commissioners and holders of the bonds to have the bonds adjudged illegal and void. The same point or question — validity of the bonds — had in that case, as in this, been passed on. The defendants in the first suit represented the city. I do not say that in any case, — as, for instance, a judgment against a town in a case to which only the mayor or other officers were parties, and the town not, — the town having capacity to sue and be sued as a corporate being, the town would be bound; but in this particular matter the mayor and clerk were made agents to sign, countersign, and deliver the bonds, and the commissioners agents to receive and sell them, and though the city was not a formal defendant, yet in this instance these agents represented it fully. Can it be said that if the injunction had been perpetuated, or while it stood, the city could have gone on and issued the bonds? I think not. It had appointed others to act for it herein, and they were enjoined. *Herman on Estoppel*, section 155, says: "An action is

between the same parties, so as to be within the principle of *res judicata*, not only when the same persons are parties, but when they have appeared by their agents and representatives."

Another point suggested to me serious doubt whether the principle of *res judicata* would apply. It is a principle that, to support the theory of *res judicata*, the judgment or decree must be final, and it is broadly laid down in Virginia decisions that an injunction may at any time be reinstated: *Radford v. Innes*, 1 Hen. & M. 7. But I conclude that such reinstatement is not as a matter of course, but cause must be shown by further evidence during the pendency of the case: *Toll Bridge v. Free Bridge*, 1 Rand. 206; *North v. Perrow*, 4 Rand. 4; Barb. Ch. Pr. 470. But at any rate, until reinstatement or reversal, there stands the order of dissolution, adjudging the law of the case on the facts. Our statute (Code 1887, c. 135, sec. 1, cl. 7) so far makes an order, either dissolving or refusing to dissolve an injunction, final in nature as to allow an appeal from it. Outside that statute, the authorities conflict as to right to appeal, but the weight is against it. Perhaps it may be said that the stronger cases hold that where the dissolution is on the merits, it is appealable. Where no relief is sought but an injunction, an order of dissolution is final: Barb. Ch. Pr. 472; High on Injunctions, sec. 1706. The bill in the first case here sought no other relief. But in Virginia, outside that statute, it is held that an appeal will lie from an order dissolving or refusing to dissolve.

The case of *Baltimore etc. R. R. Co. v. City of Wheeling*, 13 Gratt. 57, was under that statute, but the opinion shows that it was only declaratory of what already was the law. Judge Moncure says: "As to the objection that no appeal lies from the other order, it being a mere refusal of the judge in vacation to dissolve the injunction, and not an order adjudicating the principles of the cause, there seems to be no substantial difference between the provision on this subject in the code (p. 682, c. 182, sec. 2) and the law as it existed when the code took effect. In *Lomax v. Picot*, 2 Rand. 247, it was decided that an order overruling a motion to dissolve an injunction might come within the terms of the law allowing appeals from interlocutory orders, and within the mischief intended to be remedied by that law." So, also, in *Talley v. Tyree*, 2 Rob. (Va.) 500, Judge Moncure said the refusal to dissolve in the case in 13 Grattan, *supra*, adjudicated the principles of the cause, and the two prior Virginia cases cited proceeded on that ground. If

a refusal to dissolve adjudicates principles, certainly, *a fortiori* perhaps, does dissolution. And in this case the dissolution left nothing yet to be decided, the question of the validity of the bonds being the sole point of litigation. Therefore, the order refusing to dissolve the injunction is reversed, and this court, making such order as the circuit court should have made, doth adjudge, order, and decree that said injunction be dissolved, and the bill dismissed.

JUDGMENTS—RES JUDICATA.—An order dissolving an injunction is conclusive as to the issues raised on the dissolution: *Lemcunier v. McCleary*, 41 La. Ann. 411.

JUDGMENTS—RES JUDICATA.—The only matter essential to making a former judgment on the merits conclusive is, that the question to be determined in the second action is the same question judicially settled in the first: *Huntley v. Hok*, 59 Conn. 102; 21 Am. St. Rep. 71, and note. In order to make a judgment in one action operate as a bar to another action, it must appear that the precise question determined in the first is involved in the second: *Bell v. Merrifield*, 109 N. Y. 202; 4 Am. St. Rep. 436, and note; *Curry v. New Orleans*, 41 La. Ann. 996. When a second suit is upon a different cause of action, the inquiry must be as to the point litigated and determined in the original action, and as to that only is the judgment conclusive: *Chicago v. Cameron*, 120 Ill. 447.

JUDGMENTS—RES JUDICATA.—The test whether the former judgment is a bar generally is whether or not the same evidence will sustain both the former and present action: *Gayer v. Parker*, 24 Neb. 643; 8 Am. St. Rep. 227, and note; *Bell v. Merrifield*, 109 N. Y. 202; 4 Am. St. Rep. 436.

BURNER v. HEVENER.

[84 WEST VIRGINIA, 774.]

RES JUDICATA.—A FINAL ADJUDICATION BY A COURT OF COMPETENT JURISDICTION upon the merits of the controversy, so long as it remains unreversed, is a bar to any new suit between the same parties for the same cause of action, and in a court of chancery, at least, the form of the proceeding is immaterial, provided the judgment has been reached upon the merits and with full opportunity for a fair hearing.

RES JUDICATA.—ORDERS MADE UPON MOTIONS, PETITIONS, OR RULES affecting substantial rights and from which an appeal lies, if the matter in question has been fully tried, are as conclusive upon the issues necessarily decided as are final judgments or decrees.

RES JUDICATA.—ORDER OF A COURT OF CHANCERY DIRECTING A WRIT TO ISSUE to place the purchaser at a judicial sale in possession of lands, made after a full hearing, at which the issuing of the writ was resisted on the ground that the purchase had been made in trust for the original judgment debtor, and under an agreement entitling him to remain in posses-

sion, and to a conveyance of the property on his complying with certain conditions, is conclusive against him in a subsequent suit in equity seeking to enforce this same agreement upon which he relied in resisting the application for a writ of possession.

H. S. Rucker, and J. W. Arbuckle, for the appellee.

LUCAS, P. On the sixth day of June, 1887, Allen G. Burner filed his bill in chancery against Uriah Hevener, in which he set out that a certain creditor of his had brought a suit against him in the circuit court of Pocahontas County to subject his lands for the payment of his debts; that in said suit (*Arbogast v. Burner, etc.*), a tract of 154 acres, and an undivided one fourth interest in a large mountain tract, was advertised to be sold by R. S. Turk, special commissioner, on the fourth day of April, 1881.

The bill further alleges that on the day of sale the defendant, Uriah Hevener, entered into a parol contract with him as follows: "That he, Hevener, would buy the land at said commissioner's sale in his own name, but for the use and benefit of this complainant; and that he was to make the cash payment, and give his own bonds for the deferred payment of the purchase-money; that complainant was by said agreement to refund the cash payment to said Hevener, and pay the bonds of Hevener for the deferred payments as they became due, and, in the event complainant failed to pay the deferred payments as they became due, said Hevener, in the event he paid the said bonds, was to hold the said lands in trust to secure the repayment to him of all money he so paid, and a small debt complainant owed him." Complainant further alleges he was to remain in possession and control of the said lands, and to have the full use and benefit arising therefrom.

The bill then goes on to allege that on the day of sale, the defendant Hevener bid upon the land, and finding one Krietler bidding against him, he induced Krietler to stop bidding, by telling him he was bidding on the land for the use of complainant. The lands, by reason of mistake of the auctioneer, were knocked down to one J. H. Arbogast at \$1,280, both Hevener and Arbogast claiming the bid; "that complainant then agreed with Hevener to further secure him with said land, if he, Hevener, would secure for complainant a debt he owed to said Arbogast of about four hundred dollars, when Arbogast would surrender his bid to Hevener, and allow the sale to be confirmed to said Hevener, as he and complainant had already agreed upon; that this agreement was perfectly

understood and made before this sale was confirmed to Hevener, as it was, at \$1,280." The bill proceeds to allege further that the complainant repaid to Hevener the cash payment, and a small amount on the other debt which defendant had assumed to Arbogast, and that complainant has continued in uninterrupted possession of the lands from the fourth day of April, 1881. He also alleges that in the spring of 1882, N. T. Payne, a lumber dealer, to whom plaintiff had sold a large quantity of timber, offered to repay to said Hevener for complainant the amount he had paid out for the Burner lands, but Hevener refused to accept or receive the money from or through said Payne; and that the defendant, Hevener, having taken up all his bonds for deferred purchase-money, on the 14th of July, 1882, received from the special commissioner a deed for the land; that in the summer of 1885, defendant informed complainant that he had sold the one-hundred-and-fifty-four-acre tract, called the "Byrd place," and shortly afterwards obtained a judgment for the possession in an action which is now pending on appeal in said circuit court.

It is further alleged that in the original suit, in which the lands were sold, defendant has obtained a rule against the complainant to show cause why a writ of possession should not issue in his favor, and that an order was made at the April term, 1887, directing a writ of possession to issue; and the proceedings had and evidence taken under said rule are exhibited as a part of the bill. The relief asked by the bill is for specific execution of the parol contract above set out; that the deed of July 14, 1882, be treated as a trust deed only, and that the cause be referred to a commissioner to ascertain the amounts properly due from complainant to defendant, and that if they are liens upon said lands, a fair and proper sale of the lands be made to satisfy them; and that the defendant be enjoined and restrained from taking possession of said lands, or executing any writ of possession, until such fair and proper sale can be made; and for general relief.

Injunction was granted as prayed in the bill on the thirtieth day of May, 1887. On the twenty-fourth day of June, 1887, Hevener answered the bill, and demurred to the same. In his answer, he denies generally each and every allegation, charge, and insinuation in said bill set forth. He pleads, also, that the proceedings on the rule, which issued for possession, and were decided in his favor, rendered the matter sought to be put in issue *res judicata*. A large amount of

testimony was taken on both sides, and the cause was finally removed from the circuit court of Pocahontas County to the circuit court of Kanawha, where, on the eighteenth day of March, 1890, a final decree was rendered, from which an appeal has been granted by this court. The final decree complained of found that the plaintiff was entitled to the relief prayed for; that there was due Hevener \$2,290.50, which was ascertained to be a lien on the land. J. W. Arbuckle and H. S. Rucker were appointed special commissioners to sell the land. Before the removal of the cause, however, from the circuit court of Pocahontas County, the judge of that court, in vacation, on notice and motion, dissolved the injunction, but sufficient cause being shown against the same, no decree was then made as to costs and damages, nor dismissing the bill.

The first assignment of error is, that the bill should have been dismissed as presenting a case which it shows to be *res judicata*. A final adjudication by a court of competent jurisdiction upon the merits of a controversy, so long as it remains unreversed, is a bar to any new suit between the same parties for the same cause of action. This is a rule which attaches to every system of jurisprudence worthy of the name, and is no less beneficial to the public, in order that there should be an end of litigation, than conservative of the private rights of litigants, which, once determined, should not be again called in question. From an *a priori* view, we should conclude that, in a court of chancery at least, the form of the proceedings is immaterial, provided the judgment has been reached upon the merits, and with full opportunity for a fair hearing. This *a priori* view we find sustained by the authorities, the more recent ones evincing a general and growing tendency to abolish the distinction between determinations reached upon the trials of rules, motions, and collateral orders, and judgments upon formal actions and suits. If the matter in question has been fully tried upon an issue made up on a rule or motion, and the judgment of the court is so far final that an appeal would lie, then, so long as such judgment remains unreversed on review, rehearing, appeal, or otherwise, no new suit can be prosecuted between the same parties to reopen the same question. Orders made upon motions, petitions, or rules, if they come within the purview of our statute (chapter 135 of the code), are appealable in like manner as if entered on any other pleadings. That chapter, in its first sec-

tion, provides that an appeal will lie in any case in chancery wherein there is a decree or order dissolving or refusing to dissolve an injunction, or requiring money to be paid, or real estate to be sold, or the possession or title of the property to be changed, or adjudicating the principles of the cause. A purchaser at a judicial sale, when he has any relief to ask, becomes a *quasi* party to the cause, and may proceed by motion or by petition, or a rule to show cause, which is, in effect, the same as a petition: 2 Daniell's Ch. Pr. 1592. Applying these principles to this case, we find that in the case *Arbogast v. Burner, etc.*, Uriah Hevener, who purchased the lands of Allen C. Burner at a judicial sale in said case, moved the court for a rule against Burner, who remained in possession of the land, to show cause why a writ of possession should not be issued against him to remove him from the lands, and place the purchaser, Hevener, in possession. This rule issued the twenty-second day of June, 1886, and on motion of Allen C. Burner, made on the twenty-third day of June, 1886, he was given leave to file his answer within thirty days after the adjournment of the court. This answer was subsequently filed, was very elaborate, and was, to all intents and purposes, a cross-bill; so much so that the circuit court treated it as a cross-bill, and permitted Hevener, the purchaser, to file what is styled a "replication," putting in issue all the new matters alleged in the answer or cross-bill of Burner. The issue having been thus made up, a large amount of testimony was taken upon either side, and the matter finally came up before the court for hearing, and the court reached a decision, and entered an order upon the sixth day of April, 1887. A decree was entered reciting the papers formerly read, the rule, answer, replication to the answer, and depositions of witnesses, whereupon it was decreed as follows: "This court being of the opinion that there is nothing in the cause shown to deprive Uriah Hevener of the writ of possession in the rule mentioned, it is adjudged, ordered, and decreed that, upon application of Uriah Hevener, the clerk of this court issue a writ of possession for the land embraced in a deed from R. S. Turk, special commissioner in this cause, to said Uriah Hevener, dated the fourteenth day of July, 1882, directed to the sheriff of this county, whose duty it shall be to place said Hevener in possession of the 154 acres, 1,160 acres, and 904 acres of land embraced in the said deed. It is further adjudged, ordered, and decreed that Uriah Hev-

ever recover his costs in this behalf expended." It was further ordered that a suspension for sixty days should be had, to give Burner an opportunity to appeal, upon his executing the usual bond.

It was after this decree that Burner brought the suit now under consideration, and obtained an injunction against the execution of the writ of possession. He files as an exhibit with his bill all of the proceedings and record under the rule, including the depositions. The bill in his new suit was, in substance, the same as his answer to the rule, and its prayer substantially identical with the prayer of the answer to the cross-bill.

Looking at the action of the court from an equitable standpoint, we must regard its judgment in favor of the purchaser, declaring him entitled to the possession of the land in question, as equivalent to the dismissal of the cross-bill, and a refusal of the relief embraced in its special prayer, or covered by the general prayer for relief, which it also contained. The question then is, whether, in the light of the principles which we have already laid down, Burner, the plaintiff in the suit, was not estopped by the former adjudication. As before observed, the older authorities are not quite so emphatic upon the subject of estoppel upon a decision by motion as those of more recent date. Thus Mr. Bigelow, on page 56 of the edition of 1886 of his treatise on the law of estoppel, observes: "The judgment further should have been final. We have seen that a preliminary decree or judgment, or a decision upon a motion in the course of a trial, can not ordinarily result, if the case go no further, in precluding the parties from drawing the matter into issue again. The case must have gone to a complete termination, so that nothing more is necessary to settle the rights of the parties, or the extent of those rights. Thus an order in garnishment, directing the garnishee to deliver certain property of the defendant to the sheriff for sale, from the proceeds of which the garnishee is to be paid a sum named in the order, is not an adjudication that the defendant owes the garnishee the amount fixed by the order, unless there was an issue concerning the sum due."

On the other hand, in an edition of the same date, Mr. Herman says: "A motion is an application made to a judge or chancellor, or to the same parties when constituting a court, in open court, for the purpose of obtaining a rule or order directing some act to be done in favor of the applicant. This is

usually an incidental proceeding to an action, but it may be wholly distinct from that kind of proceeding. The great variety of objects for which this class of proceedings are available render it impossible to classify the numerous adjudications relating to them, and general principles can only be stated. There may be the following general classification made: 1. Orders made upon motions respecting collateral questions arising in the course of a trial; 2. Final orders affecting substantial rights, for motions from the determination of which an appeal lies, and those which are unappealable. All motions affecting the substantial rights of parties are appealable, and therefore final, unless reversed or modified by an appellate tribunal, and are placed on the same basis as any final judgment. Whenever a motion admits of grave discussion and deliberation, and is made part of the record of a cause, and subject to a review in another court, the decision by a court upon such motion is generally regarded as a final judgment or adjudication, and the rule of *res judicata* applies": Herman on Estoppel, sec. 472.

To the same effect is the authority of Mr. Black, in his recent and able book on judgments (2 Black on Judgments, sec. 691): "According to the doctrine of the earlier cases (and some more recent decisions), the determination of a motion or summary application is not *res judicata*, so as to prevent the parties from drawing the same matters in question again, in the more regular form of an action. Thus a party is not estopped from bringing an action to set aside a judicial sale, made without authority, by the fact that the court may have overruled a motion to set aside the order confirming such sale. So when a motion to open a judgment rendered on a warrant of an attorney is refused, the party may resort to equity, and the denial of such a motion is not such a prior adjudication as to bar him."

But it is now said that this rule no longer obtains in its former strictness; and regard is now had less to the form of the proceeding and more to the substance and condition of the decision. Further, there is a distinction to be noticed between orders made upon motions respecting collateral questions arising in the course of a trial and final orders affecting substantial rights and from which an appeal lies. The latter are *res judicata* and binding upon the parties, unless reversed or modified by an appellate tribunal. Following these principles, it is held that when a motion to set aside a verdict is

overruled, and judgment rendered thereon, a similar motion in a subsequent suit between the same parties, or their privies in estate, to set aside a verdict settling the same questions in the same way, must be overruled. So to a complaint by a judgment defendant to have a judgment declared satisfied, it is a good answer on the part of the judgment plaintiff that the same matters alleged in the complaint were set up in answer to a motion for leave to issue execution on the judgment, and that such matters were in that proceeding adjudicated.

In Louisiana, it is held that if the form of procedure by rule instead of injunction to arrest an execution has been adopted without objection, and a decision rendered thereon after issue joined on the merits, the defendant in execution, by whom the rule was taken, cannot afterward renew the litigation by resorting to an injunction.

Although in our own state we have no adjudication upon this immediate point which I have been discussing, yet the principles announced in our own decisions fully warrant the conclusion which I have reached. In the case of *Gallaher v. City of Moundville*, 34 W. Va. 730, *ante*, p. 942, the cases will be found collated, and that case itself is a strong authority in favor of the conclusions I have reached; *Western M. & M. Co. v. Virginia C. C. Co.*, 10 W. Va. 250; *Henry v. Davis*, 18 W. Va. 230; *Mason v. Harper's Ferry Bridge Co.*, 20 W. Va. 223; *Wandling v. Straw*, 25 W. Va. 692; *McCoy v. McCoy*, 29 W. Va. 794.

I am of opinion, therefore, and for the reasons stated, that the plea of *res judicata* should have been sustained by the circuit court, and the bill dismissed. The decree of the circuit court of Kanawha County must be reversed.

JUDGMENTS—RES JUDICATA. — A decision of a court of competent jurisdiction directly upon a question is conclusive between the parties, until annulled or reversed by a proper proceeding: *Tadlock v. Eccles*, 20 Tex. 783; 73 Am. Dec. 213, and note; *Steele v. Bates*, 2 Aiken, 333; 16 Am. Dec. 720; *Day v. Holland*, 15 Or. 464; note to *Lea v. Lea*, 98 Am. Dec. 775.

JUDGMENTS—ORDERS, WHETHER FINAL. — An order confirming a judicial sale is a final judgment, and cannot be set aside at a subsequent term: *State Nat. Bank v. Neel*, 53 Ark. 110; 22 Am. St. Rep. 185, and note. As to what orders are final and from which an appeal may be taken, see note to *Davis v. Davis*, 20 Am. St. Rep. 173. A mere order for a decree is not final and conclusive: *Gilpatrick v. Glidden*, 32 Me. 201. Orders of probate courts, in the exercise of their jurisdiction, are final and conclusive: *Murphy v. De Frances*, 105 Me. 53.

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2. **JOINDER OF CAUSES OF ACTION.** — When, in a suit to procure an injunction to prevent the continuance of unlawful acts, the complainant sets out the acts from which he has suffered, and the future continuance of which he wishes to prevent, and prays a judgment awarding him compensation for past injuries, as well as relief against their continuance, he states but one cause of action, and that is a claim for relief against the continued trespasses upon his property. *Lynch v. Metropolitan etc. Ry Co.*, 523.

3. **APPEARANCE, TAKING STAY IN FORECLOSURE SUIT IN, WHEN.** — Where, in an action to foreclose a mortgage on real estate, a decree of foreclosure and sale is rendered against the defendant, without legal service of summons upon him, and thereupon his brother, as agent for the defendant, in his name, obtains a stay of the order of sale, and the defendant, being notified of the stay, makes no objection, but avails himself of it, the taking of the stay is an appearance in the action; and the defendant, by availing himself of the stay taken in his name by his brother, thereby ratifies his act. *Fraser v. Armbruster*, 345.

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ADULTERY.

1. **FORNICATION AND ADULTERY** is a joint act, and to convict, it must be shown that two persons, a male and a female, have habitually indulged in unlawful sexual intercourse; but it is not essential to the conviction of one of them to show that both had a guilty intent. The one having such intent may be convicted, although the other, through an ignorance of the facts, had no such intent. *State v. Cutshall*, 599.
2. **FORNICATION AND ADULTERY.** — Where the accused lived for years with a woman as his wife under a marriage bigamous as to him, he is guilty of fornication and adultery, although during all the time the woman was ignorant of his previous marriage, and consequently innocent of any guilty intent or crime. *State v. Cutshall*, 599.
3. **IN FORNICATION AND ADULTERY, CRIMINAL INTENT** need not be alleged nor proved. The crime is established when it is proved that a man and woman, not being married to each other, habitually engaged in sexual intercourse. *State v. Cutshall*, 599.

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AGENCY.

1. **CORPORATION—CONVEYANCE BY AGENT OF.** — Where a resolution of the board of directors of a corporation authorizes a director "to make contracts of sale of the lands of the company," he has no authority to convey such lands as the attorney in fact of the corporation; and such a conveyance of the land by him to his wife without consideration will not even operate as a contract of sale. *Green v. Hugo*, 824.
2. **CONVEYANCE BY AGENT TO HIS WIFE.** — A deed by an agent, under power to sell and convey his principal's land, conveying such land to the agent's wife as her separate property, is void, because such agent cannot sell, either directly or indirectly, to himself. *Green v. Hugo*, 824.

2. **NOTICE OF AGENT'S AUTHORITY.** — One claiming under a contract executed by an agent is bound to know the extent of the agent's authority, unless he has been held out by his principal as having powers not in fact conferred. *Green v. Hugo*, 824.
 3. **CONVEYANCE BY AGENT — NOTICE TO SUBSEQUENT PURCHASERS.** — One who takes under a conveyance of land from an attorney in fact is bound to know the extent of the attorney's authority, and a certificate of acknowledgment, showing that the same land was subsequently conveyed by such attorney and his wife, is sufficient notice of the nature of their title to those claiming under them. *Green v. Hugo*, 824.
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1. **DOGS AS PROPERTY — VALUE HOW ESTIMATED.** — The value of a dog may be either his market value, or some special or peculiar value to his owner, to be ascertained by reference to the usefulness and services of the dog. *Heiligmann v. Rose*, 804.
2. **DOGS AS PROPERTY — DAMAGES.** — Dogs are property, and the owner may recover damages against a trespasser injuring them, although they have no market value. *Heiligmann v. Rose*, 804.
3. **EVIDENCE OF VALUE.** — In an action to recover for a malicious injury to dogs, evidence that they were useful and of special value to the owner will sustain a recovery, although they are not shown to have had any market value. *Heiligmann v. Rose*, 804.

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APPEAL.

1. **EXCEPTIONS NOT RAISED AT TRIAL** are deemed to be waived on appeal. *Fleming v. Springfield*, 268.
2. **FAILURE OF COURT TO SUSTAIN demurrers** will not be reviewed on appeal, unless assigned as error in the lower court. *Scherf v. Missouri Pac. R'y Co.*, 828.
3. **EXCLUSION OF EVIDENCE.** — Error in excluding a question cannot be reviewed, when the bill of exceptions fails to show what the evidence of the witness would have been if admitted, or what was offered to be proved thereby. *Shinners v. Proprietors of Locks and Canals*, 226.
4. **AN APPELLATE COURT** whose jurisdiction is limited to the review of the rulings of the court below will not consider grounds or questions not presented at nor passed upon by that court. *Fleming v. Fleming*, 694.
5. **ATTORNEY'S AUTHORITY TO APPEAR CANNOT BE QUESTIONED FOR FIRST TIME IN APPELLATE COURT.** — The question of the authority of attorneys who signed and filed pleadings acted upon in the trial court cannot be raised for the first time in the supreme court. If the pleading was filed without authority, steps should have been taken in the lower court to have it stricken out. *McIlhenny v. Bins*, 705.
6. **FAILURE TO SUBMIT MATERIAL ISSUE TO JURY** upon which there is no conflict of evidence is not reversible error. *Pascowalk v. Bolzman*, 399.
7. **INSTRUCTIONS AS TO DAMAGES.** — Where the verdict of the jury is for a less amount than could be properly assessed under the evidence and pleadings, an instruction that they could not return a verdict for more than a certain amount is a harmless error. *Heilgmann v. Ross*, 804.
8. **NEGLECTOR, INSTRUCTION AS TO, ALREADY GIVEN, NEED NOT BE REPEATED.** — Where the court has already instructed the jury that if it did not appear by a preponderance of testimony that the injury for which recovery was sought was occasioned by the negligence of the defendant, they should find for the defendant, it is not error to refuse to instruct them that if the injury occurred by defects in the wall, caused by the elements, which were not discovered by ordinary care, in the absence of further negligence on the part of the defendant, the plaintiff cannot recover. *Spokane Truck etc. Co. v. Hofer*, 842.
9. **IF IMPROPER EVIDENCE HAS BEEN ADMITTED**, and the court is not able to say that it did not injure the appellant, the verdict must be set aside. *Dent v. Pichens*, 921.
10. **REVERSAL OF JUDGMENT, ABSENCE OF TESTIMONY ON MATERIAL POINT GOOD GROUND FOR.** — When a judgment is rendered in a case where there is no testimony tending to establish a fact the establishment of which is necessary to warrant a verdict, the court will reverse the judgment. *Oregon R'y and Nav. Co. v. Egley*, 860.
11. **INFERENCE OF FACT — EXCEPTION.** — Where it is desired to present to the full court on appeal the question of law whether or not the agreed facts will warrant a particular inference of fact, it can best be done by an exception taken at the hearing in the lower court. *Rand v. Hanson*, 210.
12. **REVERSAL OF DECREE QUIETING TITLE DOES NOT AFFECT BONA FIDE PURCHASER.** — Where, after the entry of a decree quieting title to real estate in a party to the suit, he conveys it to a bona fide purchaser, no appeal bond having been filed, a subsequent reversal of such decree upon appeal will not affect the purchaser. *Parker v. Courtney*, 360.

See DAMAGES, 7, 8; EQUITY, 4; HABEAS CORPUS, 1; INSANE PERSONS; JUDGMENTS, 11; JURISDICTION, 1; MANDAMUS; PROHIBITION; TRIAL, 10.

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1. **ASSAULT WITH INTENT TO KILL — PROOF OF INTENT.** — Under an indictment for assault with intent to kill, the specific intent must be proved. It will not be presumed from proof of an assault with a deadly weapon without provocation. *Christman v. State*, 44.
2. **ASSAULT WITH INTENT TO KILL — INTENT QUESTION FOR JURY.** — On the trial of an indictment for assault with intent to kill, it is clearly within the province of the jury to consider the nature of the weapon used and the manner of using it, together with all the other circumstances in the case, in determining whether or not the assault was committed with the intent alleged. *Christman v. State*, 44.

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ASSOCIATIONS.

1. **JOINT-STOCK COMPANY DEFINED.** — A joint-stock company is an association of individuals for the purpose of profit, possessing a common capital contributed by the members composing it, such capital being commonly divided into shares, of which each member possesses one or more, and which are transferable by the owner, the business of the association being under the control of certain selected individuals called directors. It is a quasi partnership, whereof the capital is divided, or agreed to be, into shares, so as to be transferable without the express consent of all the partners. *Allen v. Long*, 735.
2. **JOINT-STOCK ASSOCIATION NOT A CORPORATION, WHEN.** — An association of individuals for the purpose of profit, having a capital divided into shares, and controlled by a board of directors, but not incorporated under the laws of the state, is not a corporation, but an unincorporated joint-stock company, which is governed by the general principles of law applicable to partnerships. *Allen v. Long*, 735.
3. **JOINT-STOCK COMPANY, WHEN NEW COMPANY, ALTHOUGH ORGANIZED UNDER OLD NAME.** — Where a joint-stock company ceases operations, and eight years afterwards the person who was the last president publishes in a newspaper a notice calling a meeting for the alleged purpose of re-organizing the company, and at the meeting so called a part of the old stockholders, with many new members, form an association under the

old name, which new association incurs debts, and for the purpose of paying them sells the land of the old association, the new association is a new company, and not a mere continuation of the old; such new company has no legal right to take charge of and dispose of the land of the old company to pay the debts incurred solely by the new concern, especially without the consent of all of the stockholders; and a sale of the land of the old company, made by the officers of the new company, is null and void. *Allen v. Long*, 735.

4. MEMBERS OF JOINT-STOCK COMPANY TENANTS IN COMMON, WHEN. — When an unincorporated joint-stock association owning land but owing no debts becomes *functus officio*, its members hold the land as tenants in common. *Allen v. Long*, 735.

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ATTACHMENT.

1. ATTACHMENT, STRICTLY SPEAKING, IS NOT A PROCEEDING IN REM, and the judgment obtained therein is conclusive only upon the actual parties and their privies. *Hornthal v. Burwell*, 558.
2. RECEIVERS — LEVY ON PROPERTY IN CUSTODIA LEGIS NOT AFFECTED BY PRIOR LEVY. — Where, before the dismissal of a suit in which a receiver was appointed, the court assumed the custody of the same property in another suit by appointing another receiver, and confirmed a sale of the property ordered to be made by him, the validity of such sale is not affected by an attachment levied on the property while in the custody of the first receiver, and before the dismissal of the first suit. *Texas etc. Ry Co. v. Lewis*, 776.
3. RECEIVERS, PROPERTY UNDER CONTROL OF, NOT SUBJECT TO ATTACHMENT. — After the appointment of a receiver, the property to which the receivership relates is in the custody of the law, even before he qualifies, so as to exempt it from the levy of an attachment; and such levy can confer no right on the attachment creditor or on those claiming under him. *Texas etc. Ry Co. v. Lewis*, 776.
4. INJUNCTION AGAINST EXECUTION SALE OF PROPERTY ATTACHED WHILE IN CUSTODIA LEGIS. — Property in the hands of a receiver is not subject to attachment, and as the sale of property so attached would be a cloud on the title of the purchaser at receiver's sale, he may have the sale under the attachment enjoined. *Texas etc. Ry Co. v. Lewis*, 776.
5. PURCHASER WHO MAKES PART PAYMENT ACQUIRES INTEREST ENTITLED TO PROTECTION. — Where, under a contract with a building company for the construction of houses upon the land of a purchaser, the company delivers material upon the ground, upon which the purchaser makes a part payment, and the material so furnished is seized and sold under an attachment as the property of the building company, the purchaser at the sale made under the attachment cannot take the material out of the possession of the owner of the lot without paying to him the amount of money he paid on his contract, with interest. In such case, the levy should be made by notice, and not by taking possession. *Ellis v. Bonner*, 731.

See CHATTEL MORTGAGES, 4; CONTENTPT; DAMAGES, 6; FRAUDULENT CONVEYANCES, 1.

ATTORNEY AND CLIENT.

PRIVILEGED COMMUNICATIONS. — If Two or More Persons Consult an Attorney at Law for their mutual benefit and make statements in his presence, he may disclose such statements in any controversy between them or their personal representatives or successors in interest, but not in controversies between them or either of them and third persons. *Hurlbert v. Hurlbert*, 482.

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tion may be rebutted by extraneous testimony. *Bood v. Thomas Building Ass'n*, 851.

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CARRIERS.

1. DUTY TO PROTECT PASSENGERS. — A common carrier, by his contract of transportation, undertakes to protect the passenger against any injury arising from negligence or willful misconduct of his servants while engaged in performing a duty which the carrier owes to him. *Mulligan v. New York etc. R'y Co.*, 539.
2. CARRIER OF PASSENGERS IS NOT LIABLE FOR UNLAWFUL ARREST OF A PASSENGER while in its depot, at the instance of a ticket agent, on a charge of passing counterfeit money, when it does not appear that the passenger was in the custody or under the protection of the ticket agent, or that the latter was intrusted with any powers with respect to the execution of the contract for the transportation of passengers. *Mulligan v. New York etc. R'y Co.*, 539.
3. NEGLIGENT DELAY. — MEASURE OF DAMAGES for the breach of a contract of carriage by negligent delay includes such damages only as are the direct and immediate consequences of the breach, and deemed to have been contemplated by the parties when they made the contract, whether the carrier is a natural or an artificial person. If it is an express company, it is liable for the difference between the market value of the goods at the time and place where they ought to have been delivered and such value when they were delivered, together with any extra expense incurred in writing or telegraphing for them, but not for the difference between the price for which the shipper had contracted to sell them and their market value when and where they were delivered, unless the company was notified that they were shipped to complete sales already made. *Murrell v. Pacific Exp. Co.*, 17.
4. POWER TO LIMIT LIABILITY FOR NEGLIGENCE. — Although a common carrier cannot stipulate for absolute exemption from responsibility for his negligence, he may limit his liability to an amount stated in a written receipt or special contract in the event of loss or injury to the goods or property through his ordinary negligence, provided such contract is freely, voluntarily, and fairly entered into by the parties, and is just and reasonable in its terms. *Pacific Exp. Co. v. Foley*, 107.
5. LIMITATION OF LIABILITY BY CONTRACT. — Where a special contract, voluntarily entered into by the shipper, provides that the carrier "is not to be held liable for any loss or damage, except as forwarders only, nor for any loss or damage of any box, package, or thing for over fifty dollars, unless the just and true value thereof is stated therein," the con-

tract is binding on the shipper, and is the limit and measure of his recovery when the true value of the goods shipped is not stated in the receipt, and they are lost through the ordinary negligence of the carrier. *Pacific Exp. Co. v. Foley*, 107.

6. **CONTRACT OF SHIPMENT — PRESUMPTION.** — A shipper of goods who fills out a blank receipt contained in a book previously furnished by an express company for his use, and obtains the signature of the company's agent thereto upon delivering to him a package for transportation, will be presumed to know the contents of the receipt, and if he receives such receipt without objection, his assent to its conditions will, in the absence of fraud, be conclusively presumed. *Pacific Exp. Co. v. Foley*, 107.

CARRIERS.

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See HABEAS CORPUS, 1; JURISDICTION, 2; RAILROADS, 6.

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CHATTEL MORTGAGES.

1. **THE DESCRIPTION OF PROPERTY** in a chattel mortgage is sufficient, as a general rule, when it will enable a third party, aided by inquiries which the mortgage itself suggests, to identify the property. *Buck v. Davenport Sav. Bank*, 392.
2. **SUFFICIENT DESCRIPTION.** — A description of property in a chattel mortgage as "ninety-five head of steers, one year old this spring, marked as follows: Right ear cropped, and notch cut out of the under side of the left, being the said cattle I have this day purchased of Welcome Mowry, being all the cattle I have now thus marked. Said cattle to be kept in Seward County, Nebraska, except during the herding season, in which they are kept in Butler County, Nebraska," — is sufficient. *Buck v. Davenport Sav. Bank*, 392.
3. **PRESUMPTION AS TO ASSENT OF CREDITOR.** — Where a chattel mortgage is executed in good faith in favor of a bona fide creditor, his assent thereto will be presumed from the time of its registration, although it was exe-

cutted and recorded without his knowledge. *First Nat. Bank v. Rideaux*, 167.

4. CONFLICT OF LAWS—ATTACHMENT. — If a mortgagor of personal property situated in one state, in which the mortgage is duly recorded, retains possession and carries the property into another state, where he is a non-resident, and where the property is attached and sold under judgments obtained against him by his creditors in that state, the mortgagee is entitled to recover the value of the mortgaged property sold from such judgment creditors, in the state where the mortgage was executed and recorded, although the mortgage was void as to them in the other state, because not recorded there. *Horathal v. Burwell*, 556.

See FRAUDULENT CONVEYANCES, 5; INSURANCE, 3.

CHECKS.

1. PROMISE TO ACCEPT CHECK, WHEN SUFFICIENTLY DEFINITE TO SUPPORT ACTION FOR REFUSAL TO PAY IT. — Where the cashier of a bank telegraphs to another bank, "Will you pay E. F. and W. S. Ikard's check for eighteen hundred dollars on presentation?" and the cashier of the latter bank, on the same day, telegraphs in reply, "Yes; will pay the Ikard check," and the first-named bank thereupon discounts the check, the promise contained in the reply is sufficiently definite to support an action brought by the bank that received it against the bank that made it, for its failure or refusal to pay the check. *Henrietta Nat. Bank v. State Nat. Bank*, 773.
2. ACCIDENTAL ERASURE ON CHECK NOT EXCUSE FOR REFUSAL TO PAY. WHEN. — Where on a check drawn for eighteen hundred dollars, and having the figures \$1800 in the margin, a line appears drawn along the top of the word "hundred," and it is shown that the check was intended to be drawn for eighteen hundred dollars, the apparent erasure will not excuse a refusal by the drawee to pay the check, although it may justify a delay for a reasonable time to make inquiry. *Henrietta Nat. Bank v. State Nat. Bank*, 773.

CHILDREN.

See TRUSTS, 3.

CHOSE IN ACTION.

See PLEDGE, 1.

CITIES.

See MUNICIPAL CORPORATIONS.

CLOUD ON TITLE.

See ATTACHMENT, 4.

COLLATERAL ATTACK.

See EXECUTION, 4; JUDGMENT, 27, 28.

COLLATERAL SECURITY.

See PLEDGE; SET-OFF.

COLOR OF TITLE.

See ADVERSE POSSESSION.

COMBINATION.

See CONSPIRACY.

COMMERCE.

See INTERSTATE COMMERCE.

COMMON CARRIERS.

See CARRIERS.

COMMON PROPERTY.

See NEGOTIABLE INSTRUMENTS, 2.

COMPENSATION.

See EXECUTORS AND ADMINISTRATORS, 2.

COMPLAINT.

See PLEADING, 4.

CONDEMNATION.

See RAILROADS, 2-12.

CONDITION.

See SALES, 2.

CONFLICT OF LAWS.

See CHATTEL MORTGAGES, 4; CORPORATIONS, 12; DEPOSITIONS; NEGOTIABLE INSTRUMENTS, 4; USURY.

CONGRESS.

See INTERSTATE COMMERCE.

CONNIVANCE.

See MARRIAGE AND DIVORCE, 2.

CONSIDERATION.

See AGENCY, 1; CONTRACTS, 2, 6; DEEDS, 3; INFANTS, 2; SCHOOLS, 2; SPECIFIC PERFORMANCE, 2; TRUSTS, 1.

CONSTITUTION.

See MUNICIPAL CORPORATIONS, 3; TRIAL, 1.

CONSPIRACY.

1. **HOW TO DETERMINE WHETHER ACTION LIES FOR.** — At common law, a conspiracy cannot be made the subject of a civil action, although damages result, unless something is done which without the conspiracy would give a right of action. The true test as to whether such action will lie is whether or not the act accomplished after the conspiracy has been formed is itself actionable. *Doh v. Winfree*, 755.

2. **CONSPIRACY TO INDUCE THIRD PERSON NOT TO SELL TO PLAINTIFF, ACTIONABLE WHEN.** — A petition filed by a butcher, which, in addition to charging that the defendants, who were cattle dealers, conspired together to refuse to sell cattle to him, charges that they also induced third persons
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not to sell to him, it not appearing that their interference with his business was to serve any legitimate purpose of their own, but that it was done wantonly and maliciously, causing, as was intended, pecuniary injury to him, states a cause of action, and a demurrer thereto should not be sustained. *Dels v. Winfree*, 755.

2. **RIGHT TO REFUSE TO HAVE BUSINESS RELATIONS WITH ANOTHER LIMITED TO INDIVIDUAL ACTION.** — The absolute right of a person to refuse to have business relations with any person whomsoever, whether the refusal is based upon reason or is the result of whim, caprice, prejudice, or malice, must be limited to the individual action of the party who asserts the right. It is not equally true that one person may from such motives influence another person to do the same thing. *Dels v. Winfree*, 755.

CONSTITUTIONAL LAW.

See LEGISLATURE; MUNICIPAL CORPORATIONS, 1-4; STATUTES; TRIAL, 1.

CONSTRUCTION.

See WILLS, 1.

CONTEMPT.

JUDGMENT AGAINST PURCHASER OF REAL PROPERTY, WHAT PROPER. — A decree against a purchaser of real property who has refused to comply with his contract of purchase may be against him personally, making him liable for the amount which he agreed to pay, and authorizing process for its enforcement against his person, and in case of his failure to comply with the decree, to attachment for contempt of court. *Kennedy v. Gramling*, 876.

See MANDAMUS.

CONTINUING TRESPASS.

See TRESPASS.

CONTRACTOR.

See SALES, 2.

CONTRACTS.

1. **PRIVITY — NEGLIGENCE OF SUBCONTRACTOR.** — The subcontractors of one who has agreed with the owner to move and fit up a building in a workmanlike manner are liable to the owner for negligent injury to the building in doing the work, although there is no privity of contract between them. The gist of the action is the breach of duty owed by the subcontractors to the owner, not to negligently injure his property, and such duty does not depend on nor grow out of the contract. *Bickford v. Richards*, 224.
2. **PAROL AGREEMENT NOT TO CONSTRUCT OR ERECT ANY FLATS** in the immediate neighborhood, entered into upon adequate consideration, is valid, and its specific performance may be enforced. *Lewis v. Gollner*, 516.
3. **STATUTE OF FRAUDS — PARTITION FENCE.** — A contract for the conveyance of an undivided interest in a partition fence between lands of adjoining owners is a contract for the release of an interest in real estate, and, to be binding, must, in the absence of part performance, be in writing, to satisfy the statute of frauds. *Rudisill v. Cross*, 57.

4. **STATUTE OF FRAUDS — EXECUTORY CONTRACT.** — It is no objection to a written contract that some of its terms remain to be fixed by something to be done in the future, if that something is done before an action is brought; and if the contract is then in writing, the statute of frauds is complied with. *Freeland v. Rife*, 244.
 5. **RESTRAINT OF TRADE.** — A contract between two corporations manufacturing glue from fish skins, under a patent supposed by both to be valid, the object of which was to avoid competition, and to regulate prices, is not void as against public policy, the fish-glue not being an article of prime necessity, or a staple commodity ordinarily bought and sold in the market. *Gloucester etc. Co. v. Russell etc. Co.*, 214.
 6. **PRIVILEGE OF PURCHASE AT JUDICIAL SALE AS CONSIDERATION.** — A contract between a debtor and his judgment creditor, promising an advantage to such debtor in case his creditor is permitted to purchase the property at a judicial sale, then about to take place, and which is calculated to relax the vigilance of the debtor and his friends at such judicial sale and prevent competition, will be enforced if creditors are not affected thereby, and the plea of want of consideration will not be entertained. *Carter v. Gibson*, 381.
- See ADVERSE POSSESSION; AGENCY, 1, 3; ATTACHMENT, 5; CARRIERS, 1, 2, 4, 6; CONTEMPT; DAMAGES, 1-3; INFANTS; LANDLORD AND TENANT, 8; MARRIAGE AND DIVORCE; PARTNERSHIP, 4, 5; PLEADING, 3, 4; SALES, 1, 4, 7-10; SCHOOLS, 4; SPECIFIC PERFORMANCE; TRUSTS, 1; USURY; VENDOR AND PURCHASER, 1, 3; WILLS, 1; WITNESSES, 1.

CONTRACT OF SALE.

See ADVERSE POSSESSION; AGENCY.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 10-13; RAILROADS, 19-22, 25, 27-30.

CONVERSION.

See SALES, 5.

CONVEYANCE.

See ADVERSE POSSESSION; DEEDS; REAL PROPERTY; TRUSTS, 4.

CORPORATIONS.

1. **CORPORATION DE FACTO, WHAT IS.** — A corporation *de facto* is a corporation organized and operated under color of the law, but not legally constituted. The statute of Texas requires that at least two of the subscribers to the charter of an intended incorporation must be citizens of the state. Where, therefore, articles of incorporation filed in the office of the secretary of state are signed by persons none of whom are citizens of the state, the corporation is not legally constituted, but until the pretended charter is vacated it is a corporation *de facto*. *American Salt Co. v. Heidenheimer*, 743.
2. **DE FACTO CORPORATION, WHEN BODY REGARDED AS.** — A body is regarded as a *de facto* corporation only where there has been an effort to conform to the forms of law in establishing a corporation, and some formal defect exists merely as to the mode of complying with the law, and the body is dealt with and acts as a corporation. *Allen v. Long*, 735.

2. **QUALIFICATIONS OF DIRECTOR.** — An Assignee of Stock who appears as a stockholder on the corporate books is qualified to vote the stock and hold the office of director, although the transfer was made to him for the sole purpose of so qualifying him. *In re Argus Printing Co.*, 639.
4. **DIRECTORS — QUALIFICATIONS.** — One who does not appear to be a stockholder upon the books of the corporation is not eligible to vote stock or hold the office of director therein, although he may be entitled to the legal title to the stock voted. *In re Argus Printing Co.*, 639.
5. **ELECTION OF DIRECTOR.** — It is essential to a valid election of a director of a corporation that he receive the vote of a majority of the subscribed capital stock. If he receives the vote of a minority only of such stock, his election will be set aside, and a new election ordered. *In re Argus Printing Co.*, 639.
6. **ELECTION OF DIRECTORS.** — One who holds the majority of the stock of a corporation, and who has acquiesced in the organization of a stockholders' meeting for the purpose of electing directors, and has participated in the business of such meeting by nominating directors to be voted for, cannot afterwards withdraw therefrom, organize another meeting, and elect directors named by him by voting his stock for them at the latter meeting. He must remain in and vote his stock at the meeting first organized. If his ballot should be rejected, the directors voted for by him will be declared elected by the court. In such case, a minority of the stockholders have the right to insist that after a meeting is organized the majority shall not withdraw from it and organize another meeting, at which the minority must appear or lose their rights. *In re Argus Printing Co.*, 639.
7. **LIABILITY ON FORGED CERTIFICATES OF STOCK.** — Where the by-laws of a corporation provide that all certificates of stock shall be signed by its president and treasurer, and such president, who is not the proper officer to issue certificates, makes a fraudulent issue thereof to himself, forging the name of such treasurer thereto, affixing the corporate seal, and pledging them for his individual debt, the corporation is not liable for his criminal fraud as for one not made possible by its negligence, although he was allowed to have access to its seal and certificate-book after his previous misconduct in violating an agreement to pledge certain stock to the corporation. *Hill v. Jones Pub. Co.*, 230.
8. **RIGHT AND DURESS OF PLEDGEE TO VOTE STOCK.** — A pledgee of corporate stock, who appears by the books of the corporation to be the owner thereof, has a right to vote whatever stock stands in his name at a meeting for the election of directors; and in such case the pledgor has no right to vote such stock. *In re Argus Printing Co.*, 639.
9. **REMEDY OF PLEDGOR ENTITLED TO VOTE STOCK.** — A pledgee of corporate stock who has a legal right to vote it, although it has been transferred to his pledgee on the books of the corporation, has his remedy in equity to compel a proper transfer, or to require the pledgee to give a proxy. *In re Argus Printing Co.*, 639.
10. **STOCKHOLDER — REMEDY OF ASSIGNEE OF STOCK.** — An assignee of stock who is entitled to have his transfer recorded on the corporate books may, in equity, compel the corporation to record it, or he may compel his assignor to give him a proxy; but until this is done, he is not a stockholder, so as to be entitled to vote the stock or hold the office of director. *In re Argus Printing Co.*, 639.
11. **STOCKHOLDER, WHO IS.** — One is a stockholder in a corporation only

when he holds shares on the books of the company, and not when he merely holds the certificate of such shares. *In re Argus Printing Co.*, 689.

12. STOCKHOLDERS. — UNRECORDED TRANSFER OF STOCK in a corporation is not valid for any purpose, except as between the parties, and until such transfer is made on the corporate books, the person in whose name the stock there appears will continue to be a stockholder, for the purpose of voting the stock, or of being eligible to the office of director. *In re Argus Printing Co.*, 639.
13. CONFLICT OF LAWS. — ENFORCEMENT OF PERSONAL LIABILITY OF STOCKHOLDER IN A FOREIGN CORPORATION. — A resident of New York cannot maintain an action in Massachusetts against a resident in California to establish his personal liability for the debt of a corporation having no place of business in Massachusetts, and organized under the laws of Kansas, providing for special and limited liability of a stockholder, when his liability as such stockholder has not been judicially determined in the latter state. *Bank of North America v. Rindge*, 240.
14. STOCKHOLDERS are under no obligation to inform their co-stockholders of their intention to exchange their stock for the stock of another corporation, or of their intention to invest therein. *Trisconi v. Winship*, 175.
15. STOCKHOLDERS OF DE FACTO CORPORATION NOT LIABLE TO ITS CREDITORS AS PARTNERS. — Persons who, after the organization of a corporation has been apparently effected, and the secretary of state has returned its charter, with a certificate that it has been filed in his office as the statute requires, become stockholders in such corporation, under the belief that a legal corporation exists, and without any notice of any vice in the charter of such corporation, cannot be held liable as partners for its debts. *American Salt Co. v. Heidenheimer*, 743.
16. RIGHT OF STOCKHOLDERS TO SELL STOCK. — Stockholders in a corporation, including its directors who own stock, have the indisputable right to dispose of their stock at their pleasure. *Trisconi v. Winship*, 175.
17. POWER OF MAJORITY OF STOCKHOLDERS TO WIND UP. — In the absence of any express statutory prohibition, a majority of the stockholders in a corporation, acting within the scope of their authority, may wind up its affairs and dissolve it, for reasons deemed by them sufficient; and the courts are powerless to inquire into and determine the expediency or sufficiency of the motives which dictated such action, although it entails a loss upon the minority of the stockholders. *Trisconi v. Winship*, 175.
18. MORTGAGE BY CORPORATION, DEFECTS IN, CURED BY RATIFICATION, WHEN. — Where a mortgage by a corporation is signed, without authorization by resolution, by its president and secretary, who were two of its three trustees, but the corporation receives the benefits of the mortgage, the defect in its original execution will be regarded as cured by acquiescence and ratification. If money has been obtained by a corporation upon its securities, which are irregular and *ultra vires*, but the money has been applied for the benefit of the corporation, with the knowledge and acquiescence of the stockholders, the corporation and its shareholders will be estopped from denying the corporation's liability to repay it. *Horton v. Long*, 867.
19. RECORDS OF CORPORATION, TESTIMONY INADMISSIBLE TO DESTROY EVIDENCE, WHEN. — Where, for the purpose of proving the execution of mortgage bonds by a railroad corporation, a book found in the company's

office, identified as the one in which the records of the meetings of the directors and stockholders were kept, and shown to be the only book recognized as such, is admitted in evidence, the testimony of the secretary of the company that he had written the proceedings at the dictation of the president of the company, and long after their dates, and that although the records show meetings from time to time, he believed no such meetings were held, is inadmissible to destroy the effect of the records contained in such book. Such testimony is too inconclusive, since it can serve merely to create a suspicion that there was an irregularity in the manner in which the records of the company were kept. *McIlhenny v. Bins*, 705.

See AGENCY, 1; ASSOCIATIONS; CONTRACTS, 5; LIMITATIONS OF ACTIONS, 2; MORTGAGES, 7, 8; RAILROADS; RECEIVERS, 1, 2.

COSTS.

See EXECUTION, 1; HOMESTEAD, 7; PLEADING, 7; RECEIVERS, 2.

CO-TENANCY.

1. CONVEYANCE MADE BY ONE OF SEVERAL CO-TENANTS, PURPORTING TO CONVEY A SPECIFIC PART of the common property, is not valid. *Young v. Edwards*, 689.
2. A CONVEYANCE BY A CO-TENANT OF A SPECIFIC PART of the lands of the co-tenancy, equivalent in value to his share in the entire property, with covenants of warranty, will, as against him, be treated as a conveyance of his entire interest in the common land. *Young v. Edwards*, 689.
3. A GRANT BY A MOTHER to a railway company of a right of way over lands of which she is a tenant in common with her children, who reside with her, cannot have any effect whatever on their rights. *Charleston etc. R. R. Co. v. Leach*, 667.
4. A PROCEEDING to obtain compensation for lands taken and used by a railway company will be suspended until a partition of the lands of the co-tenancy is made, where such company has received from one of the co-tenants a grant of the right to construct a railroad over lands belonging to the co-tenancy. *Charleston etc. R. R. Co. v. Leach*, 667.
5. TENANT IN COMMON CANNOT SUE HIS CO-TENANT FOR POSSESSION, WHEN.—One tenant in common cannot maintain against his co-tenant a suit for the recovery of possession of land, when the latter's possession is not adverse to his own interest, nor to the title under which they must both claim. To authorize such a suit there must be an actual ouster, and the ouster and adverse holding must be of such a character as will put the statute of limitations in motion. *Allen v. Long*, 725.
6. TENANT IN COMMON CANNOT RECOVER FOR HIS CO-TENANTS NOT PARTIAL.—Where, in an action of trespass to try title to land, the defendant establishes title to a part interest therein, the plaintiff is not entitled, as against the defendant, to recover for the benefit of other tenants in common who are not parties to the action. *Boone v. Knox*, 767.

See ASSOCIATIONS, 4; HOMESTEAD, 7, 8; HUSBAND AND WIFE, 1-3; PARTITION.

COUNSEL.

See TRIAL, 5.

COUNTIES.

MUNICIPAL RAILROAD AID BONDS — VOIDABLE ISSUE — INNOCENT PURCHASER. — A proposition submitted to the voters of a county to issue and deliver its bonds to aid in the construction of a railroad by one of two companies named, being in the alternative, is defective; and the issue and delivery of the bonds voted under such proposition will be enjoined, or they may be set aside after issue if timely application is made, yet after such bonds have been issued and certified under apparent authority, they are valid in the hands of an innocent purchaser for value. *North v. Platte County*, 395.

See JUDGMENT, 29.

COURSES AND DISTANCES.

See BOUNDARIES.

COURTS.

See APPEAL, 2; CONTEMPT; RECEIVERS, 2, 3; TRIAL, 4, 6, 9; TRUSTS, 2; WITNESSES, 3.

COUNTERCLAIM.

See SALES, 11; SET-OFF.

COVENANTS.

1. **PURCHASER OF A LOT WHICH IS SUBJECT TO A PERSONAL RESTRICTIVE AGREEMENT** entered into by its owner is bound by the restriction in a court of equity, unless he was a purchaser in good faith, in ignorance of the restriction. *Lewis v. Gollner*, 516.
2. **PERSONAL COVENANT WHEN BECOMES ATTACHED TO AFTER-ACQUIRED LAND.** — If one who has agreed not to build flats in a designated neighborhood afterwards purchases land in that neighborhood, such land in his hands becomes restricted and limited in its uses by that agreement, and remains subject to such restrictions and limitations in the hands of a purchaser from him with notice of the agreement. *Lewis v. Gollner*, 516.
2. **WARRANTOR LIABLE FOR INTEREST WHEN.** — Where rents are set off against improvements, the warrantor must pay interest for the time the rents were recovered. *Boone v. Knox*, 767.
4. **VOLUNTARY COVENANT — ENFORCEMENT OF, AFTER DEATH OF COVENANTOR.** — A voluntary covenant in an indenture under seal, executed by a testatrix in a foreign country, but which would be enforceable if executed in the state where she subsequently dies domiciled, and by which she binds her executors, within six months after her death, to pay to parties named a specified sum upon certain trusts, with interest from the day of her death, will be enforced in the state where she was domiciled at the time of her death. *Krell v. Codman*, 260.

See CO-TENANCY, 2.

COVERTURE.

See HUSBAND AND WIFE; INFANTS, 6; MARRIAGE AND DIVORCE.

CREDITORS' SUITS.

CREDITOR'S BILL TO REACH ALIMONY AWARDED TO A DIVORCED WIFE, and to apply it in payment to a debt existing before such award was made, cannot be sustained. *Romaine v. Chauncy*, 544.

CRIME.

See MASTER AND SERVANT, 2.

CRIMINAL LAW.

INTOXICATION AS DEFENSE TO CRIME. — Voluntary intoxication will not excuse the commission of a criminal act; yet where a person is accused of a crime which can be committed only by doing a particular thing with a specific intent, it may be shown, in defense, that at the time of doing the act charged, the accused was so drunk that he could not have entertained the intent necessary to constitute the offense. *Christman v. State*, 44.

See ADULTERY; ASSAULT; EMBEZLEMENT; EVIDENCE, 1; EXTRADITION; GAMING; HABEAS CORPUS; HOMICIDE; INSANE PERSONS; LARCENY.

CROSS-COMPLAINT.

See PARTIAL.

CROSSINGS.

See RAILROADS, 2-10, 17, 18, 20, 21.

DAMAGES.

1. **MEASURE OF DAMAGES — BREACH OF CONTRACT — PROSPECTIVE PROFITS.** — Where a breach of contract results in the loss of definite profits which are ascertainable and within the contemplation of the parties, they may generally be recovered; but when prospective profits are remote, conjectural, and speculative, they cannot be said to be the direct and unavoidable result of the breach, and cannot be recovered. *Sherman Center etc. Co. v. Leonard*, 101.
2. **BREACH OF CONTRACT — DUTY TO DIMINISH.** — A party suing for breach of contract is required to do what he reasonably can, and improve all reasonable opportunity, to lessen the injury and reduce the damages caused by the breach. *Sherman Center etc. Co. v. Leonard*, 101.
3. **MEASURE OF DAMAGES FOR BREACH OF CONTRACT TO MOVE HOTEL — PROFITS, LOSS OF.** — Where a contract for the removal of a hotel from one town to another is broken by the contractor, after he has been paid for the removal, it is the duty of the owner to have the hotel removed at once, and he is then entitled to recover, as damages for the breach, the necessary expenses of removal and of avoiding the direct and unavoidable consequences of the breach of the contract, but he is not entitled to recover the prospective profits which he would have possibly gained if the building had been removed according to the contract. *Sherman Center etc. Co. v. Leonard*, 101.
4. **INTEREST — NEGLIGENCE — MEASURE OF DAMAGES.** — In actions to recover damages for injury caused by negligence, awarding interest is in the discretion of the jury. *Ell v. Northern Pac. R. R. Co.*, 621.
5. **PUNITIVE DAMAGES NOT RECOVERABLE.** — The doctrine of punitive damages is unsound in principle and unfair and dangerous in practice, and such damages cannot be recovered in Washington, although the defendant may have been guilty of gross negligence. *Spokane Truck etc. Co. v. Hofer*, 842.
6. **EXEMPLARY DAMAGES NOT ALLOWED WHERE NO ELEMENT OF FRAUD OR OPPRESSION.** — In an action to recover damages for a wrongful attack-

ment, exemplary damages are not recoverable, if the plaintiff in the attachment believed that the property attached was subject to the payment of his debt, and there is no element of oppression or malice. *Ellis v. Bonner*, 731.

7. INSTRUCTIONS — VERDICT — DAMAGES. — When a jury is not charged separately as to actual and exemplary damages, a verdict for a gross sum, without specification as to whether it is actual or exemplary damages, is not reversible error. *Helligmann v. Roe*, 804.
 8. INSTRUCTIONS AS TO DAMAGES. — A submission to the jury of the question of actual and exemplary damages in one general charge is not reversible error, in the absence of a request and refusal of a special charge correcting the error. *Helligmann v. Roe*, 804.
- See ACTIONS, 1, 2; ANIMALS, 2, 3; CARRIERS, 3, 5; EQUITY, 2, 3; MARRIAGE AND DIVORCE, 4; MUNICIPAL CORPORATIONS, 10; NEGLIGENCE, 4, 16; PARTNERSHIP, 4, 5; RAILROADS, 4, 5, 8, 11, 12, 33; SALES, 11, 12; SEDUCTION; SHERIFF, 3; TREMPASS, 1, 2; TRIAL, 2; WITNESSES, 1.

DEATH.

See NEGLIGENCE, 14.

DEBT.

See MARRIAGE AND DIVORCE, 10, 11.

DEBTOR AND CREDITOR.

1. FRAUD IN SATISFACTION OF DEBT. — A creditor cannot, by practicing a fraud, acquire title to the property of his debtor, even with the purpose of crediting its value on a just debt. *Blake v. Blackley*, 556.
 2. FRAUD UPON THE CREDITORS OF ANY PERSON CANNOT RESULT from his appropriating his property to the payment of a debt for which he is liable. Therefore, one jointly liable with others as a member of a firm, or otherwise, may appropriate his individual property to the payment of a joint debt, and if all the members of a partnership are liable on an obligation, they may appropriate the firm property to its payment, though it is not a partnership debt. *Citizens' Bank v. Williams*, 454.
- See ATTACHMENT, 3; CHATEL MORTGAGES, 3, 4; CONTRACTS, 6; CREDITORS' SUITS; FRAUDULENT CONVEYANCES; PARTNERSHIP, 6; RECEIVER, 1; TRUSTS, 1.

DECLARATIONS.

See EVIDENCE, 3, 4; FRAUDULENT CONVEYANCES, 2; PLEADING, 4.

DECREES.

See JUDGMENT; MARRIAGE AND DIVORCE, 12.

DEEDS.

1. DEFECTIVE ACKNOWLEDGMENT. — Where the certificate of acknowledgment to a deed fails to show that the grantors were known to the officer taking it, or that they were proved to him on the oath of another to be such grantors, and fails to use any equivalent expression, the omission is fatal to the validity of the deed. *Frost v. Erath Cattle Co.*, 831.
2. DELIVERY. — Evidence showing that a conveyance of land was signed, acknowledged, witnessed, and handed to the grantee, who was a son of the grantor, to whom the deed was immediately returned; that the

father said he calculated to deed the property to the son, so that there would be no trouble after his death, but that he would not like to see it go on record in his lifetime; and the son replied he need not be afraid of its going on record, and that he (the father) could keep it himself, — does not show a delivery of the deed; and if the grantor subsequently destroyed it, and conveyed the same property to another person in consideration of services performed and to be performed, the latter acquired the title. *Schuffert v. Grote*, 316.

2. CONSIDERATION FOR CONVEYANCE OF LAND, or of an interest therein, need not be in money, but may consist of anything deemed by the parties to be of value. A person owning land along and through which a railroad is proposed to be built may, in consideration of the benefit which he believes will result to him from its construction, execute a release or conveyance of the right to enter upon his lands, and to construct and maintain such railway, and to use for its purposes a designated strip of land. Such consideration is sufficient to support a conveyance, though a statute of the state forbids any jury impaneled to determine the compensation to which a land-owner may be entitled from taking into account any benefit which he may derive from the construction of a railway. *Charleston etc. R. R. Co. v. Leech*, 667.
4. DEED SIGNED "A, PER B," WILL BE PRESUMED TO HAVE BEEN SIGNED IN THE PRESENCE AND BY THE AUTHORITY OF THE FORMER, IF HE WAS UNABLE TO READ OR WRITE, AND B WAS IN THE HABIT OF SIGNING DEEDS FOR HIM, AND THE PERSONS CLAIMING UNDER THE DEED HAVE BEEN IN UNDISTURBED POSSESSION FOR MANY YEARS. *Kennedy v. Gramling*, 676.
5. REGISTRATION — UNRECORDED DEED NEGLIGENCELY WITHDRAWN FROM RECORDER'S OFFICE IS NOT NOTICE. — Where the holder of a deed, after filing it for record, negligently withdraws it from the recorder's office before it is recorded, and before attaching thereto any certificate of its record, such deed is not notice to an innocent purchaser for value, so as to protect such holder. *Turnan v. Bell*, 35.

See CO-TENANT, 1-3; COVENANTS; INFANTS, 3-6; WILLS, 1; EVIDENCE, 5; FRAUDULENT CONVEYANCES.

DE FACTO.

See CORPORATIONS, 1, 2, 14.

DEFECTIVE MACHINERY.

See LANDLORD AND TENANT, 1-3; NEGLIGENCE, 12, 14; RAILROADS, 42, 43.

DEFINITIONS.

"A, per B." *Kennedy v. Gramling*, 676.

Alimony. *Romains v. Chauncey*, 544.

"As against the person so hindered, delayed, or defrauded." *Beck v. Flynn*, 351.

Bona fide purchaser. *Beck v. Flynn*, 351.

De facto corporation. *American Salt Co. v. Heidenheimer*, 743; *Allen v. Long*, 735.

"Demand, notice, and protest waived, and payment guaranteed." *Bank v. Davenport Sav. Bank*, 392.

Depriving person of property. *Gilman v. Tucker*, 464.

Disaffirmance of deed. *Searcy v. Hunter*, 837.

- Fellow-servant. *Hill v. Northern P. R. Co.*, 621.
 "For the benefit and behoof of the grantor's wife." *Kennedy v. Grumling*, 676.
Functus officio. *Allen v. Long*, 735.
 "Guest." *Pullman etc. Co. v. Lowe*, 325.
 Homestead. *Gallagher v. Smiley*, 319.
 Joint-stock company. *Allen v. Long*, 735.
 "Lodger." *Pullman etc. Co. v. Lowe*, 325.
 "Microbe killer." *Radam v. Capital Microbe etc. Co.*, 753.
 Necessaries. *Searcy v. Hunter*, 837.
 Negligence. *Montgomery v. Muskegon Booming Co.*, 303.
 Pin-pool. *State v. Quaid*, 207.
Pro hac vice. *McNeal v. Braun*, 441.
Quantum meruit. *Goose River Bank v. Willows Lake School*, 605.
 "Ready at any time to settle for the year's rent." *Kennedy v. Grumling*, 676.
 Stockholder. *In re Argus Printing Co.*, 639.
 "Testament d'Aglae Armant." *Succession of Armant*, 153.
 Trespasser. *Cline v. Crescent City R. R. Co.*, 187.
 Unlawful assembly. *People v. Most*, 458.

DELIVERY.

See DEEDS, 2.

DEMURRAGE.

See SALES, 7.

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See APPEAL, 2; CONSPIRACY, 2; HABEAS CORPUS, 1; JUDGMENTS, 16, 17, PLEADING, 2, 4.

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See TRIAL, 8.

DEPOSITIONS.

ADMISSIBILITY OF. — A deposition taken before a commissioner, sworn before an officer lawfully authorized to administer oaths in the state where the commissioner resided, is admissible in evidence in the courts of another state. *McNeal v. Braun*, 441.

DESCRIPTION.

See VENDOR AND PURCHASER, 1, 2.

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EASEMENTS.

LATERAL SUPPORT. — Juxtaposition of lands gives no right of support to buildings erected thereon, unless conferred by grant, conveyance, or statute, and if they are injured by excavating on adjoining land, there is no liability, in the absence of improper motive, or carelessness in doing the work. *Schultz v. Byers*, 435.

EJECTMENT.

1. **JUDGMENT IN EJECTMENT — CONCLUSIVENESS OF, AS TO TITLE.** — Judgment for plaintiff in ejectment is conclusive against defendant on the question of title, from whatever source derived, and forever estops him from asserting a claim of title which existed at the time of the rendition of the judgment. *Hentig v. Redden*, 91.
2. **JUDGMENT IN EJECTMENT AS ESTOPPEL — NEW TITLE, WHEN MUST BE ASSERTED.** — Where defendant in ejectment acquires a new title during the pendency of the action, he must assert it therein before final judgment is rendered against him. Such judgment estops him from afterwards asserting it against the successful plaintiff therein. *Hentig v. Redden*, 91.

See CO-TENANCY, 5.

ELIMINATIONS.

See CORPORATIONS, 3, 6, 8-11; COUNTIES.

EMBEZZLEMENT.

INDICTMENT — NECESSARY AVERMENTS. — An indictment for embezzlement must allege a fiduciary relation sustained by defendant as clerk, agent, servant, or otherwise, made by the statute an element of the offence, and that, by virtue of such relation, he took into his possession the property which he is charged with embezzling, the ownership of which must be alleged with the same degree of certainty required in an indictment for larceny. *State v. Roubles*, 179.

EMINENT DOMAIN.

See RAILROADS, 2-12.

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See HUSBAND AND WIFE, 1-3.

EQUITY.

1. JURISDICTION ON, TO ENTER PERSONAL JUDGMENT. — The fact that the final relief granted may be or is a personal judgment is not conclusive against the jurisdiction in equity, because when jurisdiction is once acquired it will be retained to the end, though relief is reached by a mere personal judgment. *Lynch v. Metropolitan etc. Ry Co.*, 522.
 2. JURISDICTION ON, TO AWARD DAMAGES FOR TRESPASS. — When an injunction is sought against the continuance of trespasses upon complainant's property, a court of equity, in addition to granting the injunction, may close up all matters of legal dispute between the parties, by assessing the loss sustained by the acts which it has restrained. *Lynch v. Metropolitan etc. Ry Co.*, 523.
 3. JURISDICTION. — IF A COURT OF EQUITY ACQUIRES JURISDICTION FOR ONE PERSON, it may retain it generally, and may, when necessary to do complete justice between the parties, ascertain and award damages as incidental to the main relief sought. *Lynch v. Metropolitan etc. Ry Co.*, 522.
 4. INJUNCTION ON SPECIAL DEMAND must be pleaded in the lower court to be available on appeal. *Smith v. Perkins*, 704.
 5. INJUNCTION IN SINKING NO DEFEAT VOIDABLE MUNICIPAL RAILROAD AID BONDS. — A delay of nine years in bringing an action to defeat municipal railroad aid bonds, voidably issued and delivered, is such laches as will defeat the action, when the bonds have passed into the hands of an innocent purchaser for value. *North v. Platte County*, 305.
- See CORPORATIONS, 9, 10; EXECUTORS AND ADMINISTRATORS, 1; MORTGAGES, 11; NEW TRIAL; REAL PROPERTY; TRIAL, 1, 2.

EQUITY OF REDEMPTION.

See MORTGAGES, 12.

ERROR.

See APPEAL; HABEAS CORPUS; PLEADING, 2; SALARY, 11; TRIAL, 4.

ESTATE IN FEE.

See TRUSTS, 4.

ESTATE OF DECEDENTS.

See EXECUTORS AND ADMINISTRATORS.

ESTOPPEL.

See EJECTMENT, 1, 2; EXTRADITION; SCHOOLS, 8.

EVIDENCE.

1. **DEGREE OF PROOF REQUIRED IN CIVIL ACTION INVOLVING CRIMINAL ACT.** — In an action to recover damages for the malicious poisoning of dogs, the facts alleged need only be proved by a preponderance of the evidence, although they also involve a criminal act. *Heiligmann v. Rose*, 804.
 2. **EVIDENCE THAT A WITNESS HAS HEARD** that the defendant has married since the commencement of an action against him for the breach of his promise to marry plaintiff is not admissible in such action, both because it is hearsay, and because evidence of matters occurring after the institution of suit cannot be admitted to aggravate damages. *Dent v. Pickens*, 921.
 3. **DECLARATIONS OF A TESTATOR OR INTESTATE** binding on him or his estate may be given in evidence against his personal representative, in all cases where they would have been competent against himself had he been living and a party to the action. *Hurlburt v. Hurlburt*, 482.
 4. **STATEMENT BY INJURED PARTY TO HIS PHYSICIAN**, purporting to be a description of his symptoms, made for the purpose of medical advice and treatment, is admissible in evidence in an action to recover for the injury, although it was made only a day or two before, or possibly during, the trial. *Fleming v. Springfield*, 268.
 5. **LATENT AMBIGUITY IN DEED** — EVIDENCE TO EXPLAIN. — Where the deeds in a chain of title contain such latent ambiguity in the description as to render them inadmissible in evidence, but such description contains data by which the land conveyed may be identified, extraneous evidence is admissible to explain such ambiguity, and identify the land conveyed. *Frost v. Brath Cattle Co.*, 831.
 6. **LETTER BETWEEN PARTIES TO SUIT, WHEN RELEVANT AND ADMISSIBLE IN EVIDENCE.** — In an action for the price of fire-brick, in which the defendant sets up breach of warranty as a counterclaim, a letter written by the plaintiff to the defendant, containing statements as to the quality of the brick which he proposed to sell to the defendant, is admissible in evidence, and the mere fact that other brick had been shipped to the defendant just previous to the order for those in controversy does not render the letter irrelevant or immaterial, although it does not specifically refer to the brick in controversy, it being a part of the correspondence between them concerning the subject of fire-brick. *Tacoma Coal Co. v. Bradley*, 890.
 7. **SEAL OF COURT ATTACHED TO CLERK'S CERTIFICATE SUFFICIENT.** — In attesting the record of a foreign court, it is only necessary that the seal of the court be attached to the certificate of the clerk. It need not be attached to the record. *Ritchie v. Carpenter*, 877.
 8. **CLERK OF COURT PRESUMED TO BE PROPER CUSTODIAN OF ITS RECORDS.** — It will be presumed, without being certified or otherwise shown, that the clerk of a court of record who has attested its record offered in evidence is the proper custodian of its records. *Ritchie v. Carpenter*, 877.
 9. **FOREIGN JUDGMENT, RECORD OF, ADMISSIBLE IN EVIDENCE WITHOUT CERTIFICATE OF JUDGE THAT CLERK'S ATTESTATION IS IN DUE FORM.** — Under the code of Washington, the records and proceedings of courts of other states are admissible in evidence in that state without the certificate of the judge that the attestation of the clerk having charge of such records is in due form, as required by the act of Congress. *Ritchie v. Carpenter*, 877.
- See ANIMALS, 3; APPEAL, 3, 6, 9; ATTORNEY AND CLIENT; BOUNDARIES;

CORPORATIONS, 18; DEPOSITIONS; FRAUDULENT CONVEYANCES, 2; INSURANCE, 6; JUDGMENT, 9; MARRIAGE AND DIVORCE, 4; MUNICIPAL CORPORATIONS, 17; NAMES; NEGLIGENCE, 9, 14, 15; NEW TRIAL; PARTNERSHIP, 4; PLEADING, 7; RIOT, 6; SALES, 3; SEDUCTION, 2; TRADE-MARKS, 4-7; TRIAL, 7, 8; WITNESSES.

EXAMINATION OF PERSON.

See TRIAL, 8.

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EXCUSABLE HOMICIDE.

See HOMICIDE, 3, 4.

EX DELICTO.

See RAILROADS, 34.

EXCEPTIONS.

See APPEAL, 1, 11; PLEADING, 2.

EXECUTION.

1. **EXECUTION FOR COSTS** is properly issued in the names of the parties to the suit, instead of the names of the officers in whose favor the costs are adjudged. *Smith v. Perkins*, 794.
2. **FOR A LEVY ON THE GOODS OF A STRANGER** to the writ the execution creditor is not liable, unless he was present at such levy, or otherwise directed, aided, or abetted the same. This rule was held applicable where the judgment creditor was a municipal corporation, and the net proceeds of the sale were paid to the mayor, though it was further held that such proceeds might be recovered. *Thomas v. Town of Grafton*, 924.
3. **EXECUTION SALES.** — Purchase of land at public auction by a justice of the peace who issued the execution under which it was sold will not make the sale void. *Smith v. Perkins*, 794.
4. **EXECUTION SALES — COLLATERAL ATTACK.** — In an action of trespass to try title, by a plaintiff who claims under the purchaser at execution sale, a plea in reconvention by defendant in possession, who claims under the defendant in such execution, seeking to avoid such sale for gross inadequacy of price, without making either the execution plaintiff or the purchaser thereunder parties, is a collateral attack, and will be disregarded by the court. *Smith v. Perkins*, 794.
5. **EXECUTION SALES.** — **GROSS INADEQUACY OF PRICE** is insufficient by itself to vacate an execution sale, even on direct attack, though it may be regarded as strongly indicative of fraud. *Smith v. Perkins*, 794.
6. **EXECUTION SALES — ANNULMENT.** — **JUSTICE OF PEACE HAS NO JURISDICTION** to entertain a motion or original suit to set aside a regular or voidable execution sale of land for fraud, irregularity, or gross inadequacy of price, after the sale has been completed and a deed delivered to the purchaser under process from his court. In such cases, resort

must be had to the district court of the county in which the land is situated. *Smith v. Perkins*, 794.

See SEQUESTRUM, 2.

EXECUTION SALE.

See ATTACHMENT, 4.

EXECUTORS AND ADMINISTRATORS.

1. **EXECUTORS, ACCOUNTING BETWEEN.** — EQUITY HAS JURISDICTION over a suit brought by one executor against another who has received all the commissions allowed by the statute for an accounting, and to determine to what portion each is entitled. *Speirs v. Wiener*, 306.
2. **COMPENSATION.** — EXECUTORS ARE NOT NECESSARILY ENTITLED TO SHARE PRO RATA IN THE STATUTORY FEES; and if one has substantially managed the whole business, and had the whole responsibility, a court of equity may refuse to require him to share the statutory fees, or any part thereof, with his co-executor. *Speirs v. Wiener*, 306.
3. **LACHES IN APPLYING FOR ORDER TO SELL PROPERTY OF DECEDENT TO PAY DEBTS.** — A delay of more than twenty years after letters of administration have been granted, before applying for an order to sell the lands of the decedent to pay his debts, is not unreasonable, when such lands have been set aside as dower, and the application is made upon the death of the widow. *Killough v. Hinton*, 19.
4. **ADMINISTRATORS — LIABILITY ON BOND BEFORE FINAL DISCHARGE.** — When a probate court has passed all orders fixing the administrator's final liability to the heirs, and has ordered the amount found due to be paid to them, the administrator's refusal to obey such order on demand is a violation of his trust, which authorizes suit against the sureties on his bond, before his final discharge. *Stewart v. Morrison*, 321.
5. **ADMINISTRATORS. — SUIT AGAINST SURETIES** on an administrator's bond is properly brought in the county where the parties defendant reside, instead of the county of the administration. *Stewart v. Morrison*, 321.
6. **ADMINISTRATORS — SURETIES — PROBATE ORDERS AGAINST, CONCLUSIVE ON.** — Probate court orders ascertaining and fixing the amount finally due by an administrator are conclusive against the sureties on his bond, in a suit against them for his failure to pay over such amount as ordered by the court. *Stewart v. Morrison*, 321.

See NEGLIGENCE, 16.

EXEMPLARY DAMAGES.

See DAMAGES, 5-9; MASTER AND SERVANT, 1; RAILROADS, 30.

EXEMPTION.

See HOMESTEAD.

EXPERTS.

See TRADE-MARKS, 7; WITNESSES, 2, 3.

EXPRESS COMPANIES.

See CARRIERS, 3, 6.

EXTRADITION.

A. PRISONER WHO VOLUNTARILY ACCOMPANIES AN OFFICER INTO THE STATE WITHOUT THE USE OF EXTRADITION PAPERS ISSUED IN HIS CASE CANNOT AFTERWARDS OBJECT TO THE REGULARITY OF SUCH PAPERS. *State v. Cuthall*, 502.

See **HABEAS CORPUS**, 2; **SHERIFFS**, 4.

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FORCEFUL ENTRY AND UNLAWFUL DETAINERS.

ACTION OF UNLAWFUL DETAINER LIES IN FAVOR OF A SUBSEQUENT LESSEE AGAINST A PRIOR LESSEE WHO HAS FORFEITED HIS RIGHTS BY THE NON-PAYMENT OF RENT. *Guffy v. Hull*, 901.

FORECLOSURE.

See **ACTIONS**, 3; **MORTGAGES**, 4-10; **RECEIVERS**, 2.

FOREIGN JUDGMENT.

See **DEEDS**, 7-9; **JUDGMENTS**, 12-14; **NAMES**; **PROCESSES**, 2.

FOREMAN.

See **MASTER AND SERVANT**, 8, 9.

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See **LANDLORD AND TENANT**, 5, 6.

FORGERY.

See **CORPORATIONS**, 7.

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FOURTEENTH AMENDMENT.

See **MUNICIPAL CORPORATIONS**, 2.

FRAUD.

See **DAMAGES**, 6; **DEBTOR AND CREDITOR**, 1, 2; **EXECUTION**, 4-6; **SALER**, 5.

FRAUDULENT CONVEYANCES.

1. **ATTACHMENT.** — A creditor may obtain from his failing debtor ample security for his debt, without being chargeable with a fraudulent intent to hinder and delay other creditors; but if he takes and ties up property of the debtor greatly in excess of security for his debt, he is chargeable with such fraudulent intent, and the property in his hands is subject to attachment by the other creditors. *Smith v. Boyer*, 373.
2. **EVIDENCE OF SUBSEQUENT ACTS AND DECLARATIONS OF VENDOR.** — An exception to the general rule, that the declarations of a party made after he has parted with his interest in the subject-matter of litigation cannot be received to disparage the right or title of an innocent purchaser, exists in cases of fraudulent sales of property to defeat creditors. In these cases the acts and declarations of the debtor while claiming an interest in the property which he asserts he has conveyed are admissible in evidence to prove fraudulent intent. *Smith v. Boyer*, 373.
3. **GRANTEE HAVING KNOWLEDGE OF FRAUDULENT INTENT NOT BONA FIDE PURCHASER.** — A purchaser of an entire stock of goods, constituting the whole of the property of a debtor, who knows that the effect of his alleged purchase will be to hinder and delay, if not to defraud, the creditors of such debtor, is not a *bona fide* purchaser. Such purchaser cannot close his eyes to the circumstances under which the debtor sells, and if he buys at a considerable discount, and the proposed means of payment must have the effect of hindering and delaying the seller's creditors, he will buy at his peril. *Beels v. Flynn*, 351.
4. **FRAUDULENT CONVEYANCES, CREDITORS DEFRAUDED MAY CONTEST.** — The words "as against the person so hindered, delayed, or defrauded," in a statute against fraudulent conveyances by debtors, are intended to limit the right of recovery to those who have suffered by the act complained of. A mere volunteer who has no interest in the result of the suit cannot complain, even if the transfer is known to him to be fraudulent, but a creditor who has been defrauded has an unquestionable right to contest the sale. *Beels v. Flynn*, 351.
5. **CHATTEL MORTGAGE PREFERRING CREDITOR.** — A chattel mortgage, executed in good faith in favor of a *bona fide* creditor, is not necessarily fraudulent and void as to the other creditors of the insolvent mortgagor, although it exhausts his property, and its effect is to hinder and delay them, or to absolutely prevent them from enforcing any part of their claims. *First Nat. Bank v. Ridenour*, 167.
6. **PARENT TO CHILD.** — A deed or conveyance of property made by a parent to his minor child, in consideration of services performed by the latter, is voluntary, without legal consideration, and void as against the creditors of the parent, if made when his remaining property is insufficient to pay his debts. *Stambaugh v. Anderson*, 121.

See LIMITATIONS OF ACTIONS, 1.

FRAUDULENT REPRESENTATIONS.

See SALES, 4, 5.

GAMBLING.

See WAGERS.

GAMING.

PIN-POOL IS NOT A GAMBLING GAME within the sense of the constitution

and laws of Louisiana, and a municipal ordinance prohibiting it as such is illegal and void. *State v. Quaid*, 207.

See **WAGERS**.

GARNISHMENT.

See **ATTACHMENT**.

GRANT.

A GRANT OF A THING IMPLIES THE RIGHT TO ALL THE MEANS OF ENJOYING IT, so far as the grantor was possessed of those means. *Charlesson et al. R. R. Co. v. Leech*, 667.

See **CO-TENANCY**, 3.

GUARANTY.

See **PARTNERSHIP**, 2, 3.

HABEAS CORPUS.

1. **HABEAS CORPUS DOES NOT LIE TO CORRECT ANY IRREGULARITY OF PROCEDURE** where there is jurisdiction. This writ is not the proper remedy for relief against defective indictments for acts which are offenses under criminal laws, although it may be a remedy where an indictment charges as a criminal offense an act which was not made so by the law obtaining at the time the act was done. It cannot be used as a substitute for a demurrer, a motion to quash, a writ of error, or an appeal, or *certiorari*. *Ex parte Prince*, 67.
2. **ARREST WITHOUT EXTRADITION.** — Where a person is arrested in one state without warrant, requisition, extradition, or other legal process, and by force, fraud, deceit, or other means taken into another state to answer to a criminal charge, the latter state acquires no jurisdiction over him, and he is entitled to his discharge on *habeas corpus*. *In re Robinson*, 378.

See **JURISDICTION**, 2; **LARCENY**, 2.

HEARSAY.

See **EVIDENCE**, 2; **TRADE-MARKS**, 5.

HIGHWAYS.

See **MUNICIPAL CORPORATIONS**, 15-17.

HOMESTEAD.

1. **HOMESTEAD LAW LIBERALLY CONSTRUED.** — The homestead law is remedial in its character, and is to receive a liberal construction, to carry into effect its beneficent provisions. *Mitchelson v. Smith*, 357.
2. **HOMESTEAD LAW IN FORCE WHEN CONTRACT IS MADE IS THE LAW APPLICABLE THERETO.** — The homestead statute in force at the time when an indebtedness was incurred remains the law of the contract. *Gallagher v. Smiley*, 319.
3. **WHAT CONSTITUTE.** — A homestead is a parcel of land on which the family reside, and which is to them a home, and is constituted by the two acts of selection and residence in compliance with the terms of the law conferring it. *Gallagher v. Smiley*, 319.
4. **HOMESTEAD RIGHT NOT DIMINISHED BY EXTENSION OF CITY LIMITS WHEN.** — Where the owner of a tract of land near a city has acquired a home-

stead right therein under the law in force at the time he acquired it, such right cannot be diminished by the subsequent enactment, without his consent or procurement, of a law by which the land is included within the corporate limits of the city. *Gallagher v. Smiley*, 319.

5. **HOMESTEAD RIGHT, ONCE VESTED, CANNOT BE DIMINISHED BY LEGISLATURE.** — Where a homestead right has become vested under a law exempting the homestead from sale upon attachment or execution so long as it is owned and occupied by the debtor as a homestead, such right cannot be diminished by a subsequently enacted law without the debtor's consent. And while a judgment may be a lien upon it which may become operative upon sale or abandonment, yet the homestead character cannot be molested for the purpose of enforcing its payment. By the existence of the homestead right, the power of the judgment creditor to appropriate the property to the payment of his judgment is held in abeyance during the continuance of the right. *Gallagher v. Smiley*, 319.
6. **HOMESTEAD, ADDITIONAL LIABILITY WILL NOT BE IMPOSED ON, BY MARSHALING SECURITIES.** — Where a husband and wife execute a mortgage upon their homestead, and other real estate owned by the wife, and she afterwards executes to another person a mortgage upon the same real estate, excepting the homestead, in a suit to foreclose the mortgage the first mortgagee will not be required to exhaust the fund derived from a sale of the homestead before resorting to the land covered by the second mortgage; the court has no authority to impose a greater burden upon the homestead than has been placed thereon by the parties themselves or by the law. This is not a case in which the securities can be marshaled. *Mitchelson v. Smith*, 357.
7. **COSTS OF PARTITION SALE OF HOMESTEAD NOT PAYABLE OUT OF PROCEEDS OF SALE WHEN.** — Where a partition sale is made of property in which a divorced husband and wife are tenants in common, and in which the wife has a homestead interest, it is error to decree that her portion of the costs of the partition suit shall be paid out of the proceeds of the sale. But a personal judgment may be rendered against her for such costs. *Kirkwood v. Donnan*, 770.
8. **PARTITION OF HOMESTEAD AFTER DIVORCE MAY BE MADE WHEN.** — Where a husband and wife owning a homestead are divorced, without any mention or disposition of their property, they become tenants in common of the property, subject to all the rules and regulations of strangers bearing to each other that relation; and the property may be partitioned, although the wife has a homestead interest in it, which is protected from forced sale. And if it is incapable of being equitably partitioned without being sold, it may be sold, and the homestead exemption will then attach to the wife's half of the money. *Kirkwood v. Donnan*, 770.

See MARRIAGE AND DIVORCE, 12; PUBLIC LANDS.

HOMICIDE.

1. **JUSTIFIABLE HOMICIDE, DUTY OF COURT TO STATE TO JURY CIRCUMSTANCES WHICH SHOW KILLING TO BE.** — When the court undertakes to instruct the jury as to the several degrees of homicide, and the facts that constitute each as defined by statute, it should also give to them the circumstances that constitute the exceptions mentioned in the statute wherein the killing is declared to be justifiable or excusable. *Pinder v. State*, 75.

- 3. HOMICIDE JUSTIFIABLE IN SELF-DEFENSE, THOUGH SLAYER'S FEAR NOT WELL FOUNDED.** — To make a homicide excusable on the ground of self-defense, it is not necessary that the accused should have done the killing under the well-grounded belief, justified by the surroundings, that it was necessary to take the life of the person slain in order to save his own life or to prevent great bodily harm to himself. All that is required of the slayer is, to show that, at the time of the killing, he was surrounded by such a condition of affairs as made it, from his stand-point, reasonable for a cautious and prudent man to believe that it was necessary to fire the fatal shot or to strike the fatal blow in order to save himself from death or great bodily harm, even though it may turn out afterwards that the surrounding appearances were deceptive, and that in reality his life or person was in no danger at the time. *Pinder v. State*, 75.

DEFENSE THAT KILLING WAS ACCIDENTAL, RIGHT OF ACCUSED TO MAKE. — Where the defense that the killing of the deceased by the defendant was unintentional, and accidentally brought about by the excusable or justifiable defense of himself against impending danger from a third party, is deducible from the evidence in the cause, it is error for the court to instruct the jury that in order to avail himself of the plea of self-defense, he must show that it was necessary to take the life of the person slain in order to save his life. *Pinder v. State*, 75.

- 4. ACCIDENTAL KILLING OF BY-STANDER BY SHOT FIRED AT ANOTHER, WHEN EXCUSABLE.** — If the killing of the party intended to be hit would, under all the circumstances, have been excusable or justifiable upon the theory of self-defense, then the unintended killing of a by-stander by a random shot fired in the proper and prudent exercise of such self-defense is also excusable or justifiable. And if the killing of the intended victim would have been reduced by the circumstances to murder in the second or third degree, or to manslaughter in any of the degrees, then the unintended and accidental killing of the by-stander resulting from any act designed to take effect upon the intended victim would be likewise reduced to the same grade of offense as would have followed the death of the victim intended to be killed. *Pinder v. State*, 75.

- 5. MURDER OR MANSLAUGHTER, KILLING MUST BE UNLAWFUL TO CONSTITUTE.** — To constitute the crime of either murder or manslaughter, the killing must have been unlawful, — that is, without authority of law, — and the trial court, in its instructions to the jury, in defining murder and manslaughter in the different degrees, should not fail to give to the defendant the benefit of the idea that the killing must have been unlawful or without legal excuse or justification. *Pinder v. State*, 75.

- 6. MANSLAUGHTER IN FOURTH DEGREE, OMISSION TO MENTION IN CHARGE, ERRONEOUS WHEN.** — Where a conviction for manslaughter in the fourth degree might have been warranted by the evidence in a cause, it is erroneous for the court to omit entirely any mention, in its charge to the jury, of the fourth degree of manslaughter, after instructing them that under the indictment they might convict the defendant of either murder in the first or second degree, or of manslaughter in the second or third degree, especially if it omits to intimate to the jury that they had the power to acquit the prisoner if the evidence warranted an acquittal. Such omissions tend to mislead the jury into a belief that they should not do otherwise than to convict of murder in the first or second degree, or of manslaughter in the second or third degree, and that they could not convict of manslaughter in the fourth degree. *Pinder v. State*, 75.

HORSE-RACE.

See *WAGERS*.

HOTELS.

See *INNKEEPERS*.

HUSBAND AND WIFE.

1. **TENANCY BY ENTIRETY** is created by a conveyance of land to a husband and wife which does not state the manner in which they shall hold such land. *Steh v. Shreck*, 475.
 2. **DIVORCE—ENTIRETY.**—Land acquired and held by husband and wife as tenants by entirety on their divorce vests in them as tenants in common. *Steh v. Shreck*, 475.
 3. **TENANCY BY ENTIRETY.**—IT IS NOT AN IMPLIED CONDITION, annexed to an estate by entirety, that each of the grantees shall remain faithful to the obligations of the marriage state, and shall not cause the dissolution of the marital relation upon which the estate depends; and the disregarding of such obligation, resulting in a divorce, does not, therefore, terminate the interest of the guilty spouse in the land held by the entirety. *Steh v. Shreck*, 475.
 4. **TENANCY BY ENTIRETY, WHAT DESTROYS.**—An estate by entirety, being founded upon the marital relation and upon the legal theory of the absolute oneness of husband and wife, cannot continue after that relation is destroyed, and the legal unity existing between the parties to it has been terminated through their separation by divorce. *Steh v. Shreck*, 475.
 5. **ESTATE IN ENTIRETY—CONVEYANCE OF HUSBAND'S INTEREST TO WIFE—RIGHT OF WIFE TO SUE.**—When husband and wife hold an estate in entirety, the husband may convey his interest therein, through a third person, to his wife. The wife may then mortgage the estate, and maintain a suit in relation thereto in her own name. *Donahue v. Hubbard*, 271.
 6. **ESTATE BY ENTIRETIES—STATUTE OF LIMITATIONS.**—When husband and wife own an estate in fee by entireties, the statute of limitations will not run against them during coverture as to an action by them involving the title or possession of the land, because of the disability of the wife. *Johnson v. Edwards*, 580.
 7. **ESTATE BY ENTIRETIES NOT SUBJECT TO CONVEYANCE, ENCUMBRANCE, OR JUDGMENT LIEN.**—A conveyance of land in fee to husband and wife vests the title in them by entireties, with the right of survivorship; and neither can convey or encumber the estate without the assent of the other, nor can the interest of either be sold, under judgment and execution against the other, so as to pass title during their joint lives, or as against the survivor after the death of one of them. *Bruce v. Nicholson*, 562.
 8. **ENTIRETIES—JUDGMENT LIEN AGAINST HUSBAND DOES NOT EXTEND TO HIS CONTINGENT INTEREST IN AN ESTATE HELD BY HIMSELF AND HIS WIFE BY ENTIRETIES.** *Bruce v. Nicholson*, 562.
 9. **MARRIED WOMEN'S SEPARATE PROPERTY, AND ACTIONS IN RELATION THERE TO.**—In North Carolina no limit is imposed upon the wife's power to acquire property by contracting with her husband or a third person, and she may maintain an action in relation to property so acquired, either alone or jointly with her husband. *Blake v. Backley*, 566.
- See **ADULTERY**, 2; **AGENCY**, 1, 2, 4; **HOMESTEAD**, 7, 8; **MARRIAGE AND DIVORCE**; **TRUSTS**, 3, 5.

IDENTITY.

See NAME.

IMPEACHMENT.

See TRIAL, 8.

INADEQUACY OF PRICE.

See EXECUTION, 4-6.

INCREASE OF RISK.

See INSURANCE, 2.

IN CUSTODIA LEGIS.

See ATTACHMENT, 2-4.

INDEMNITY.

See SHERIFF, 1, 2, 3.

INDICTMENT.

See ASSAULT, 1, 2; EMBEZZLEMENT; LARCENY, 2.

INDORSEMENT.

See NEGOTIABLE INSTRUMENTS, 2-4; PARTNERSHIP, 2.

INFANTS.

1. **CONTRACTS—PAYMENT.**—An employer cannot avail himself of nor enforce, by way of an allegation of payment, contracts with his infant employee, which he could not enforce by direct suit. *Meres v. Hy*, 263.
2. **RESCISSIION OF CONTRACT—RETURN OF CONSIDERATION.**—When an infant employee agrees with his employer, by contracts fairly made, for reasonable prices, and beneficial to the infant, to take in lieu of his wages the difference between the price of a horse and cow exchanged, and further sums for the services of a stallion and a bull, for a calf purchased, and for pasturage received, he may, after selling the cow, and the colt resulting from the service of the stallion, disaffirm the contracts during his minority, and recover his full wages, without returning the consideration received, or putting his employer *in statu quo*. *Meres v. Hy*, 263.
3. **INFANT'S DEED IS VOIDABLE, NOT VOID;** and in order to avoid it, he must disaffirm it within a reasonable time. What is such reasonable time is a question of fact. *Searcy v. Hunter*, 837.
4. **RIGHT TO DISAFFIRM DEED.**—The conveyance of land to an innocent purchaser for value by the grantee of an infant will not bar the right of the latter to disaffirm his conveyance within a reasonable time. *Searcy v. Hunter*, 837.
5. **DISAFFIRMANCE OF DEED.**—A conveyance by a grantor or his heirs is one mode of disaffirming his prior deed made during infancy. *Searcy v. Hunter*, 837.
6. **COVERTURE—WHEN EXCUSES LACHES IN DISAFFIRMING A DEED.**—A married woman may be barred by lapse of time from disaffirming her deed made during infancy; but her coverture should be considered in

determining, as a question of fact, whether the disaffirmance has been attempted within a reasonable time or not. *Searcy v. Hunter*, 837.

7. **ATTORNEY FEES AS NECESSARIES.** — Beneficial legal services in defense of the rights of an infant may be considered as necessities, and constitute a valid consideration for a deed to a share of the land recovered. *Searcy Hunter*, 837.

See NEGLIGENCE, 4, 12; RAILROADS, 25, 26, 29, 31; SEDUCTION.

INFRINGEMENT.

See TRADE-MARKS, 2-4.

INHERITANCE.

See TRUSTS, 4.

INJUNCTION.

1. **JURISDICTION — STATUTE.** — An injunction will not issue to restrain the operation of a valid statute. *State v. Nelson County*, 609.
2. **MANDATORY INJUNCTION WILL BE ISSUED** only when a court of law cannot grant adequate relief, or where full compensation in damages cannot be made. *Atchison etc. R. R. Co. v. Long*, 225.

INNKEEPERS.

"GUEST" AND "LODGER" DEFINED. — Any one away from home, receiving accommodations at an inn as a traveler, is a guest, and entitled to hold the innkeeper responsible as such. Generally, a lodger is one who, for the time being, has his home at his lodging-place. *Pullman etc. Co. v. Lowe*, 325.

See ACTIONS, 2; ATTACHMENT, 4; EQUITY, 2; JUDGMENT, 4-8, 22; JURISDICTION, 1; LICENSES; NUISANCE, 1; PARTNERSHIP, 5; WATERS AND WATER-COURSES.

INJURY.

See TRIAL, 2.

IN REM.

See ATTACHMENT, 1.

INSANE PERSONS.

INSANITY AS DEFENSE IN CRIMINAL CASE — ACCUSED NOT REQUIRED TO PROVE, BEYOND REASONABLE DOUBT. — In criminal cases, where the plea of insanity is set up as a defense, and evidence is introduced which tends to rebut the presumption of sanity on the part of the accused, if the jury, after considering all the evidence, entertain a reasonable doubt as to his sanity, it is their duty to acquit him. It is therefore error for the trial judge, in such a case, to charge that "when insanity is set up as a defense in a criminal case, it must be established to the satisfaction of the jury by a preponderance of the evidence, and a reasonable doubt of the defendant's sanity raised by all the evidence does not justify an acquittal." *Armstrong v. State*, 72.

INSOLVENCY.

DISCHARGE IN, NOT BAR TO RECOVERY, WHEN. — Where a decree of foreclosure is rendered against a party subsequent to his discharge in insol-

vency, but before such discharge is entered, and he fails to apply to the court to limit the plaintiff's recovery in the foreclosure suit to the proceeds of the sale thereunder, the discharge will not prevent a recovery for any deficiency that may remain after a sale of the mortgaged premises. *Leisure v. Kneeland*, 888.

See MORTGAGES, 7, 8; RAILROADS, 44-52; RECEIVERS, 1.

IN STATU QUO.

See INFANTS, 2.

INSURANCE.

1. **CONDITION AVOIDING POLICY** if the property insured shall become encumbered by a chattel mortgage is reasonable and valid. *Olney v. German Ins. Co.*, 281.
2. **LEASED PREMIUMS — INCREASE OF RISK.** — Where the house insured was occupied by a tenant at the time of the delivery of the policy and of the loss, and the tenant, without the knowledge or consent of the insured, erected an addition to such house, such change does not avoid the policy, unless it contains a stipulation that an increase of risk by the tenant shall render it void, in addition to a condition that it shall be void if the risk is increased by any means within the knowledge or control of the insured. *Nebraska etc. Ins. Co. v. Christensen*, 407.
3. **CHANGE IN INTEREST.** — THE EXECUTION OF A CHATTEL MORTGAGE BY A PARTNER on the partnership chattels, and insured for the benefit of the firm, is such a change in interest in the subject of insurance as will render it void. *Olney v. German Ins. Co.*, 381.
4. **LEASED PREMIUMS — ILLEGAL USE.** — Where a house insured is occupied by a tenant at the time of the delivery of the policy and of the loss, the fact that the premises were used for an unlawful purpose, as for prostitution, without the knowledge or consent of the insured, will not avoid the policy, when it does not prohibit such illegal use, and the loss does not result therefrom. *Nebraska etc. Ins. Co. v. Christensen*, 407.
5. **WAIVER OF CONDITIONS RELATING TO PAYMENT OF PREMIUM.** — Conditions contained in a policy of insurance, intended for the benefit of the company, and relating to the payment of premiums, may be waived by it. *Nebraska etc. Ins. Co. v. Christensen*, 407.
6. **EVIDENCE SHOWING WAIVER OF PAYMENT OF PREMIUM.** — Evidence that an insurance company and has often extended time to others and to the insured for the payment of premiums on other policies, that the policy in suit was delivered without payment of premium or subsequent demand therefor, and that the company accepted part of the premium due when tendered, is sufficient to prove a waiver of a condition in the policy exempting the company from liability unless the premium is actually paid; and it cannot, after loss, urge as a defense that the premium was not all paid. *Nebraska etc. Ins. Co. v. Christensen*, 407.
7. **INSURANCE POLICY — PERIOD OF LIMITATION STIPULATED IN, BEGINS TO RUN FROM DATE OF FIRE.** — Where a policy of fire insurance contains a stipulation that no action upon the policy shall be sustained unless commenced within six months after the time the fire shall have occurred, the period of limitation begins to run from the date of the fire, although the policy also provides that no loss shall become due and payable until proof of loss is made and examined into by the insurance company. *State Ins. Co. v. Meesman*, 870.

See VENDOR AND PURCHASER, 2.

INSTRUCTION.

See APPEAL, 8; DAMAGES, 7, 8; HOMICIDE, 1, 6; SALES, 11, 12; TRIAL, 9, 10.

INSTRUMENT.

See WILLS, 1.

INTENT TO KILL.

See ASSAULT, 1.

INTEREST.

See DAMAGES, 4; JUDGMENT, 12.

INTERSTATE COMMERCE.

1. JURISDICTION — INTERSTATE COMMERCE ACT. — One who claims damages for a violation of the interstate commerce act cannot maintain his action in a state court, but must bring it either before the interstate commerce commission or a federal court. *Copp v. Louisville etc. R. R. Co.*, 198.
2. POWER OF STATE TO REGULATE. — When state legislation is not in conflict with any law passed by the federal Congress in pursuance of its powers, and is merely intended and operates to aid commerce, and to expedite instead of hindering the safe transportation of persons or property from one state to another, it is not repugnant to the federal constitution, and will be enforced, either as supplementary to federal statutes relating to the same subject, or in lieu of such statutes, when they do not exist. *Bagg v. Wilmington etc. R. R. Co.*, 569.
3. POWER OF CONGRESS TO REGULATE. — The power of the federal Congress over commerce between the states is, as a general rule, exclusive, and its inaction is equivalent to a declaration that it shall be free of any restraint which it has a right to impose, except by such state statutes as are passed for the purpose of facilitating the safe carriage of goods and passengers, and are not in conflict with valid federal statutes. *Bagg v. Wilmington etc. R. R. Co.*, 569.
4. TAXATION. — LICENSE TAX of one tenth of one per cent on the total amount of purchases in or out of the state, made by merchants or other dealers within the state, "except on purchases of farm products from the producer," is a valid state occupation tax; nor does the exception render it invalid as violating the principle of uniformity of taxation, or denying to such dealers the equal protection of the laws, or as a regulation of interstate commerce, or as a discrimination against the products of other states. *State v. Stevenson*, 595.
5. TAXATION — LICENSE TAXES. — When transactions are between parties in different states, or consist of the transportation of freight or passengers from one state to another, a state tax is prohibited, whether it creates discrimination or not; but when the tax is on an occupation carried on in a state, or on property therein, it is valid, unless it discriminates against articles brought from other states, or taxes the sale of such articles in the original package. *State v. French*, 590.
6. LICENSE TAX. — A tax imposed on merchants and all other dealers, of one tenth of one per cent of their purchases in or out of the state, is a license or occupation tax for the privilege of carrying on business within the state, and is valid, both under the state constitution and that portion of the federal constitution giving power to Congress to regulate interstate commerce. *State v. French*, 590.

See STATUTES, 4, 5.

INTERVENTION.

INTERVENTION, PETITION IN, PROPERLY STRICKEN OUT, WHEN. — When parties plaintiff, claiming in their original petition as heirs and legatees of their father, file at the time of the trial, in substitution and lieu of such original petition, an amended petition, claiming adversely to their father, and wholly as heirs of their mother, they in effect abandon their original cause of action, and the amended petition so filed may be treated as an original plea in intervention filed on the eve of the trial, seeking to introduce new issues, and calculated to protract the litigation, and the court may in its discretion, upon motion, strike it out without prejudice. *McIlhenny v. Biss*, 705.

INTOXICATING LIQUORS.

See CRIMINAL LAW.

JOINDER.

See ACTIONS, 2.

JOINT LIABILITY.

See JUDGMENTS, 1.

JOINT-STOCK COMPANIES.

See ASSOCIATIONS, 1-4.

JUDGMENT.

1. **JOINT OR SEVERAL.** — When separate causes of action are alleged by each plaintiff, a judgment for plaintiffs for an aggregate sum, distinctly stating the amount which each of them is to receive, is not erroneous, as being joint instead of several as to them. *Stewart v. Morrison*, 521.
2. **LIEN — EXTENT OF.** — The lien of a judgment does not vest in the judgment creditor any estate or interest in the real property subject to it. It extends to and embraces only such estate, legal and equitable, in the real property of the judgment debtor, as he could sell or dispose of at the time it attached, and creates, and during its continuance secures, the right of the judgment creditor to have his debt paid out of the proceeds of the sale of the property. *Bruce v. Nicholson*, 552.
3. **PARTIES.** — A judgment against defendants who are parties to an action as judgment creditors is admissible and conclusive against them in a subsequent action to enforce a liability arising from their having indemnified a sheriff against the consequences of certain wrongful acts. In neither action did they appear in any representative capacity, and therefore the judgment in one is evidence against them in the other. *Dyett v. Hymon*, 533.
4. **JUDGMENTS WITHOUT NOTICE — RELIEF BY INJUNCTION.** — One against whom a judgment has been rendered without notice may obtain relief from it by injunction, although it may appear, from an official return or by the recitals in the final judgment, that he has been duly served, or that he has voluntarily appeared, either in person or by attorney. *Hambden v. Knight*, 818.
5. **JUDGMENTS WITHOUT NOTICE.** — RELIEF BY INJUNCTION from a judgment without notice will not be given when the party complaining has an adequate remedy at law, nor, as a general rule, when he has an opportunity

- to make a motion for a new trial at the term at which the judgment was rendered. *Hamblin v. Knight*, 812.
6. JUDGMENTS WITHOUT NOTICE.—*RELIEF BY INJUNCTION* AGAIN A judgment obtained without notice should be sought without delay, or the delay caused by showing the party seeking relief has a meritorious defense to the action; otherwise relief will not be granted. *Hamblin v. Knight*, 812.
 7. JUDGMENT WITHOUT NOTICE.—*NEW TRIAL*.—*RELIEF FOR NEW MOTION FOR*. — WHEN RELIEF BY INJUNCTION is sought during the continuance of the term at which a judgment was rendered, an allegation of the existence of any circumstances making an application for a new trial an inefficient or less effective remedy than a separate suit would afford, is sufficient to entitle the party to process by injunction instead of being confined to a motion for a new trial. *Hamblin v. Knight*, 818.
 8. JUDGMENT WITHOUT NOTICE.—*LEGAL REMEDY*.—*WHEN MUST BE PURSUED*. — When a petition for an injunction against a judgment rendered without notice admits that the term of the court at which the judgment was rendered had not adjourned at the time the petition was filed, the petitioner is not entitled to relief, in the absence of a showing that his remedy by motion for a new trial was inadequate. *Hamblin v. Knight*, 818.
 9. JUDGMENT AS EVIDENCE AGAINST SURETIES IN INDEMNITY BOND. — In an action against sureties on a bond given by plaintiff in execution to a sheriff, to indemnify him against judgments to which he shall be a party, by reason of a levy on property claimed by a third party, a judgment so obtained against the officer, in an action defended for him by the principal in the bond, is conclusive against the sureties, in the absence of fraud and collusion, although they had no notice of the pendency of the action in which such judgment was obtained. *Plummer v. Ballman*, 809.
 10. JUDGMENT, JOURNAL ENTRY OR, NEED NOT BE SIGNED BY JUDGE. — The signature of the judge to the journal entry of a judgment offered in evidence is not necessary to make it valid. *Ritchie v. Carpenter*, 877.
 11. JUDGMENT BY DEFENDANT AGAINST DEFENDANT FAILING TO ANSWER REMOVED BY SUPREME COURT. — Where one of several defendants in the court below fails to answer the plaintiff's petition, which states a good cause of action, and the others having made successful defenses, judgment is rendered in favor of all the defendants, the supreme court will reverse the judgment as to the one who failed to answer, and will render judgment against him. *American Salt Co. v. Heidenshain*, 742.
 12. OBJECTIONS, WHAT NOT TRIABLE IN ACTION ON FOREIGN JUDGMENT. — Where an action is brought in Washington upon a judgment of a district court of Kansas, rendered in a case originally instituted before a justice of the peace, objections that the action in Kansas was instituted and carried on without any complaint having been filed, that there was no proof that the justice of the peace had any authority to certify the case to the district court, and that he did not in fact so certify it, cannot be raised in the action in Washington. *Ritchie v. Carpenter*, 877.
 13. INTEREST ON COSTS INCURRED IN FOREIGN JUDGMENT, JUDGMENT MAY BE REMOVED FOR. — In an action on a foreign judgment, a verdict may be rendered for the aggregate amount of the judgment rendered in the foreign state, including the costs of the proceeding, with interest thereon. *Ritchie v. Carpenter*, 877.
 14. JUDGMENTS OF OTHER STATES.—*SERVICE*. — NO PRESUMPTION IN FAVOR of the validity of the judgment of another state exists, where it appears

from the record that the defendant was a non-resident, and it does not appear affirmatively that service of process was made upon him in that state. In a suit on such judgment, it is a good defense to show that defendant was not a resident, and that no proper service was made on him in the state where the judgment was rendered. *Rand v. Hanson*, 210.

15. **RES JUDICATA**. — ORDER OF A COURT OF CHANCERY DIRECTING A WRIT TO ISSUE to place the purchaser at a judicial sale in possession of lands, made after a full hearing, at which the issuing of the writ was resisted on the ground that the purchase had been made in trust for the original judgment debtor, and under an agreement entitling him to remain in possession, and to a conveyance of the property on his complying with certain conditions, is conclusive against him in a subsequent suit in equity seeking to enforce this same agreement upon which he relied in resisting the application for a writ of possession. *Burner v. Hewener*, 948.
16. **JUDGMENT ON DEMURRER AS RES JUDICATA**. — Final judgment on general demurrer, after plaintiff has declined to amend, precludes him from recovering upon the same cause of action in another suit. *Scherff v. Missouri Pac. Ry Co.*, 828.
17. **JUDGMENT ON DEMURRER, WITH LEAVE TO AMEND, AS RES JUDICATA**. — Judgment on general demurrer, with leave to plaintiff to amend, is not final; and if he subsequently suffers a nonsuit and obtains a dismissal, the judgment on demurrer is not conclusive against him as *res judicata*. *Scherff v. Missouri Pac. Ry Co.*, 828.
18. **RES JUDICATA**. — A judgment or decree of a court of competent jurisdiction is final, not only as to the subject-matter, but also as to every other matter which the parties might have litigated and had decided in the case. *Hentig v. Redden*, 91.
19. **RES JUDICATA**. — **TEST OK**. — If it is doubtful whether a second suit is for the same cause of action as the first, it is a proper test to consider whether the same evidence would sustain both, and what was the particular point or matter determined in the former action. *Gallaher v. Moundsville*, 942.
20. **JUDGMENT TO HAVE AUTHORITY OF RES JUDICATA** must be a definitive judgment of condemnation or dismissal, upon the merits of the case. *Scherff v. Missouri Pac. Ry Co.*, 828.
21. **RES JUDICATA**. — A JUDGMENT IS CONCLUSIVE IF ON A DIRECT POINT, though the object of the two suits is different. *Gallaher v. Moundsville*, 942.
22. **ORDER DISSOLVING AN INJUNCTION** issued to prevent the issuing and selling of certain bonds of a municipal corporation, though not followed by a final judgment dismissing the bill, is conclusive in a subsequent suit brought to restrain the levy of taxes to pay such bonds and interest thereon, when all the grounds for the issuing of the injunction in the second suit were equally available against dissolving it in the first. *Gallaher v. Moundsville*, 942.
23. **RES JUDICATA**. — THE PARTIES to two suits must be regarded as the same, when the complainants in both were certain tax-payers of a municipality suing on behalf of themselves and all other tax-payers, and the defendants in both, though consisting of different persons, were, in each suit, representing and acting for the municipality without any private interest. *Gallaher v. Moundsville*, 942.
24. **RES JUDICATA**. — A FINAL ADJUDICATION BY A COURT OF COMPETENT JURISDICTION upon the merits of the controversy, so long as it remains

unreversed, is a bar to any new suit between the same parties for the same cause of action, and in a court of chancery, at least, the form of the proceeding is immaterial, provided the judgment has been reached upon the merits and with full opportunity for a fair hearing. *Burner v. Hevener*, 948.

25. RES JUDICATA. — ORDERS MADE UPON MOTIONS, PETITIONS, OR RULES affecting substantial rights and from which an appeal lies, if the matter in question has been fully tried, are as conclusive upon the issues necessarily decided as are final judgments or decrees. *Burner v. Hevener*, 948.
 26. FINDINGS AFFIRMED BY JUDGMENT AS RES JUDICATA. — A finding of fact in a foreclosure suit in favor of a defendant therein, that he has a valid tax deed subsequent to the mortgage, and is the owner and in the possession of certain land described therein, which finding is affirmed by the judgment of foreclosure as to the other land described, specially excepting his land therefrom, is conclusive as to his title thereto, as to all the parties and those claiming under them, in a subsequent action of ejectment for the same land. *Redden v. Metzger*, 97.
 27. WANT OF JURISDICTION, EXTENT TO WHICH IT MAY BE SHOWN. — Want of jurisdiction may be shown by the defendant, even to the extent of contradicting express recitals in the record. *Rückle v. Carpenter*, 577.
 28. EXECUTION SALES — ATTACK — PERIOD OF LIMITATION. — Ten years are allowed in which to make a direct attack upon proceedings subsequent to judgment, in selling land, but an attack upon the judgment itself must be made within two years from the time it was rendered. *Smith v. Perkins*, 794.
 29. SATISFACTION OF. — COUNTY WARRANTS AND APPROVED PROMISSORY NOTES, received and accepted as cash in satisfaction of a judgment and execution, will be treated as a good payment in cash. *Pasewalk v. Bellman*, 399.
- See ACTIONS, 2, 3; ATTACHMENT, 1; EJECTMENT, 1, 2; EQUITY, 1; HUSBAND AND WIFE, 7, 8; PLEADING, 7; TRIAL, 11.

JUDGMENT LIEN.

See TRUSTS, 1.

JUDICIAL PROCEEDINGS.

See LIBEL, 5, 6.

JUDICIAL SALE.

See ACTIONS, 3; CONTRACTS, 6; EXECUTION, 2-6; TRUSTS, 1.

JURISDICTION.

1. ORIGINAL JURISDICTION TO ISSUE INJUNCTIONS will not be exercised by the supreme court, when the question presented is one of merely local concern, affecting a county and its tax-payers only. *State v. Nelson County*, 609.
2. ORIGINAL JURISDICTION TO ISSUE EXTRAORDINARY WRITS — WHEN EXERCISED. — The writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, and injunction will not be issued by the supreme court, in the exercise of its original jurisdiction, except in a limited class of cases, where the writs, except *habeas corpus*, are sought for on motion of the attorney-general, under information as prerogative writs, as in cases *publici juris*, and those affecting the sovereignty of the state, its franchises and pro-

rogatives, or the liberty of the people. In all other cases, the writs should be issued by the district courts or by the judges thereof. *State v. Nelson County*, 609.

3. JURISDICTION OF FEDERAL COURT, WHEN EXCLUSIVE. — Where a United States statute gives a right without specifying a remedy, it may be prosecuted in a state court; but when a right is thus given, and a specific remedy provided, or a new power and the means of executing it are therein granted, such right and power can be enforced only in the method provided by such statute. *Copp v. Louisville etc. R. R. Co.*, 198.
4. REMEDY — STATE OR FEDERAL COURT. — Legal or equitable rights acquired under state laws may be vindicated in a state court, or if the parties reside in different states, in a federal court, or if such rights are acquired under United States laws, in state or federal courts, subject to the qualification that where a right arises under United States law, Congress may give a federal court exclusive jurisdiction. *Copp v. Louisville etc. R. R. Co.*, 198.
5. PRESUMPTION THAT COURT OF RECORD IS COURT OF GENERAL JURISDICTION. — Where an action is brought upon a judgment of a court of record of another state, it will be presumed, in the absence of evidence to the contrary, that such court is a court of record; and the recitals in the record of such court of the jurisdiction acquired over the defendant's person in that proceeding are *prima facie* evidence thereof. *Ritchie v. Carpenter*, 877.

See ACTIONS, 3; APPEAL, 4; EQUITY, 1-3; HABEAS CORPUS, 1; INTERSTATE COMMERCE; JUDGMENT, 27; MARRIAGE AND DIVORCE, 7; NAMES; PLEADING, 6; PROCESS, 1; TRIAL, 6.

JURY.

See APPEAL, 6, 7; ASSAULT, 2; NEGLIGENCE, 13; RIOT, 6; TRIAL; WITNESSES, 3.

JUSTICE OF THE PEACE.

See EXECUTION, 3, 6.

JUSTIFIABLE HOMICIDE.

See HOMICIDE, 1, 2.

LACHES.

See EQUITY, 4, 5; EXECUTORS AND ADMINISTRATORS, 3; INFANTS, 6; JUDGMENT, 6.

LANDLORD AND TENANT.

1. LIABILITY OF LANDLORD TO TENANT'S SERVANT — DEFECTIVE MACHINERY. — Where the owner of a building leases part of it, and then undertakes for a consideration to transmit power to the leased premises for the use of his tenant, he is bound to exercise reasonable care that the pulleys and shafting used for that purpose are in a suitable condition to do the work without danger to persons rightfully on the leased premises, and themselves in the exercise of due care; and if a servant of the tenant so on the premises is injured by the negligence of the landlord in the use of such shafting and pulleys, the latter is liable therefor, although by the terms of the lease the tenant is bound to keep such appliances in repair. *Poor v. Sears*, 272.

3. NEGLIGENCE OF LANDLORD TOWARDS TENANT'S SERVANT—DEFECTIVE APPLIANCES—EVIDENCE OF CONTROL.—In an action against the owner of a building, who, after leasing part thereof, continued to furnish his tenant with power, by means of belting and a defective shaft, on the leased premises, causing injury to a servant of such tenant, evidence that prior to the accident such landlord continued to oil the defective shaft and to lace the belting thereon, and that subsequently to the accident he repaired the damage done to a stairway by the fall of such shaft, and ceased belting to be sheathed, is competent to show that, after leasing part of the building, he continued to use and exercise control over the shafts and belting therein. *Poor v. Sears*, 272.
3. NEGLIGENCE OF LANDLORD TOWARDS TENANT'S SERVANT—DEFECTIVE APPLIANCES—CONTRIBUTORY NEGLIGENCE.—Where the owner of a building, after leasing part thereof, continues to furnish his tenant with steam-power, by means of defective appliances, on the leased premises, thereby causing an injury to a servant of the tenant, the negligence of such tenant or of his employees in failing to warn such servant of danger cannot be imputed to the latter so as to constitute contributory negligence on his part, nor relieve the landlord of the negligence of himself or his servants. The question of due care on the part of the injured servant is to be determined by his own action under the existing circumstances, so far as they were known to him. *Poor v. Sears*, 272.
4. RULE THAT TENANT HOLDING OVER IS DEEMED TO HOLD UNDER TERMS OF PRIOR LEASE NOT APPLICABLE TO CITY.—A tenant who holds over after the end of his term, with the consent of his landlord, is deemed to be in possession upon the terms of his prior lease, upon the ground that the parties are presumed to have tacitly renewed the former agreement. But this rule is not applicable where the tenant is a municipal corporation, because the law will not imply a contract as against it. Such corporation is, however, bound to pay for the premises for the time its officers have occupied them. *San Antonio v. French*, 763.
5. LEASE, FORFEITURE OF.—If a lease of land for drilling for oil and gas provides that the lessee will commence operations within nine months after the execution of the lease, or will thereafter pay the lessor \$1.33½ per month until work is commenced, and that the failure to comply with each of these conditions shall work an absolute forfeiture of the lease, and the lessor is, by the lease, entitled to remain in possession of the land, subject to the lessee's right to bore for oil, the lease is forfeited and terminated if, after the lessee is in default, the lessor refuses to accept payment of the arrears of rent and leases the same property for the same purpose to another person. *Guffy v. Hukill*, 901.
6. LEASE, WAIVER OF.—FORFEITURE OF A LEASE for non-payment of rent cannot be made the lessor after he has granted a lease of the same premises to another lessee. *Guffy v. Hukill*, 901.
7. STATUTE OF FRAUDS—MEMORANDUM OF LEASE.—A written agreement to sublet rooms, the lease therefor "to be in substantial accordance with the blank form hereunto annexed, and to be made subject, in all respects, to the terms and conditions of" an agreement and lease between the owner of the building and the sublessor, is a sufficient memorandum of the terms of such sublease to satisfy the statute of frauds, after the lease to such sublessor has been executed. *Freeland v. Riss*, 244.
8. CONTRACT FOR LEASE—EVIDENCE OF COMPLIANCE BY LESSOR AND WAIVER BY LESSEE.—In an action to recover for a breach of an agreement to

execute a lease, evidence that the lessor wrote to the lessee in regard to the lease, and subsequently sent him a copy of a lease for his signature, which copy he retained without signing and without objection, shows a compliance by the lessor with the agreement to execute a lease, and an unwillingness on the part of the lessee to accept a lease in any form, as well as his waiver of a strict compliance by the lessor with the terms of the agreement. *Freeland v. Ritz*, 244.

See FORCIBLE ENTRY; INSURANCE, 2, 4; NEGLIGENCE, 13; VENDOR AND PURCHASER, 2.

LATERAL SUPPORT.

See NEGLIGENCE; EASEMENTS.

LARCENY.

1. GREENBACKS AND NATIONAL BANK BILLS, SUBJECT OF. — Both greenbacks and national bank bills are the subject of larceny in Florida. *Ex parte Prince*, 67.

2. INDICTMENT FOR, SUFFICIENCY OF CHARGE BE INQUIRED INTO ON HABEAS CORPUS, WHEN. — Under a statute which punishes the crime of larceny of any money, goods or chattels, or bank notes, the sufficiency of an indictment which charges the larceny of diverse bills commonly known and denominated as national currency, giving their denomination and value, cannot be inquired into on *habeas corpus*. *Ex parte Prince*, 67.

LEASE.

See LANDLORD AND TENANT.

LEGISLATURE.

DENIAL OF RELIEF IN THE COURTS. — It is not competent for the legislature to deny, for any cause, to a party who has been illegally deprived of his property, access to the constitutional courts of the state for relief. *Gilman v. Tucker*, 464.

LETTERS.

See EVIDENCE, 6.

LEVY.

See ATTACHMENT, 2, 3; EXECUTION, 2.

LIABILITY.

See SHERIFF, 2-4.

LIBEL.

1. PRIVILEGED COMMUNICATION is one made under such circumstances as to repel the legal inference of malice, and to throw upon the accused the burden of showing malice otherwise than by merely proving the falsity of the statement made. *Rotkopf v. Dunkle*, 432.

2. PRIVILEGED COMMUNICATION. — A voluntary communication, made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, whether made in response to an inquiry or not, if made to a person having a corresponding interest or duty, although it contains exoneratory matter, *AM. ST. REP., VOL. XXVI.—64*

which, without this privilege, would be actionable as libelous. *Rothholz v. Dunkle*, 432.

2. **PRIVILEGED COMMUNICATION.**—A communication made by a cashier of a bank to a stockholder therein, regarding the financial standing of a surety on an official bond to the bank, is privileged, whether made in response to an inquiry by such stockholder or not. *Rothholz v. Dunkle*, 432.
4. **IN PRIVILEGED COMMUNICATIONS, THE PARTY MAKING THEM IS PROTECTED** from the infliction of damages, unless the occasion making them privileged was used as a means of inflicting a willful and malicious injury upon another. *Gardinal v. McWilliams*, 195.
5. **PRIVILEGE, TO WHOM EXTENDS.**—Communications made in the course of duty in judicial or legislative proceedings are absolutely privileged and free from liability, civil or criminal. This privilege extends to parties, counsel, witnesses, jurors, and judges in judicial proceedings, and to members and attaches in legislative proceedings. *Gardinal v. McWilliams*, 195.
6. **PRIVILEGED COMMUNICATIONS—JUDICIAL PROCEEDINGS—BURDEN OF PROOF.**—If an occasion, such as a judicial proceeding, exists which renders the communication complained of privileged, the only inquiry is whether or not the matter was pertinent to the occasion. If it was, this is an absolute defense, and depends in no respect upon the good faith of the party complained of. The burden of proof is on the complainant to show want of occasion, or if it existed, that the matter was not pertinent, and that the communication was made with malice in fact, with design to injure the complainant. *Gardinal v. McWilliams*, 195.
7. **OCCASION WHICH RENDERS COMMUNICATIONS PRIVILEGED REBUTS ANY INFERENCE OF MALICE** arising from a statement prejudicial to another, and casts the burden upon him to prove malice in fact, and also that the party making them was actuated by motives of personal spite and ill-will, independent of the occasion on which the communications were made. *Gardinal v. McWilliams*, 195.
8. **IN LIBEL AND SLANDER, QUESTIONS OF DAMAGE AND MALICE** are mixed questions of law and fact, of which courts are more competent to judge than juries are. *Savoie v. Scanlan*, 200.

See SLANDER.

LICENSE.

STATUTE OF FRAUDS.—PAROL LICENSE TO BUILD AND MAINTAIN A WALL on the land of another, though fully executed, is revocable, and therefore equity will not enjoin the removal of such wall by the land-owner. *Oreedale v. Lantigan*, 551.

LICENSE TAX.

See INTERSTATE COMMERCE, 4-6.

LIEN.

See JUDGMENTS, 2; MORTGAGES; RAILROADS, 48; RECEIVERS, 4.

LIMITATIONS OF ACTIONS.

1. **STATUTE OF LIMITATIONS BEGINS TO RUN FROM DATE OF RECORDING OF FRAUDULENT CONVEYANCE, WHEN.**—While the person against whom a

fraud has been perpetrated has four years from the discovery of the fraud within which to commence his suit for relief, the fraud will be deemed to have been discovered when such facts are known, either actually or constructively, as would amount to knowledge, or which would naturally suggest such inquiries as, if followed up, would lead to such knowledge. Where, therefore, an insolvent debtor executes and records a deed of land to his wife, and it appears from the evidence that his creditor was fully aware of his financial condition, and that the conveyance to his wife could not be otherwise than fraudulent, or that by the most superficial examination suggested by facts within his knowledge he might have had full and complete knowledge of the condition of the title, the statute of limitations will begin to run from the date of the recording of the conveyance, and will bar the creditor's right to relief after the lapse of four years from that date. *Wright v. Davis*, 347.

2. **STATUTE OF LIMITATIONS, ACTION AGAINST STOCKHOLDERS OF CORPORATION FOR WITHDRAWING ITS ASSETS WITHOUT PAYING ITS DEBTS BARRED BY.** — A cause of action set up in a petition, that the defendants, as stockholders of a corporation, had withdrawn its assets, leaving the debt due to the plaintiff unpaid, is one that is barred by the statute of limitations after five years. *American Salt Co. v. Heidenheimer*, 743.
3. **PLEADING ACKNOWLEDGMENT OR NEW PROMISE.** — If it is sought to avoid the effect of the statute of limitations by some subsequent promise, either express or implied, the action must be upon such promise as a cause of action, and not upon the original indebtedness. *Fleming v. Fleming*, 694.
4. **PAYMENTS UPON A PROMISSORY NOTE BEFORE THE STATUTE OF LIMITATIONS** has interposed any obstacle to its enforcement do not prevent the running of that statute; and if they are relied upon as new promises, they must be pleaded as such. *Fleming v. Fleming*, 694.
5. **PLEADING NEW PROMISE, WHAT IS NOT.** — A complaint which alleges the making of a promissory note, that it is past due, and that no payments have been made thereon, except as follows (stating the amounts and dates of certain payments), is based upon the note alone, and will not be treated as a complaint upon a new promise arising from the acknowledgment of continuing liability implied from such payments, especially if the complaint does not clearly state that the payments were made by the defendant. *Fleming v. Fleming*, 694.

See **ADVERSE POSSESSION**; **CO-TENANCY**, 5; **HUSBAND AND WIFE**, 6; **INSURANCE**, 7; **JUDGMENT**, 23.

LUNATICS.

See **INSANE PERSONS**.

MALICE.

See **LIBEL**, 1, 8; **MALICIOUS PROSECUTION**; **PLEADING**, 1; **SLANDER**, 3, 4.

MALICIOUS PROSECUTION.

1. **PROBABLE CAUSE—FINDING AS EVIDENCE.** — The finding of a committing magistrate that an offense has been committed, and that there is probable cause to believe the defendant guilty thereof, is only *prima facie* and not conclusive evidence of probable cause, in an action for malicious prosecution, brought by such defendant after his discharge, against the complaining witness. *Ross v. Hizon*, 123.
2. **PROBABLE CAUSE.** — **CONVICTION** is generally conclusive of probable cause

in actions for malicious prosecution, yet it may be overcome by showing that it was procured by fraud, undue means, or the false testimony of the prosecution. *Boss v. Hison*, 122.

MANDAMUS.

CONTEMPT OF COURT, MANDAMUS LIES TO COMPEL COURT TO VACATE ORDER SUSPENDING ATTORNEY FOR, WHEN. — Where a superior court imposes a fine upon an attorney for contempt of court, and further orders that he purge himself of the said contempt, and, after the fine is paid, makes another order suspending the attorney from practice in said court until he has purged himself of the contempt by apologising, the supreme court can intervene by its writ of *mandamus* to compel said court to vacate and set aside its order of suspension. The latter part of the first order, if it required anything more than the payment of the fine, required something which the court had no right, under any circumstances, to order, and was, therefore, absolutely void, and could not for that reason furnish any foundation for the proceedings which led to the entry of the second order, which was, therefore, absolutely void as an entirety. *State ex rel. v. Sachs*, 357.

See JURISDICTION, 2.

MANDATORY INJUNCTION.

See INJUNCTION, 2; WATERS AND WATERCOURSE.

MANSLAUGHTER.

See HOMICIDE.

MARKET.

See CONTRACTS, 5.

MARRIAGE AND DIVORCE.

1. **VALIDITY — COITION.** — When a marriage is regularly solemnized, its consummation by coition between the parties is not necessary to its validity. *Franklin v. Franklin*, 206.
2. **PLEADINGS — MARRIAGE, ACTION FOR BREACH OF PROMISE OF.** — The seduction of plaintiff by defendant may be proved in an action for a breach of promise to marry, though not alleged in the complaint. *Dent v. Pickens*, 921.
3. **EVIDENCE OF THE PLAINTIFF'S GOOD REPUTATION** is admissible, in an action for a breach of promise to marry, if the defendant has previously introduced evidence intended to cast a cloud on her character. *Dent v. Pickens*, 921.
4. **DAMAGES FOR BREACH OF PROMISE OF.** — **EVIDENCE OF THE WEALTH OF** defendant is admissible, in an action for a breach of promise to marry, for the purpose of showing the loss which the plaintiff had sustained from the non-fulfillment of the contract; but as no evidence should be received of any fact tending to aggravate or diminish damages, occurring after the commencement of the action, evidence of the defendant's financial condition at the time of the trial should be rejected, unless followed by testimony connected with his previous circumstances. *Dent v. Pickens*, 921.

5. **VALIDITY—AGREEMENT TO LIVE APART.**—The validity of a marriage regularly solemnized is not affected by a preliminary or collateral agreement of the parties not to live together. *Franklin v. Franklin*, 266.
6. **AGREEMENT TO LIVE APART—ADULTERY.**—The fact that husband and wife live apart by mutual agreement is no bar to a suit for divorce brought by either against the other on the ground of adultery. *Franklin v. Franklin*, 266.
7. **RESIDENCE—JURISDICTION.**—When the husband has resided in the state for the statutory period of time before bringing his action for divorce, the court has jurisdiction, although the parties have never lived together as husband and wife within the state where the action is brought. *Franklin v. Franklin*, 266.
8. **CONIVANCE—ADULTERY.**—A husband who suspects his wife of having committed adultery, and who, without throwing any opportunities in her way, merely suffers her, in a single instance, to avail herself to the full extent of an opportunity to indulge her adulterous disposition, is not guilty of connivance, even though he hopes he may obtain proof which will entitle him to a divorce, and purposely refrains from warning her for that reason. *Wilson v. Wilson*, 237.
9. **HUSBAND'S LIABILITY FOR WIFE'S ATTORNEY FEE.**—An attorney cannot recover, as against the husband, for legal services rendered his wife in a contemplated suit for divorce on the ground of his cruelty, for the reason that prosecuting or defending a suit for divorce has no relation to her protection as wife. *Kinchebe v. Merriman*, 60.
10. **ALIMONY IS AN ALLOWANCE** for support and maintenance, having no other purpose and providing for no other object. Like the *alimentum* of the civil law, from which the word was evidently derived, it respects a provision for food, clothing, and habitation, or the necessary support of a wife, after the marriage bond has been severed; and when sued for, it is not so much in the nature of the payment of a debt as in that of the performance of a duty. *Romaine v. Chauncey*, 544.
11. **ALIMONY IS NOT STRICTLY A DEBT** due to a wife, but rather a general duty of support, made specific and measured by the court. *Romaine v. Chauncey*, 544.
12. **HOMESTEAD OF DIVORCED PARTIES, POWER OF COURT IN DECREE TO PROTECT WIFE IN ITS USE.**—A court decreeing a divorce has power to make such a decree with regard to the use of the homestead of the parties as will properly protect the wife in its use, and may also provide for its protection and use by the minor children of the marriage, subject only to the prohibiting clause of the statute that the decree shall not have the effect in form or in substance of divesting the husband of his title to one half, where the homestead is community property. But the husband's interest in the property can be so charged only in the divorce suit, and as a part of the decree of divorce. *Kirtwood v. Domnau*, 770.

See CREDITORS' SUITS; EVIDENCE, 2; HUSBAND AND WIFE.

MARRIED WOMEN.

See TRUSTS, 3; NEGOTIABLE INSTRUMENTS, 3; HUSBAND AND WIFE.

MARSHALING SECURITIES.

See HOMESTEAD, 8.

MASTER AND SERVANT.

1. **MASTER NOT LIABLE IN EXEMPLARY DAMAGES FOR TORT OF SERVANT UNLESS AUTHORIZED OR RATIFIED.** — A master is not liable in exemplary or punitive damages for the tort of his servant, unless he authorized it, or, with knowledge of the wrong and its nature, adopted or ratified it so as to make it his act in fact. *Gulf etc. R'y Co. v. Reed*, 749.
2. **CRIME OF SERVANT PRESUMED NOT TO BE AUTHORIZED OR SANCTIONED BY MASTER.** — Where the act of a servant amounts to a crime, or is of a willful and malicious character, the law *prima facie* presumes that the perpetrator was not authorized before nor sanctioned afterward by the master, and this presumption continues until repelled by proof to the contrary. *Gulf etc. R'y Co. v. Reed*, 749.
3. **RISKS ASSUMED BY SERVANT.** — An employee, when he enters into service, agrees to assume all risks ordinarily incident to his employment; and if he is of mature years, experienced in the business undertaken, and knows what instrumentalities are to be used by him, he assumes the risks incident to their use, as well as any other risk incident to the business. If the master uses proper care in providing the kind of instrument contemplated, the employee cannot complain, although some other kind would have been less dangerous. *St. Louis etc. R'y Co. v. Davis*, 48.
4. **SAFE MACHINERY — RISKS ASSUMED BY EMPLOYEE.** — When a master employs a servant to do a particular work, with a particular kind of implement or machine, he agrees that it is sound, and fit for the purpose intended, so far as ordinary care and prudence can discover, but not that it is free from danger in its use. The servant agrees to use in the service the particular kind of implement or machine furnished, and if he is injured, his injury must be ranked among the risks of the employment assumed by him in entering the service. *St. Louis etc. R'y Co. v. Davis*, 48.
5. **RISKS ASSUMED BY SERVANT.** — A servant assumes all open and palpable risk of accident in the common course of the business, including the negligence of all fellow-servants, of whatever grade or rank, in the same employment. *Ell v. Northern Pac. R. R. Co.*, 621.
6. **FOREMAN AS FELLOW-SERVANT.** — A foreman who has the control, direction, and supervision of a gang of railroad employees, with authority to employ and discharge them, is a fellow-servant, and not a vice-principal. A master is not liable for an injury to an employee, caused by the negligence of such foreman. *Ell v. Northern Pac. R. R. Co.*, 621.
7. **LIABILITY OF MASTER, HOW DETERMINED — FELLOW-SERVANTS.** — The liability of a master depends upon the character of the act in the performance of which the injury arises, and not upon the grade or rank of the employee whose negligence causes it. If the act is one pertaining to a personal duty that the master owes to his servants, he is responsible to them for the manner of its performance, by whoever performed; but if it pertains to the duty of an operative or employee, the person performing it is a mere servant, whatever his rank, and the master is not liable to a fellow-servant of inferior rank for its improper performance. *Ell v. Northern Pac. R. R. Co.*, 621.
8. **RESPONSIBILITY OF MASTER — FELLOW-SERVANTS.** — The character of the negligence from which damage to a co-employee results, and not the superior rank of the negligent servant, determines the responsibility of the master. *Ell v. Northern Pac. R. R. Co.*, 621.
9. **FELLOW-SERVANTS — SUPERIOR AND INFERIOR SERVANT.** — A foreman,

superintendent, or superior servant and an inferior servant, when the two are engaged in the same general work for the master, are fellow-servants. The superior rank of the former cannot lift him above the grade of a fellow-servant into the position of a vice-principal, so long as he is engaged in the work of a servant only. In such case, the superior servant is no more the representative of the master than the inferior servant, except in the enlarged field of his action, and the wider scope of the trusts confided to him; nor does his rank increase the risks of his employment assumed by the inferior servant. *Ell v. Northern Pac. R. R. Co.*, §21.

10. **FELLOW-SERVANTS — SUPERIOR AND INFERIOR SERVANTS.** — The fact that an inferior servant may not be able to exert any influence for safety over his superior servant in the same general business or employment will not justify a refusal to apply the rules and principles applicable to fellow-servants. *Ell v. Northern Pac. R. R. Co.*, 631.
11. **MASTER CANNOT DELEGATE PERSONAL DUTIES.** — A master must use due care in supplying his servants with safe appliances, and a safe place in which to work. He cannot escape liability by delegating these personal duties to another. *Ell v. Northern Pac. R. R. Co.*, 631.
12. **RATIFICATION AS IMPOSING LIABILITY FOR VOLUNTEER'S ACT.** — Where one, who is not at the time a servant of a coal dealer, undertakes to deliver coal ordered of the latter, as his servant and for his benefit, the dealer, by subsequently ratifying such delivery, establishes the relation of master and servant between them, so as to make himself liable for the negligence of such servant in delivering the coal. *Dempey v. Chambers*, 249.

See CARRIERS, 1, 2; INFANTS, 1, 2; LANDLORD AND TENANT, 1-3; NEGLIGENCE, 13; RAILROADS, 40-43; SEDUCTION.

MEMORANDUM.

See VENDOR AND PURCHASER, 1, 2; SALES, 3.

MERIDIAN.

See BOUNDARIES.

MINORS.

See INFANTS.

MISTAKE.

See MORTGAGES, 11; TELEGRAPH COMPANIES, 1-3.

MODIFIED CONTRACTS.

See SPECIFIC PERFORMANCE, 3.

MORTGAGES.

1. **DESCRIPTION OF LANDS IN ONE MORTGAGE NOT AIDED BY THAT IN ANOTHER, WHEN.** — Where a railroad company executes a mortgage upon its property, including certain lands therein described and embraced in a schedule annexed thereto, and subsequently, for the purpose of remedying certain defects in this mortgage, executes a second mortgage, somewhat different in the extent of the property included, referring in no way to the description in the former mortgage, but referring to exhibits

annexed, though no exhibits are attached, the description in the one mortgage cannot be aided by that in the other, and the lands described in the first mortgage cannot be considered as embraced in the second. *McIlhenney v. Bins*, 705.

2. **PRIOR AND SUBSEQUENT MORTGAGES — NOTICE.** — A prior mortgagee is not bound to protect the equitable rights of a subsequent mortgagee in the property of which the former has no notice, actual or constructive. The recording of the subsequent mortgage is not such notice so as to prevent the prior mortgagee from releasing from the lien of his mortgage any property upon which the subsequent mortgagee has no lien. *Sarles v. McGee*, 633.
3. **PRIORITY AND EXTENT OF LIEN — NOTICE.** — A second mortgagee with notice of his mortgagor's mortgage on the same land can enforce his lien only to the extent of his mortgagor's claim. If he is without notice, he can enforce his lien to the extent of his entire mortgage debt. *Terman v. Bell*, 35.
4. **FORECLOSURE AGAINST EQUITABLE OWNER — PARTIES.** — The equities of a grantor in an absolute deed, who retains an unrecorded defeasance, are postponed only to the lien of the subsequent mortgagee of his grantee without notice, and cannot be extinguished or foreclosed by suit to which he is not a party. He may therefore redeem from the purchaser under foreclosure, especially when he gives notice of his equities at the foreclosure sale, and prior thereto records his defeasance. *Terman v. Bell*, 35.
5. **PARTIES.** — A junior judgment creditor is not entitled to become a party to an action to foreclose a prior mortgage, in order that he may attack it for fraud. His remedy is by separate action against the parties. *Bruce v. Nicholson*, 592.
6. **COMPLAINT IN FORECLOSURE NEED NOT ALLEGES CHARACTER OF INTEREST OF CO-DEFENDANT.** — A complaint in an action to foreclose a mortgage, which alleges that a party made a co-defendant with the mortgagor has, or claims to have, some interest in or claim upon the mortgaged premises, is sufficient, without alleging the nature of such interest. *Horton v. Long*, 867.
7. **INSOLVENT CORPORATION NOT INJURED BY FORECLOSURE OF MORTGAGE GIVEN BY IT, WHEN.** — Where, upon the petition of a corporation, the court appoints a receiver, although such appointment is erroneous, the proceedings of the court consequent upon the appointment are not void; and if, in such proceeding, the master's report and the evidence adduced upon the trial show that the corporation is hopelessly insolvent, it cannot be injured by the action of the court in foreclosing the mortgages given by it. *McIlhenney v. Bins*, 705.
8. **MORTGAGE ON PROPERTY OF INSOLVENT CORPORATION PROPERLY FORECLOSED THOUGH NOT YET DUE, WHEN.** — When a court has the entire property of an insolvent corporation in the hands of its receiver, and all the creditors before it, it may properly treat the assets as a trust fund for distribution among such creditors, according to their respective priorities and liens, and may foreclose both a first and a second mortgage upon the property, although the first-mortgage bonds are not by their terms yet due, default in the payment of interest upon both mortgages having been made, and the second-mortgage bonds having by their terms become due. Under such circumstances, it would be anomalous to decree a sale of the property subject to the first mortgage. *McIlhenney v. Bins*, 705.

9. **FORECLOSURE PURCHASER — SUBROGATION.** — A purchaser at foreclosure sale under a mortgage succeeds to all the rights of the holder of the mortgage foreclosed. *Tinsman v. Bell*, 35.
 10. **ATTORNEY'S FEE, REASONABLENESS OF, WHEN DENIED, MUST BE PROVED.** — Where the complaint in a suit to foreclose a mortgage alleges that \$250 is a reasonable attorney's fee, and the answer denies that any greater sum than \$100 is a reasonable fee in the case, and no testimony is offered on that point, the court should allow the latter sum only. When the reasonableness of an attorney's fee is denied, it must be proved like any other fact. *Horton v. Long*, 367.
 11. **RELEASE BY MISTAKE — EQUITABLE RELIEF.** — A prior mortgagee who, in good faith and without culpable negligence, has released the lien of his first mortgage, and has taken a second mortgage to secure his debt, in ignorance of an intermediate mortgage on the same premises, may have the lien of his prior mortgage restored in equity, provided it can be done without working hardship or injustice to innocent parties. The fact that the intermediate mortgagee has made advances after the release of the prior mortgage, with full notice of the nature of the transaction, will not bar relief. *Wooster v. Cavender*, 31.
 12. **SALE TO PAY FIRST INSTALLMENT DOES NOT RELEASE.** — PURCHASER OF EQUITY OF REDEMPTION in land sold under execution to satisfy an installment of the mortgage debt, with notice of the facts, takes subject to the lien of the mortgage. *Whitmore v. Tatum*, 56.
- See ACTIONS, 3; CHATTEL MORTGAGES; CORPORATIONS, 17; HOMESTEAD, 6; INSOLVENCY; PUBLIC LANDS.

MORTGAGE BONDS.

See RECEIVERS, 2.

MORTGAGE LIEN.

See TRUSTS, 1.

MOTION.

See PLEADING, 2.

MUNICIPAL CORPORATIONS.

1. **CONSTITUTIONAL LAW — MUNICIPAL CORPORATIONS.** — THE LEGISLATURE MAY DELEGATE to municipalities the power to regulate, restrain, or even to suppress particular branches of business, when deemed necessary for the preservation of the public health. *Town Council v. Pressley*, 659.
2. **CONSTITUTIONAL LAW — POLICE POWER.** — A municipal corporation whose charter gives its town council power to make such rules, by-laws, and ordinances respecting roads, markets, streets, and police as shall appear to them necessary and requisite for the security, welfare, and convenience, or for preserving health, peace, order, and good government, authorizes it to adopt and enforce an ordinance prohibiting the cultivation, for agricultural purposes, within the corporate limits, of more than one eighth of an acre of land for each family or household, and restricting the right to cultivate to that extent to the lot or premises of such family or household. *Town Council v. Pressley*, 659.
3. **CONSTITUTIONAL LAW — FOURTEENTH AMENDMENT.** — AN ORDINANCE OF A MUNICIPAL CORPORATION, by which persons are restricted in the right to

cultivate land for agricultural purposes in a village to one eighth of an acre, though the operation of such restriction may be that the owner of that quantity of land may cultivate the whole of it, while owners of larger tracts must leave the greater part of them uncultivated, is not in conflict with the constitution of South Carolina, declaring "that no person shall be subject in law to any other restraint or disqualification in regard to personal rights than such as are laid upon others under like circumstances"; nor with that portion of the fourteenth amendment to the constitution of the United States, providing "that no state shall deny to any person within its jurisdiction the equal protection of the laws." The question of equality is not to be determined by the number of acres a citizen may happen to own. *Town Council v. Pressley*, 659.

4. **CONSTITUTIONAL LAW. — THE LOCAL CHARACTER OF A STATUTE** does not make it necessarily unconstitutional. The legislature must determine whether particular rules shall extend to the whole state and its citizens, or, on the other hand, to a subdivision of the state or a single class of citizens. It is sufficient that the statute applies equally to all persons within the territorial limits described in the act. Hence an ordinance restraining the cultivation of lands for agricultural purposes in a municipality is not rendered invalid by the fact that such cultivation is not restricted in other municipalities in the same state. *Town Council v. Pressley*, 659.
5. **RESOLUTION — APPROVAL, WHAT IS NOT.** — If a statute requires resolutions of the city council to be approved and signed by the mayor, the fact that he, as presiding officer, heard the resolution read, put the motion for its adoption, declared it adopted, and in fact approved it, and signed and approved the journal in which it was entered, does not dispense with his approving the resolution in the manner pointed out in the statute. *Whitney v. Port Huron*, 291.
6. **MUNICIPAL BONDS. — PURCHASERS OF MUNICIPAL BONDS HAVE A RIGHT TO RELY** upon the facts asserted or appearing on the face of the bonds, made by any person or body authorized by law to pass upon and determine such facts. *Gilbe v. School District*, 295.
7. **THE TITLE OF A BONA FIDE HOLDER** of a municipal bond cannot be defeated by the neglect to enter the order directing the bond to be issued, when the bond upon its face declares that such order has been made. *Gilbe v. School District*, 295.
8. **REASONABLE TIME TO INVESTIGATE CLAIMS AGAINST.** — If the charter of a municipal corporation provides that no action shall be maintained on a claim against it unless presented to its council, and a reasonable time allowed to investigate and pass upon it, and the claim has been presented for more than five weeks, during which the council has met five times and has not acted upon the claim, the claimant need not wait longer before bringing suit thereon. *Whitney v. Port Huron*, 291.
9. **PERSONS CONTRACTING WITH A MUNICIPAL CORPORATION ARE BOUND TO KNOW THE LIMITS** of its powers, and cannot sustain an action to recover damages resulting to them from the fact that they and the officers of the municipality misapprehended its powers, and entered into a contract for the performance of work which it had no right to do without first making compensation to property owners injured thereby. *Matheson v. Grand Rapids*, 299.
10. **DAMAGES AGAINST, FOR CONTRACTING WITHOUT AUTHORITY.** — Damages cannot be recovered by persons contracting with a city to grade a street in such a manner that embankments must rest more or less upon the

lands of abutting owners, because such contractors were delayed in the prosecution of their work by an injunction obtained by such owners. The contractors were chargeable with knowledge that the law would not permit the city to thus injure private property, and no cause of action resulted to them when such owners vindicated their rights in the courts. *Mathewson v. Grand Rapids*, 299.

11. **A TOWN SERGEANT IN LEVYING EXECUTION IN FAVOR OF THE TOWN** is not performing a corporate function, nor acting as its servant, and therefore the town is not answerable for his levying on the property of a stranger to the writ. *Thomas v. Town of Grafton*, 924.
12. **LIABILITY FOR DEFECTIVE STREETS.** — A city must keep its streets and sidewalks in good repair, so as to prevent accident or injury to persons or their property; and when injury is caused by the fault of a municipality having previous knowledge of the bad condition of the street or sidewalk, without any contributive act on the part of the party injured, whether by commission or omission, the city is liable. *Oline v. Crescent City R. R. Co. etc.*, 187.
13. **LIABILITY FOR NEGLIGENCE OF RAILROAD USING ITS STREETS.** — A city may legitimately grant to a railroad company the privilege to build tracks and run cars on its streets, and may impose the burden it owes of keeping them in good order and repair, so as to avoid injury, upon the company; but the imposition upon and acceptance of such burden by the company will not relieve the city from liability, should the company fail to comply with its obligations, and, by its negligence, inflict injury upon one using due care and not guilty of contributory neglect. In such case, both the city and the company are primarily liable; and when the city is mulcted, it may recover against the company in the same action, if both are made parties, or in a distinct suit. *Oline v. Crescent City R. R. Co. etc.*, 187.
14. **NEGLECT — PROXIMATE CAUSE.** — The neglect of a city to keep its streets in proper condition for safety does not render it liable, when such negligence is the remote, but not the proximate, cause of the injury. *Oline v. Crescent City R. R. Co. etc.*, 187.
15. **LIABILITY FOR DEFECTIVE HIGHWAYS.** — A town is not liable for an injury to a traveler, caused by a defect in a highway culvert, merely because the highway is so constructed that such defect is likely to occur in the remote future, when such defect has not existed for such period of time prior to the injury as to make the town chargeable with notice thereof, the road having been in good repair during heavy travel for more than a year previously, and there being no apparent probability that the culvert would break down all at once and without previous warning. *Rockefort v. Inhabitants of Attleborough*, 221.
16. **LIABILITY FOR DEFECTIVE HIGHWAY.** — The fact that a highway is so constructed that it is not likely to keep in good condition for a great length of time will not impose liability on a town bound to keep it in repair for injury caused by the sudden softening of the earth therein, of which the town had no notice, unless the danger was so imminent as to show a want of reasonable care and diligence in guarding against it at the time of the accident. *Stoddard v. Inhabitants of Winchester*, 223.
17. **EVIDENCE OF NEGLIGENCE IN REPAIR OF STREETS.** — In an action to recover for injuries received in a public street, caused by the sinking of the road-bed over a defective sewer-pipe, evidence that the sewer was constructed of a cheap grade of pipe, laid in soil which tended to

eat it rapidly, and of which the superintendent was informed at the time; that a few months before the accident, and near the place thereof, a depression in the street over the pipe was filled by the city, without examination as to its cause; that two weeks before the accident, and near the place thereof, the city repaired a break in the pipe by taking up the defective pipe and replacing it with a new one; and that, upon examination, the pipe, at the place of the accident, as well as at the other places mentioned, was found to be in bad condition and full of holes, — should be submitted to the jury, and is sufficient to support a finding that the city was guilty of negligence in failing to use reasonable diligence to keep its streets in repair. *Fleming v. Springfield*, 263.

18. **LIABILITY FOR NUISANCE — ENCROACHMENT OF WALL.** — A city cannot enlarge its school-grounds by taking the land of an adjoining owner by means of an encroaching wall or fence, without first making compensation; and if, by the action of the elements, or otherwise, without the adjoining owner's fault, the city's wall comes upon his land and continues there, it becomes a nuisance for which the city is liable. *Miles v. Worcester*, 264.

See COUNTIES; EQUITY, 5; EXECUTION, 2; GAMING; HOMEOWNER; LANDLORD AND TENANT, 4; SCHOOLS.

NAMES.

IDENTITY OF NAME PRIMA FACIE PROOF OF IDENTITY OF PERSON. — In an action upon a foreign judgment, where the name of the defendant in the record offered in evidence is identical with that of the defendant in the action upon the judgment, this is *prima facie* proof of identity of person; and the defendant is bound, in order to raise the question of identity, to allege and prove every fact necessary to show that the court had no jurisdiction of his person. *Eitel v. Carpenter*, 877.

NECESSARIES.

See INFANTS, 7.

NEGLECTOR.

1. **NEGLECTOR IS THE WANT OF ORDINARY CARE.** — Negligence in the conduct of a tug is the failure to use the care ordinarily used by careful men, and cannot be imputed from the failure to do what is practically impossible. *Montgomery v. Muskegon Booming Co.*, 303.
2. **NEGLECTOR CANNOT BE PREDICATED OF THE LAWFUL AND CUSTOMARY USE OF OWNER'S PREMISES.** *Montgomery v. Muskegon Booming Co.*, 303.
3. **LIABILITY OF OWNERS OF STEAM-CRAFT FOR FIRE.** — It is only when want of ordinary care is shown in the selection, care, and operation of appliances, or in the management of fires on such craft, or where the absence of proper appliances or neglect in their management, or in the management of fires, can be inferred from peculiar circumstances, that those owning and operating such craft can be held liable. *Montgomery v. Muskegon Booming Co.*, 303.
4. **LATERAL SUPPORT — DUTY TO GIVE NOTICE OF EXCAVATION.** — An owner making a reasonable excavation on his own land, and thereby causing injury to an adjoining owner's building, without giving him previous notice or without his knowledge, is liable in damages on the ground of negligence in executing the work. *Schultz v. Byers*, 435.

5. **CARE, DEGREE OF, REQUIRED OF PERSON PERFORMING ACT WHERE SAFETY OF PUBLIC INVOLVED.** — A person engaged in hoisting a heavy safe in a public place where people are constantly passing is bound to use such care as the nature of the employment and the situation and circumstances require of a prudent person experienced and skilled in such or similar work. *Spokane Truck etc. Co. v. Hofer*, 842.
6. **IF A FATHER BUYS AN AIR-GUN FOR HIS SON**, nine years of age, and provides him with shot commonly used in such a toy, charging him not to let other boys have it, and the son leaves it in an outhouse, where it is found by another boy, ten years of age, who is allowed, with the permission of its owner's mother, to use it, and it is by the latter boy shot off, and the shot with which it is loaded hits a man standing in a public street and destroys his eye, the father is not chargeable with negligence in purchasing the gun and giving it to his son, nor is he answerable, for any reason, to the person thus injured. *Chadlock v. Phummer*, 283.
7. **NEGLECTOR WILL NOT IN ANY CASE BE PRESUMED FROM THE MERE FACT OF A FIRE**, when the testimony as to the cause of the fire is speculative or conjectural, and there is nothing tending to show negligence in not providing proper means for the prevention of fires or in the management of apparatus. *Montgomery v. Muskegon Booming Co.*, 308.
8. **NEGLECTOR IN CAUSING FIRE BY ONE USING STEAM CANNOT BE ESTABLISHED** when he uses carefully those appliances which science and ingenuity have invented to reduce the probabilities of fire. *Montgomery v. Muskegon Booming Co.*, 308.
9. **EVIDENCE OF SUBSEQUENT ACTS.** — When an accident has happened through the alleged negligence of a person, his subsequent acts in taking additional precautions to prevent other accidents are not admissible in evidence against him for the purpose of showing that such precautions were needed at the time of the accident. *Shinnors v. Proprietors of Locks and Canals*, 226.
10. **CONTRIBUTORY NEGLIGENCE IS A WANT OF THE EXERCISE OF ORDINARY CARE**, which proximately causes the injury complained of. *Oline v. Crescent City R. R. Co. etc.*, 187.
11. **CONTRIBUTORY NEGLIGENCE, WHEN A PROXIMATE CAUSE OF INJURY**, bars the right of recovery. *Oline v. Crescent City R. R. Co. etc.*, 187.
12. **CONTRIBUTORY NEGLIGENCE OF PARENT BARS HIS RECOVERY, BUT NOT HIS MINOR CHILD'S, WHEN.** — Where, through the negligence of a telegraph company in failing to deliver a message sent to a physician informing him that a boy fifteen years old had dislocated his elbow, and asking him to come on the first train, the physician, who could have reset and saved the arm, is prevented from coming to the boy's aid, and the boy's parent sends no further message nor seeks any other surgical aid for nine days, when, in the physician's opinion, it would have been dangerous to attempt to reset the dislocation, and the arm in consequence becomes stiff and permanently disabled, in an action against the company to recover for the injury, the contributory negligence of the parent, in failing to send another message or to secure assistance from some other physician, will bar a recovery by him; but such contributory negligence on the part of the parent cannot be interposed as a defense to bar a recovery for the benefit of the minor. The contributory negligence that precludes the minor's recovery must be that of himself, and whether it existed or not is a question for the jury to decide, taking into consideration the age and

- situation of the minor, and all other circumstances connected with the case. *Western U. Tel. Co. v. Hoffman*, 759.
13. NEGLIGENCE OF LANDLORD TOWARDS TENANT'S SERVANT—DEFECTIVE APPLIANCES.—CONTRIBUTORY NEGLIGENCE QUESTION FOR JURY.—When the owner of a building leases part thereof, and continues to furnish his tenant with steam-power by means of defective appliances, thereby causing injury to a servant of such tenant, for which the landlord is sued, the question of contributory negligence on the part of the injured servant is properly left to the jury to decide, if the circumstances attending the accident are sufficiently developed in evidence to enable the jury to pass fairly upon the question of due care on his part. *Poor v. Sears*, 272.
14. EVIDENCE—DEFECTIVE APPLIANCES.—In an action against the owner of a building engaged in transmitting power to an adjoining building by means of shafts and pulleys, evidence that a subsequent examination of the broken shaft causing the injury sued for disclosed that it contained dark streaks, as though there had been a flaw or previous crack in it, and that rust extended from one third to one half way through it, is admissible to show negligence and want of ordinary care and prudence by the owner in its use. *Poor v. Sears*, 272.
15. EVIDENCE—DEFECTIVE APPLIANCES.—In an action against the owner of a building, engaged for a consideration in transmitting power to an adjoining building by means of shafts and pulleys, evidence that the shaft which broke and caused the injury sued for to a person rightfully on the premises, and in the exercise of due care, was not sufficiently supported, and should have had an additional hanger; that a shelf underneath it would have tended to afford protection, and was often placed under shafts similarly located; and that safety would have been promoted by a larger shaft,—is admissible to show negligence and want of ordinary care and prudence in the use of the shafting by the owner thereof. *Poor v. Sears*, 272.
16. DEATH—RELEASE OF RIGHT TO SUE FOR INJURIES RESULTING IN.—A release of damages resulting from injuries, given by the party injured, and who but for such release might have sustained an action, continues operative on his subsequent death as a consequence of such injuries, and precludes any recovery by his personal representative for his death, or for the injuries from which it resulted. *Price v. Richmond etc. R. R. Co.*, 700.
- See APPEAL, 8; CARRIERS, 1-3; CONTRACTS, 1; DAMAGES, 4-8; LANDLORD AND TENANT, 1-3; MUNICIPAL CORPORATIONS, 12-17; PHYSICIANS AND SURGEONS, 1; PLEDGE; RAILROADS, 15-31; SALES, 6, 8; TELEGRAPH COMPANIES, 1, 2.

NEGOTIABLE INSTRUMENTS.

1. ACCEPTANCE, DIFFERENCE BETWEEN ACTION UPON, AND ONE UPON PROMISE TO ACCEPT.—The difference between an action upon an acceptance and one upon a promise to accept is, that the former may be brought by the holder of the bill, while the latter can be maintained only by the party to whom the promise is made. *Henrietta Nat. Bank v. State Nat. Bank*, 773.
2. INDORSEMENT WITH ENLARGED LIABILITY.—The written words, "demand, notice, and protest waived, and payment guaranteed," signed by the payee on the back of a negotiable note, constitute an indorsement with an enlarged liability. *Buck v. Davenport Sav. Bank*, 392.

2. MAKER OF NOTE PAYABLE TO ORDER OF MARRIED WOMAN GUARANTEES HER CAPACITY TO INDORSE IT.—The maker of a promissory note payable to the order of a married woman guarantees her capacity to indorse and transfer the same; and the fact that such note is community property will not affect the title of a *bona fide* indorsee for value before maturity, who has no notice that it is community property. *Castor v. Peterson*, 854.

4. CONFLICT OF LAWS.—THOUGH AN INDORSEMENT of a note is made in one state, yet if the indorser transmits it to another state to be there received by the payee, and this is done pursuant to an agreement made in the latter state, the obligation of the indorser is to be determined by the law of the state in which the note was received by the payee. *Staples v. Nott*, 480.

See CHURCHES; JUDGMENTS, 29; LIMITATIONS OF ACTIONS, 4, 5; PARTNERSHIP, 2, 3, 6; SCHOOLS, 3; USURY.

NEW PROMISE

See LIMITATIONS OF ACTIONS, 3-5.

NEW TRIAL

NEW TRIAL IN EQUITY WILL BE GRANTED when the case cannot be intelligently determined because both parties have without fault failed to introduce material evidence. *Turman v. Bell*, 35.

See JUDGMENT, 7, 8; TRIAL, 10.

NOTICE

See AGENCY, 2, 4; DEEDS, 5; JUDGMENT, 4-8; MORTGAGES, 2, 3; REAL PROPERTY; SALES, 12.

NUISANCE

1. WATERS, INJUNCTION TO RESTRAIN POLLUTION OF, WHEN GRANTED.—An owner of a large tract of land upon a small stream, who erects and maintains thereon a large feeding-barn, in which he keeps several thousand cattle, and washes into the stream the manure and urine, and other foul and deleterious substances from the cattle, thereby fouling and polluting the water of the stream, and impregnating it with noxious exhalations, destructive to husbandry and dangerous to health, will, at the suit of an adjoining riparian proprietor below him, be restrained from continuing the nuisance. And the fact that the plaintiff might be able at comparatively small cost to supply water to his cattle from an independent source cannot be considered in connection with his right to have the stream uncontaminated. *Barton v. Union Cattle Co.*, 340.

2. NUISANCE, CONTINUING, MAY BE RELIEVED AGAINST AT LAW OR IN EQUITY.—A continuing nuisance caused by the pollution of the waters of a stream, and others of a like character, may be proceeded against either at law or in equity, at the election of an injured party. *Barton v. Union Cattle Co.*, 340.

See MUNICIPAL CORPORATIONS, 12.

OCCUPATION TAX

See INTERSTATE COMMERCE, 4-6.

OFFER.

See **VENDOR AND PURCHASER**, 2.

OFFICE AND OFFICER.

See **SCHOOLS**, 5, 6; **SHERIFF**, 1.

OLOGRAPHIC.

See **WILLS**, 2-5.

OPINIONS.

See **WITNESSES**, 1.

PARENT AND CHILD.

See **CO-TENANCY**, 3; **FRAUDULENT CONVEYANCES**, 6; **INFANTS**; **NEGLIGENCE**, 6, 12; **SEDUCTION**.

PAROL EVIDENCE.

See **CORPORATIONS**, 12, **EVIDENCE**, 4; **SALES**, 2; **VENDOR AND PURCHASER**, 1, 2.

PARTIES.

A CO-DEFENDANT to a cross-complaint must be made a party, or must appear, before his rights can be adjudicated. *Turnan v. Bell*, 34.

See **ATTACHMENT**, 1; **CO-TENANCY**, 6; **JUDGMENTS**, 2; **MORTGAGES**, 4, 5; **PARTITION**, 1.

PARTITION.

1. **PARTITION, ALL TENANTS IN COMMON SHOULD BE MADE PARTIES TO SUIT FOR.** — Before partition of land is ordered, all the tenants in common should be brought before the court. *Boone v. Knox*, 767.

2. **A CO-TENANT MAY COMPEL A PARTITION OF LANDS OF A CO-TENANCY**, though another co-tenant does not desire it. *Charleston etc. R. R. Co. v. Leach*, 667.

3. **CO-TENANT MAY BE COMPELLED TO SECURE A PARTITION**, by a grantee to whom he has conveyed an interest in severalty; and therefore, where a co-tenant had given a railway company the right to enter upon land and construct and maintain a railway, it was held that the company could sustain an action against the grantor and his co-tenants to compel the partition of the land, for the purpose of ascertaining whether the portion assigned to the grantor would embrace the lands over which the right of way was granted. *Charleston etc. R. R. Co. v. Leach*, 667.

4. **CO-TENANCY.** — A GRANTOR FROM ONE OF SEVERAL CO-TENANTS AS AN INTEREST IN SEVERALTY in a portion of the lands of a co-tenancy may compel his grantor and the other co-tenants to partition their lands, in order that it may be ascertained whether or not the portion thus granted will be awarded to the grantor, and his grant thereby made effective. *Charleston etc. R. R. Co. v. Leach*, 667.

5. **WHEN A CO-TENANT HAS CONVEYED IN SEVERALTY a part of the common lands**, a court in decreeing partition will direct it to be so made as to set apart to his grantee the lands so conveyed, if it can be done without prejudice to the interests of his co-tenants. *Young v. Edwards*, 682.

See **CO-TENANCY**; **HOMESTEAD**, 7, 8.

PARTNERSHIP.

1. POWER OF ATTORNEY GIVEN TO A PARTNERSHIP may be executed by a member of the firm. *Frost v. Brath Cattle Co.*, 831.
 2. POWER OF PARTNER TO BIND FIRM BY GUARANTY. — One who accepts negotiable paper bearing the indorsement of a firm as guarantors or sureties takes it subject to the presumption that the firm name was not signed in the usual course of business of the firm, and cannot recover on the indorsement alone, but must show special authority to make the indorsement on the part of the partner by whom the firm name was signed, or an authority to be implied from the common course of business of the firm, or a previous course of dealing between the parties, or that the indorsement was subsequently adopted and acted upon by the partnership. *Clarke v. Wallace*, 636.
 3. GUARANTY OF NEGOTIABLE PAPER BY PARTNER. — A member of a banking or other partnership has no implied authority, without the consent of his copartners, to guarantee negotiable paper in the firm name for the accommodation of a third person, in consideration of obtaining security for a firm debt, especially when the liability thus incurred is several times greater than the debt secured. In such a case, the other partners will not be bound by such guaranty, in the absence of proof of express authority, or authority implied from the previous course of business between the parties, or that such guaranty was necessary for carrying on the firm business in the ordinary way, or that it was subsequently ratified by the firm. *Clarke v. Wallace*, 636.
 4. BREACH OF FIRM CONTRACT BY INDIVIDUAL MEMBER — EVIDENCE — DAMAGES. — An agreement by a partnership not to engage in business in the same town in opposition to its vendee is binding upon its members individually; and in an action against one of them for a breach of the contract, evidence of the amount of business done by him subsequently to the breach is admissible as a basis upon which to estimate damages. *Welsh v. Morris*, 801.
 5. BREACH OF FIRM CONTRACT BY INDIVIDUAL MEMBER — INJUNCTION. — The recovery of damages against a party for breach of a contract made by a partnership of which he was then a member is no ground for refusing an injunction against a subsequent breach of such contract. *Welsh v. Morris*, 801.
 6. PARTNERSHIP IS NOT GUILTY OF DEFRAUDING ITS CREDITORS WHEN IT MAKES AN ASSIGNMENT of its property for the benefit of all its creditors, among whom it includes the holders of a note executed by both partners, though one signed it simply as the surety of the other. *Citizens' Bank v. Williams*, 454.
- See ASSOCIATIONS, 1, 2; CORPORATIONS, 14; DEBTOR AND CREDITOR, 2; INSURANCE, 3.

PASSENGERS.

See RAILROADS, 26-36.

PATENTS.

See CONTRACTS, 5; PUBLIC LANDS; SPECIFIC PERFORMANCE, 2.

PAYMENT.

See ATTACHMENT, 5; INFANTS, 1; JUDGMENT, 29; SCHOOLS, 5; SET-OFF; TAXES; TRUSTS, 1.

PENALTY.

See SHERIFF, 2.

PERSONAL JUDGMENTS.

See EQUITY, 1; HOMESTEAD, 7.

PHYSICIANS AND SURGEONS.

1. VETERINARY SURGEON — DEGREE OF SKILL REQUIRED OF. — A veterinary surgeon impliedly engages and is bound to use, in the performance of his duties in his employment, such reasonable skill, diligence, and attention as may be ordinarily expected of careful and trustworthy persons in that profession. He does not contract to use the highest degree of skill, nor an extraordinary amount of diligence, nor, in the absence of special contract, to effect a cure; and negligence cannot be implied from his failure to do so. *Barney v. Pinkham*, 389.
2. COMPLAINT CHARGING VETERINARY SURGEON WITH IGNORANCE OR WANT OF DUE CARE must contain specific allegations stating such ignorance or want of care, and not leave it to be deduced from mere inference, or the use of vague and indefinite terms. *Barney v. Pinkham*, 389.
See EVIDENCE, 4; NEGLIGENCE, 12; TRIAL, 6.

PLEA.

See PLEADING, 6.

PLEADING.

1. AN ALLEGATION THAT THE DEFENDANT WILLFULLY LEFT A SPARK-ARRESTER open, and allowed sparks to escape and set fire to the plaintiff's property, implies that the act charged was done maliciously. *Montgomery v. Muskegon Booming Co.*, 308.
2. INDEFINITE ALLEGATIONS IN PLEADINGS cannot be corrected and made more definite by demurrer. This can be done only by motion. *Dowser v. Bennett*, 415.
3. WHERE CONTRACT SUED ON IS INCOMPLETE in itself and depends upon another agreement, the terms of such agreement, so far as they are material to complete the contract in suit, should be set forth with appropriate allegations; and if a waiver is also relied upon, it should be pleaded as an excuse for non-performance by the plaintiff. *Freeland v. Elm*, 244.
4. DEMURRER, WHEN FULL CONTRACT IS NOT SHOWN BY THE COMPLAINT. — If the declaration sets out a contract in full, which refers to plans, specifications, and profiles of work to be done, but the declaration omits such specifications, the defendant may attach them to his demurrer, so that the whole contract may be before the court. *Matheson v. Grand Rapids*, 299.
5. ANSWER WILL BE LIBERALLY CONSTRUED AFTER VERDICT. *Boels v. Fyke*, 351.
6. PLEAS TO JURISDICTION MUST SET UP FACTS TENDING TO SHOW WANT OF IT. — Pleas to the jurisdiction must be direct and certain, and set up the facts which go to show want of it. *Stickle v. Carpenter*, 377.
7. VARIANCE BETWEEN PLEADING AND PROOF IMMATERIAL WHEN. — Where a complaint on a foreign judgment describes it as rendered for costs in the sum of \$19.30, and the judgment offered in evidence, though similar in

other respects to the one pleaded, was rendered for costs in the sum of \$18.30, the variance is immaterial, it not appearing that the defendant was misled thereby. *Ritchie v. Carpenter*, 877.

3. **AMENDMENT.** — It is not error for the court to grant leave to either party to amend his pleadings after exceptions thereto have been sustained, and after the parties have announced that they are ready for trial, if justice requires such amendment, even though, under the strict construction of a rule of court, the amendment could not be allowed. *Radam v. Capital Microbs etc. Co.*, 783.

See APPEAL, 5; EQUITY, 4; INTERVENTION; LIMITATIONS OF ACTIONS, 2, 5; MARRIAGE AND DIVORCE, 2; MORTGAGES, 6; PHYSICIANS AND SURGEONS, 2.

PLEDGE — COLLATERAL SECURITY.

1. A PLEDGER OF NON-NEGOTIABLE CHOSSES IN ACTION IS REQUIRED to exercise reasonable care and diligence in their collection, and is liable for the face value of such choses if they are lost by reason of his inexcusable default. *Rumsey v. Laidley*, 935.
2. THE HOLDER OF COLLATERAL SECURITIES MUST USE REASONABLE CARE AND DILIGENCE to make them available, and if, by negligence, wrongful act, or omission on his part, loss is sustained, it must be borne by him. *Rumsey v. Laidley*, 935.

See CORPORATIONS, 8, 9; RAILROADS, 45.

POLICE POWER.

See MUNICIPAL CORPORATIONS; STATUTES.

POSSESSION.

See ADVERSE POSSESSION.

POSTHUMOUS CHILD.

See WILLS, 1.

POWER OF ATTORNEY.

See AGENCY, 5-7; PARTNERSHIP, 1.

PREFERENCES.

See FRAUDULENT CONVEYANCES, 5.

PREPONDERANCE OF EVIDENCE.

See EVIDENCE, 1; INSANE PERSONS.

PRESUMPTIONS.

See BOUNDARIES; DEEDS, 4; EVIDENCE, 8; JUDGMENT, 14; JURISDICTION, 5; MASTER AND SERVANT, 2; PARTNERSHIP, 2.

PRINCIPAL AND AGENT.

See AGENCY.

PRIORITIES.

See MORTGAGES, 2, 3; RAILROADS, 44, 47, 50-52.

PRIVILEGED COMMUNICATIONS.*See* ATTORNEY AND CLIENT; LIES, 1-3.**PROBABLE CAUSE.***See* MALICIOUS PROSECUTION.**PROBATE COURTS.***See* EXECUTORS AND ADMINISTRATORS, 3, 6; WILLS, 2.**PROCESS.**

1. JURISDICTION — DEFECTIVE PROCESS. — Where the copy of a justice's original summons, served on defendant by leaving it at his usual place of business, is, by mistake, signed by the constable serving it instead of the justice issuing it, but it contains the name of the justice in the indorsement on the copy served, a judgment on such service is voidable on direct proceeding, but is not absolutely void. *Stewart v. Bodley*, 105.
 2. JUDGMENTS OF OTHER STATES — RETURN OF SERVICE OF PROCESS SILENT AS TO THE STATE IN WHICH SERVICE WAS MADE. — Where, in an action in one state against a resident of another, the order for service of process directed it to be made upon defendant by publication, or by giving him a copy personally, or by leaving it at his last or usual place of abode, and the return of the officer showed a personal service on defendant, without stating where it was made, such return does not warrant the inference that service was made in the state in which the action was pending. *Rand v. Hanson*, 210.
- See* ACTIONS, 3; CONTEMPT; JUDGMENT, 14; MUNICIPAL CORPORATIONS, 11.

PROFITS.*See* DAMAGES, 1-3.**PROHIBITION.**

PROHIBITION DOES NOT LIE WHERE REMEDY BY APPEAL EXISTS. — The writ of prohibition is an extraordinary remedy, only to be resorted to in cases where the usual and ordinary forms of remedy are insufficient to afford redress. It will not, therefore, lie to restrain courts having original jurisdiction of all cases in equity from issuing injunctions in excess of their jurisdiction, when there is a complete remedy by appeal from any final judgment they may render. *State v. Jones*, 397.

PROMISSORY NOTES.*See* USURY.**PROXIMATE CAUSE.***See* MUNICIPAL CORPORATIONS, 14; NEGLIGENCE, 18, 11; RAILROADS, 16.**PUBLIC LANDS.**

MORTGAGE OF HOMESTEAD BEFORE ISSUANCE OF PATENT. — When a person has done everything necessary under the homestead laws to entitle him to a patent for a tract of public land, he may mortgage it before the patent therefor is issued to him, and such mortgage may be enforced. *Gutherson-Sloss etc. Co. v. Forbes*, 22.

PUBLICATION.

See PROCESS; 2.

QUESTIONS OF FACT.

See INFANTS, 3; LABEL, 8; RAILROADS, 22, 30; TRIAL, 11.

QUIET TITLE.

See APPEAL, 12.

QUO WARRANTO.

See JURISDICTION, 2.

RAILROADS.

1. **RAILROADS OF LESS LENGTH THAN ONE MILE ARE LEGAL**, if of public use and benefit, and a connection between two existing railroads may be accomplished by an independent corporation organized for that purpose. *National Docks etc. R'y Co. v. State etc. R. R. Co.*, 421.
2. **CONDEMNATION OF CROSSING.** — One railroad may condemn a right of way to cross another which is intersected by its route. After such condemnation the place of crossing remains in the common use of both roads for the exercise of their respective franchises, and the manner of crossing must not be destructive of the ability of the road crossed, to fully, fairly, and freely exercise its franchises. *National Docks etc. R'y Co. v. State etc. R. R. Co.*, 421.
3. **CONDEMNATION OF CROSSING.** — One railroad in condemning a right of way to cross another may determine by the location of its route how and where it will cross. *National Docks etc. R'y Co. v. State etc. R. R. Co.*, 421.
4. **CONDEMNATION OF CROSSING BY RAILROAD — DAMAGES.** — Where the petition for the condemnation of the right to cross one railroad by another prescribes the manner of crossing, the condemning company will be compelled to make compensation only for a crossing in the manner specified; and if such crossing is afterwards materially changed, compensation for the damage occasioned by such change must be made. *National Docks etc. R'y Co. v. State etc. R. R. Co.*, 421.
5. **CONDEMNATION OF CROSSING BY RAILROAD — DAMAGES.** — Where a petition for the condemnation by one railroad of a right of way to cross the road of another describes the exact manner of using the right of way to be acquired, compensation is limited to such damages as may result from such use; and it is not presumed, as in case of a general condemnation, that all damages, both present and prospective, including those occasioned by subsequent changes in the plan of crossing, have been considered and allowed. *National Docks etc. R'y Co. v. State etc. R. R. Co.*, 421.
6. **CONDEMNATION OF CROSSING BY RAILROAD — CERTIORARI.** — Where a petition by one railroad for the condemnation of a right to cross the road of another specifies the manner of crossing, the legality of the proposed plan may be conveniently and properly questioned before the condemnation proceeds only by the supreme court, under its general supervisory powers, upon certiorari. *National Docks etc. R'y Co. v. State etc. R. R. Co.*, 421.
7. **CONDEMNATION OF CROSSING BY RAILROAD.** — Ability to enjoy all its

privileges and to perform all its duties in a proper and reasonable manner, being secured to a railroad company whose road is crossed by another, the former must, upon being fully compensated for the right of way, submit to the necessary inconvenience and damage which such crossing may occasion. *National Docks etc. Ry Co. v. State etc. R. R. Co.*, 421.

8. CONDEMNATION OF CROSSING BY RAILROAD—MEASURE OF DAMAGE.—Where a railroad, in its petition to condemn a right of way across another railroad, fails to define how it will cross, but seeks to condemn the privilege of crossing generally, damages should be assessed, not only for the manner of crossing at present lawful and necessary, but also for lawful changes in that manner of crossing in the future. *National Docks etc. Ry Co. v. State etc. R. R. Co.*, 421.
9. CONDEMNATION OF CROSSING BY RAILROAD—EQUITABLE REGULATION.—Where one railroad acquires the right to cross another, either generally or specially, by condemnation proceedings, equity may be invoked, in case of subsequent conflict between such companies, to secure to each the enjoyment of its privileges in a lawful manner. *National Docks etc. Ry Co. v. State etc. R. R. Co.*, 421.
10. CONDEMNATION OF CROSSING BY RAILROAD—DESCRIPTION.—In condemnation proceedings by one railroad company to obtain a crossing over the road of another, the land sought to be condemned must be within the located route of the condemning company, and must be described with such certainty as to be capable of definite and unmistakable ascertainment; otherwise the proceedings are void. *National Docks etc. Ry Co. v. State etc. R. R. Co.*, 421.
11. TRESPASS, CONTINUING, DAMAGES RECOVERABLE FOR.—The building, maintaining, and operating of an elevated railway in, as to lots abutting upon the street, to the owners of which no compensation has been made, a continuing trespass; but in an action at law for the recovery of damages for such building and maintenance, the compensation must be limited to the injuries suffered up to the time of the commencement of the action, because the railway company is under a legal obligation to remove its road and structures, and to cease its trespass, and the law presumes it will do so. *Pappenheim v. Metropolitan etc. Ry Co.*, 486.
12. DAMAGES AT TIME OF CONDEMNATION, WHEN NOT A PROPER TEST.—If a railway corporation enters upon a street, and there constructs and maintains a railway, by which the value of the property abutting on the street is depreciated, and after such depreciation has taken place commences proceedings for condemnation, the amount which it must be required to pay should be determined by ascertaining what would be the fair market value of the property at the time of the condemnation without the railway, and deducting from that sum such value with the railroad in existence. *Pappenheim v. Metropolitan etc. Ry Co.*, 486.
13. PURCHASER OF REAL PROPERTY AFTER THE CONSTRUCTION IN FRONT THEREOF of a railroad by which it is depreciated in value is, when proceedings are subsequently commenced to obtain the right to maintain such railroad, entitled in the assessment of damages to have the land valued as if such railway had not yet been constructed. This assessment cannot be diminished by the fact that because of the existence of the railroad when he purchased he was able to secure the property at less than its former value, on account of the depreciation occurring while it

- was the property of his vendor, from the construction and maintenance of the railroad. *Pappenheim v. Metropolitan etc. R'y Co.*, 486.
14. **TRESPASSERS, WHO ARE NOT. — TRAVELERS ON CITY STREETS USING TRACKS OF RAILROAD** operating therein are not trespassers. *Cline v. Crescent City R. R. Co.*, 187.
 15. **LIABILITY FOR INJURY FROM DEFECTIVE TRACK IN STREET. —** A railroad company operating in the streets of a city is bound to keep its road, track, and rails in proper order and condition to prevent injury to travelers on the street, independent of contract with the city to that effect; and it is liable for an injury proximately caused by its negligence in this respect, when the party injured was not guilty of contributory negligence. *Cline v. Crescent City R. R. Co.*, 187.
 16. **NEGLECTENCE — LIABILITY FOR INJURY FROM DEFECTIVE TRACK IN STREET — PROXIMATE CAUSE. —** A railroad company operating in the streets of a city is liable for an injury to a traveler by coming in contact with a loose rail and protruding spike in its track, due to its negligence, although the negligence of the city in leaving a dangerous hole in the street may have primarily and remotely caused the fall and accident which resulted in the injury. *Cline v. Crescent City R. R. Co.*, 187.
 17. **NEGLECTENCE — WARNING AT CROSSINGS. —** In the absence of any statute regulating the time and manner of giving signals, the failure of an engineer in charge of a locomotive to ring the bell or sound the whistle, on approaching the crossing of a public highway, or a point where the public have been habitually permitted to cross, and where the approaching train is hidden from the view of the traveler by any obstruction allowed to be placed or placed in any way by the company, is negligence on its part. *Hinkle v. Richmond etc. R. R. Co.*, 581.
 18. **NEGLECTENCE — WARNING AT WHISTLE-POST. —** When a railroad company has erected a whistle-post at a proper distance from a crossing, to notify engineers when to give timely warning of the approach of a train to persons using the intersecting highway, and the purpose of the company is known to the public, so that persons generally are led to act on the supposition that a signal will be given at the post, it is negligence on the part of the company if the engineer fails to sound the whistle at such post when passing with a train. *Hinkle v. Richmond etc. R. R. Co.*, 581.
 19. **WARNING AT CROSSINGS. — CONTRIBUTORY NEGLIGENCE. —** Where the person injured would not have ventured upon the railroad track at a crossing, and would have incurred no risk of a collision with a passing train, but for the negligence of the engineer in failing to give timely warning of its approach, the company is negligent and liable in damages, although such person may have been careless in exposing himself to danger. *Hinkle v. Richmond etc. R. R. Co.*, 581.
 20. **NEGLECTENCE — CROSSINGS — DUTY TO LOOK AND LISTEN. —** A traveler must look and listen before going upon a railroad track, although it is not the hour when a regular train is expected. He is, however, bound to look only when to do so would aid him in determining whether or not a train is approaching. In all other respects, he has a right to rely upon his ears. *Hinkle v. Richmond etc. R. R. Co.*, 581.
 21. **CROSSINGS — CONTRIBUTORY NEGLIGENCE. —** Where a traveler ventures upon a railroad track when proper signals are given, and miscalculates as to the chances of crossing, the risk is his, unless some negligence can be

- imputed to the company, which has directly caused the injury. *Hinkle v. Richmond etc. R. R. Co.*, 581.
22. NEGLIGENCE, WHEN A QUESTION FOR JURY. — When the evidence is conflicting, it is for the jury to determine whether the party injured looked and listened for the approaching train before attempting to cross the railroad track, and whether the engineer keeping a proper lookout could have avoided the injury or diminished its danger by stopping or slackening the speed of the train. *Hinkle v. Richmond etc. R. R. Co.*, 581.
23. NEGLIGENCE — EVIDENCE that soon after the happening of an accident to a traveler at a railroad crossing the company put it in good repair is admissible as tending to show that the railway company was under obligation to keep it in repair. *Hinkle v. Richmond etc. R. R. Co.*, 581.
24. NEGLIGENCE — TURN-TABLES. — Where a railroad company leaves its turn-table unlocked and unguarded upon its own premises, near a public highway, or in an open and exposed position near the accustomed or probable place of resort of children, it is not liable to a child, eleven years of age, injured while at play upon such turn-table, and attracted there without any invitation or inducement, express or implied, from the company. In such case, the child is a trespasser, to whom the company does not owe the duty of ordinary care. *Daniels v. New York etc. R. R. Co.*, 283.
25. CONTRIBUTORY NEGLIGENCE, BOY NINE AND A HALF YEARS OLD RESPONSIBLE FOR, WHEN. — A boy nine and a half years old, injured while stealing a ride upon the foot-board of a switch-engine, who is shown to have been of ordinary intelligence, familiar with the working of a switch-engine, aware of the danger of his act, frequently forbidden by his parents to go upon the cars, and several times driven away from them by the employees of the railroad company, is chargeable with such contributory negligence as will bar a recovery by him for the injury. *Oregon R'y & Nav. Co. v. Egley*, 860.
26. NEGLIGENCE, RAILROAD COMPANY NOT GUILTY OF, WHEN. — A railroad company is not negligent in failing to ascertain that a boy of tender years is stealing a ride on the back foot-board of a switch-engine, unknown to its employees, who are shown to have immediately driven off and threatened boys, whenever they saw them about the cars, and to have done all they reasonably could be expected to do to carry out the instructions of the company, forbidding boys to be allowed on the track. *Oregon R'y & Nav. Co. v. Egley*, 860.
27. PASSENGERS — NEGLIGENCE. — Although a railway company has provided a safe way of egress from its cars, a passenger who is ignorant thereof is not guilty of negligence if he fails to ascertain that fact and to avail himself of that way, when he sees another way, apparently safe, is in general use by passengers, with the tacit permission of the railroad company. *Missouri Pac. R'y Co. v. Long*, 811.
28. PASSENGERS — NEGLIGENCE. — Although a railway company has provided a safe exit from its cars, yet if at the same time there exists another way which is not safe, and which is in such general use by its passengers as to induce the belief that it was provided, in part at least, for that purpose, the company is liable to a passenger who, by taking the latter way, is injured in alighting from the cars, in the absence of warning by the company's employees that there is another and safer way which he is expected to use. *Missouri Pac. R'y Co. v. Long*, 811.
29. PASSENGERS — CONTRIBUTORY NEGLIGENCE. — Where a railway company

has provided a safe exit from its cars, while another way which is not safe exists, and is in such general use by its passengers, with the tacit consent of its employees, as to induce the belief that it is provided as a means of exit, a passenger who, in alighting, takes the latter way at night, and is injured by stepping into an opening between the cars and the platform, is not guilty of contributory negligence. *Missouri Pac. R'y Co. v. Long*, 811.

30. **INFANTS, CONTRIBUTORY NEGLIGENCE OF, QUESTION OF FACT.** — The question whether or not the mind of a boy, ten years of age, is sufficiently mature to make him responsible for his contributory negligence is a question of fact for the jury, and should not be decided by the court on demurrer, even when the petition admits that he had sufficient intelligence to contract for his passage, and knew of the movements of the train on which he was a passenger. *Avey v. Galveston etc. R'y Co.*, 809.
31. **NEGLECT TOWARD MINOR PASSENGER.** — Where a child, ten years of age, is compelled, through the negligence of a railroad conductor, to jump from a train on which he is a passenger, or be carried past his destination, his contributory negligence in so jumping will not relieve the company of liability, unless he was of sufficient intelligence to be responsible for his own acts. *Avey v. Galveston etc. R'y Co.*, 809.
32. **RIGHT TO EJECT PERSON WHO HAS BEEN GIVEN WRONG TICKET BY MISTAKE, OR WHOSE TICKET HAS BEEN IMPROPERLY TAKEN UP.** — As between a passenger and a conductor, the ticket is conclusive evidence of the passenger's rights, and if it does not entitle him to ride he may be ejected from the train without giving him any cause of action in tort, though the company, through mistake of its agent, has given the passenger a wrong ticket, or has taken up his ticket when not entitled to do so. In such circumstances, his remedy is by an action on the contract for giving him a wrong ticket, or for wrongfully taking up his ticket, and not by an action for his wrongful removal from the train. *McKay v. Ohio River R. R. Co.*, 913.
33. **ACTION OF TRESPASS ON THE CASE FOR VIOLENTLY EJECTING plaintiff from railway car** cannot be sustained where the evidence shows that no violence was used toward him, and that he merely got off the car when told by the conductor that he must do so. The plaintiff's remedy, if any he has, is by an action on the case in *assumpsit*, based on the breach of the defendant's contract to carry him. *McKay v. Ohio River R. R. Co.*, 913.
34. **ACTION, WHETHER EX CONTRACTU OR EX DELICTO.** — An action should be regarded as in trespass on the case, and not in *assumpsit*, where the declaration, after setting out a contract for the transportation of plaintiff as a passenger on defendant's cars, and that plaintiff had taken his seat in one of such cars as such passenger, that the defendant, disregarding its undertaking, did not convey plaintiff as it agreed to do, but instead thereof violently and with force ejected him from the car, and compelled him to walk a long distance to a hotel, etc. *McKay v. Ohio River R. R. Co.*, 913.
35. **RAILWAY CORPORATION IS NOT LIABLE FOR THE ACT OF A TICKET AGENT** in directing the arrest of a person from whom such agent had received for tickets a bill believed by him to be counterfeit, where he acted at the suggestion of a police-officer, and for the purpose of apprehending the person whom he believed to be engaged in the commission of a crime. It was not within the line of his duty to receive money which he be-

- lieved to be counterfeit and worthless; and in what he did he acted in his personal capacity, and not as the agent or servant of the railway corporation. *Mulligan v. New York etc. R'y Co.*, 539.
36. **SLEEPING-CAR COMPANY'S LIABILITY FOR PASSENGER'S APPAREL STOLEN FROM ITS CAR.** — A sleeping-car company, so far as it renders service as an innkeeper, is subject to like liabilities and obligations, and is liable for a necessary article of wearing apparel belonging to a passenger in its car, which was placed in the care of its employees, and was stolen from the car, without any negligence on the part of the passenger. *Pullman etc. Co. v. Lowe*, 325.
37. **LOCAL AGENT OF RAILWAY COMPANY NOT PRESUMED TO HAVE AUTHORITY TO RATIFY TORT OF ITS SERVANT.** — A local agent or subordinate employee of a railway company is not presumed to have authority to ratify the torts of its servants, in the absence of proof to that effect. *Gulf etc. R'y Co. v. Reed*, 749.
38. **RATIFICATION BY RAILWAY COMPANY OF ITS SERVANT'S TORT, WHAT NECESSARY TO CONSTITUTE.** — To prove the ratification by a railway company of the wrongful act of its servant, the adoption or confirmation of such act must be shown to be by some chief officer, vice-principal, or *alter ego* of the company, who must be proved to possess under and for the company sufficient authority and discretion to act and speak for the company as if it were bodily present in the persons of its managers, speaking and acting for itself and on its own responsibility. *Gulf etc. R'y Co. v. Reed*, 749.
39. **RAILWAY COMPANY LIABLE FOR ACTUAL, BUT NOT EXEMPLARY, DAMAGES, WHEN.** — Where the yard-master of a railway company throws carcasses of dead cattle into a bayou near the plaintiff's residence, thereby polluting the water and atmosphere, the railway company will be liable to the plaintiff for the actual damages sustained by him by reason of the wrongful act of its yard-master, but not for exemplary damages, in the absence of proof of authority or ratification. *Gulf etc. R'y Co. v. Reed*, 749.
40. **RISKS ASSUMED BY EMPLOYEE — UNBLOCKED FROGS.** — Where an employee enters the service of a railway company, knowing that it uses nothing but unblocked frogs, he assumes the risks incident to their use, and cannot recover for an injury therefrom, although the duty of reasonable care would require the company to substitute blocked for unblocked frogs, to promote the safety of its employees. *St. Louis etc. R'y Co. v. Davis*, 48.
41. **ASSUMPTION OF RISKS BY EMPLOYEES.** — An employee accepting service on a railway, with knowledge of the character and position of structures from which he is liable to receive injury, cannot call upon his employer to make alterations to secure his greater safety, nor to respond in damages for injuries received from his want of care while passing under or through such structures. *Williamson v. Newport News Co.*, 927.
42. **LIABILITY FOR DEFECTIVE MACHINERY.** — When a railway employee is injured while using a draw-head which has a patent structural defect, he is entitled to recover without proof that the company had notice of such defect; but if the defect has occurred so recently as to exist in spite of all proper care on the part of the company, the employee is not entitled to recover. *St. Louis etc. R'y Co. v. Davis*, 48.
43. **IF A BRIDGE OR TUNNEL THROUGH WHICH A BRAKEMAN MUST PASS IS TOO LOW TO PERMIT HIS PASSAGE IN SAFETY WHILE STANDING UPRIGHT ON THE CAR**

and he is warned of this fact at or before he entered into the service of the corporation, he cannot recover damages because of injuries inflicted upon him by such bridge or tunnel by his coming into contact with it when standing upright on the car. *Williamson v. Newport News Co.*, 927.

44. RAILWAYS, INSOLVENT—PRIORITY ALLOWED TO CLAIM THAT HAS ACCRUED MORE THAN SIX MONTHS BEFORE APPOINTMENT OF RECEIVER, WHEN. — Where there is nothing to show laches on the part of the claimant, a claim for coal furnished to a railroad company is entitled to priority, although it did not accrue within six months before the appointment of a receiver. *McIlhenny v. Bins*, 705.
45. PLEDGE OF EARNINGS OF RAILROAD INVALID, WHEN. — Where notes are given by a railroad company for money borrowed by it to pay interest on its bonds, each containing a stipulation that "three quarters of the gross earnings of the road from date is pledged in liquidation of this note," such stipulation has no legal effect, the holder of the notes has no claim upon the gross earnings of the road, and the notes have no priority over the bonded debt of the road. *McIlhenny v. Bins*, 705.
46. WAIVER OF RIGHT TO PRIORITY, TAKING ADDITIONAL SECURITY NOT, WHEN. — Where the holder of claims against a railway company for wages takes notes of the company indorsed by its president, but without intending to waive his right to priority of payment, the taking of such notes is not a waiver of his right. *McIlhenny v. Bins*, 705.
47. ASSIGNMENT OF CLAIMS FOR WAGES DOES NOT DESTROY RIGHT TO PRIORITY OF PAYMENT. — Where an arrangement is made with a railroad company, whereby a sufficient amount of the wages of its laborers is retained by the company to pay their board, the claims of the boarding-house keepers for such amount are to be treated as claims originally due laborers, and duly assigned to the holders, and their assignment does not destroy their right to priority. *McIlhenny v. Bins*, 705.
48. RAILWAYS, INSOLVENT—STATUTORY LIENS, CLAIMS HAVING, ENTITLED TO PRIORITY, WHEN. — Claimants having statutory liens against a railroad for labor performed in its construction, operation, and maintenance, who, before such liens expire, are prevented from enforcing them by the appointment of a receiver, will not be denied the priority to which they are entitled, merely because their claims accrued more than six months before the appointment of the receiver, notwithstanding the court has made a provisional order prescribing six months as the limit of time within which claims to be entitled to priority must have accrued. *McIlhenny v. Bins*, 705.
49. RAILWAYS, INSOLVENT—FUND DIVERTED IN DEROGATION OF RIGHTS OF THOSE ENTITLED TO IT MUST BE RESTORED. — Where the net earnings of an insolvent railroad in the hands of a receiver sufficient to pay all the preferred claims have been appropriated to the making of betterments upon the property and to the payment of interest upon the bonds, this diversion being in derogation of the rights of those entitled to the fund, the court should restore the fund from the proceeds of the sale of the mortgaged property. *McIlhenny v. Bins*, 705.
50. RAILWAYS, INSOLVENT—CONSTRUCTION CLAIMS ENTITLED TO PRIORITY, WHEN. — Claims for construction of a railroad are not, as a general rule, allowed priority over mortgage debts of the company, unless the work was done or the material furnished in pursuance of an order of the court; but there may be construction claims that appeal as strongly to the conscience of a court of equity as the debts commonly known as operating

expenses; and when mortgages are executed upon an unfinished road, and they show upon their face that it was contemplated that the work of construction should be prosecuted to completion, and when the mortgages attach to the new road as fast as it is finished, the new road should be considered a useful improvement; and if the road be put into the hands of a receiver before the work and materials are paid for, holders of the claims for such work and material should be paid from the net income of the road while under the control of the court, if there be a fund on hand that can be applied to such payment, and they have not been guilty of any laches. *McIlhenny v. Biss*, 705.

51. RAILWAYS, INSOLVENT — OPERATING EXPENSES OF. — Priority in payment is generally conceded to claims for the operating expenses of an insolvent railway in the hands of a receiver over the mortgage debts of the company. *McIlhenny v. Biss*, 705.
 52. RAILWAYS, INSOLVENT — IN HANDS OF RECEIVER, CLAIMS HAVING PRECEDENCE OVER MORTGAGES. — In the settlement and distribution of the assets of an insolvent railway company which has been placed in the hands of a receiver, priority of payment is allowed to certain claims over the mortgage debts, and creditors who have labored, furnished supplies, made repairs or useful improvements in the operation, maintenance, and betterment of the railway, and who have been suddenly deprived of their remedies at law by the appointment of a receiver, are entitled to the equitable consideration of the court in the distribution of the assets of the company, and to priority in payment from the net income of the property while in the hands of the court. *McIlhenny v. Biss*, 705.
 53. STREET-RAILWAYS HAVE NO PARAMOUNT RIGHTS OVER OTHER VEHICLES AT STREET-CROSSINGS. — At such crossings, the cars of the street-railways have a right to cross the streets, and other vehicles a right to cross the track of the railway. Neither right is superior to the other. The right of each must be exercised with due regard to the right of the other; and the right of each must be exercised in a reasonable and careful manner, so as not to unreasonably abridge or interfere with the right of the other. *O'Neil v. Dry Dock &c. R. R. Co.*, 512.
- See ABATEMENT; CORPORATIONS, 18; CO-TENANCY, 3, 4; COUNTIES; DEEDS, 3; INTERSTATE COMMERCE, 1-3; MORTGAGES, 1; MUNICIPAL CORPORATIONS, 13; PARTITION, 3; RECEIVERS; TRESPASS, 1, 2; WATERS AND WATERCOURSES.

RATIFICATION.

See CORPORATIONS, 17; MASTER AND SERVANT, 1, 12; RAILROADS, 37, 38.

REAL PROPERTY.

NOTICE — POSSESSION BY GRANTOR AFTER CONVEYANCE AS NOTICE OF EQUITIES. — Where a grantor who has given a warranty deed continues in open and notorious possession of agricultural land at the time of the grant, and for a considerable time thereafter during crop season, subsequent purchasers are put upon notice and under duty to make inquiries as to his rights and equities in the land, unless he has, either expressly or by a recognized course of dealing, held out his grantee as authorized to convey. *Turman v. Bell*, 85.

See APPEAL, 12; CONTRACTS; CONTEMPT; NEGLIGENCE, 4; TRUSTS, 1; VENDOR AND PURCHASER.

REASONABLE DOUBT.

See INSANE PERSONS.

REBUTTAL.

See BOUNDARIES; TRIAL, 7.

RECEIVERS.

1. **RECEIVER OF INSOLVENT CORPORATION, PROPER PARTIES TO INSTITUTE SUIT FOR APPOINTMENT OF.** — If a railway corporation becomes insolvent, and a receivership is necessary for the preservation of its property and the distribution of its assets among its creditors, the directors, as trustees for the stockholders and creditors, and not the company itself, would seem to be the proper parties to institute the suit for the appointment of a receiver. *McIlhenny v. Binn*, 705.
2. **RECEIVER'S SALE, PROCEEDS OF, MAY BE ORDERED PAID ON FIRST-MORTGAGE BONDS, WHEN.** — Where the court decrees a sale by a receiver of the property of an insolvent railroad corporation, it may properly provide that the proceeds of the sale, after the expenses of the receivership, costs of court, and of foreclosure, and the payment of such claims as have been awarded priority, shall be paid on the first-mortgage bonds given by the company. *McIlhenny v. Binn*, 705.
3. **MINIMUM BID FOR PROPERTY SOLD BY RECEIVER MAY BE PRESCRIBED BY ORDER OF COURT.** — The court has power, in decreeing the sale by a receiver of the property of an insolvent railroad corporation, to order that the sale shall not be made for a less price than one named in the decree. Such an order may be necessary to prevent a sacrifice of the property. *McIlhenny v. Binn*, 705.
4. **SALE BY — RIGHTS OF PURCHASER.** — As against the purchaser at a valid receiver's sale, no lien can be made to attach to the property which did not rest upon it at the time of the institution of the suit under which the sale was made. *Texas etc. R'y Co. v. Lewis*, 776.

See ATTACHMENT, 2-4; RAILROADS, 44, 49, 52.

RECORDS.

See CORPORATIONS, 18; EVIDENCE, 7-9; NAMES.

RECOUPMENT.

See SALES, 12.

REGISTRATION.

See DEEDS, 5.

RELEASES.

See MORTGAGES, 11, 12; NEGOTIATION, 14.

REPEAL.

See STATUTES, 2.

RES JUDICATA.

See JUDGMENT, 1, 2; JUDGMENT, 3, 15-22.

RESCISSION.

See SALES, 10.

RESIDENCE.

See MARRIAGE AND DIVORCE, 7.

RESTRAINT OF TRADE.

See CONTRACTS, 5.

RESTRICTIONS.

See COVENANTS, 1, 2.

REVIEW.

See APPEAL.

REVIVAL.

See ABATEMENT.

REVOCATION.

See TRUSTS, 2.

RIOT — UNLAWFUL ASSEMBLY.

1. UNLAWFUL ASSEMBLY AT THE COMMON LAW WAS A DISTURBANCE OF THE PEACE by persons assembling together with an intention to do a thing which, if executed, would make them rioters, but neither executing it nor making a motion towards its execution. *People v. Most*, 458.
2. UNLAWFUL ASSEMBLY — NUMBER OF PERSONS WHO MUST PARTICIPATE THEREIN. — The offense of an unlawful assembly can be committed only when there is a concert of three or more persons who unite in an attempt or in a threat to do one or more of the things specified in the statute. *People v. Most*, 458.
3. UNLAWFUL ASSEMBLY — THREATS, WHO MAY BE DEEMED TO PARTICIPATE IN. — Persons may be regarded as participating in a threat made by another though they did not utter or repeat the words used by him, if they were present and under the influence of similar sentiments, and by their conduct assented to and adopted his language as their own. *People v. Most*, 458.
4. UNLAWFUL ASSEMBLY. — THE THREATS NECESSARY TO THE COMMISSION OF the crime of unlawful assembly may relate to acts to be performed at some future time, when affairs shall be ripe for their performance. *People v. Most*, 458.
5. UNLAWFUL ASSEMBLY. — THREATS OF VIOLENCE AGAINST PERSONS RESIDENTS OF ANOTHER STATE are within the statute of New York defining the offense of unlawful assembly. *People v. Most*, 458.
6. EVIDENCE — ANARCHISTS. — EVIDENCE THAT PERSONS ASSEMBLED AT A MEETING WERE ANARCHISTS is competent to aid the jury in determining whether such meeting joined in threats made by defendant, who was one of the speakers thereat. *People v. Most*, 458.

RIPARIAN RIGHTS.

See WATERS AND WATERCOURSES.

RISKS.

See MASTER AND SERVANT, 2-10; RAILROADS, 40, 41.

SALES.

1. **WHEN THE SUBJECT OF A SALE IS NOT IN EXISTENCE** at the time of the contract, the agreement that it shall, when existing, possess certain qualities is not a mere warranty, but is a condition the performance of which is precedent to any obligation upon the vendee under the contract. *American Bronze Co. v. Gillette*, 286.
2. **TITLE TO MATERIAL FOR BUILDING TO BE ERECTED ON LAND OF PURCHASER VESTS, WHEN.** — The rule in relation to acts necessary to pass title to the purchaser of goods ordered to be manufactured is applicable only to contracts relating to personal property in the possession of the manufacturer, but is not applicable to contracts for the construction of houses upon land owned or controlled by the purchaser. If a party contracts, out of his own material, to construct a house upon the lot of another, the legal title to the material will remain in the contractor, and will be liable to seizure and sale for his debts, subject to such equities as may exist in favor of others; but if he contracts to sell to the owner of the lot the material for the house, and also to construct the house, intending that the property in the material shall be in the owner and at his risk until the house is completed, the legal title to the material will vest in the owner of the lot upon its delivery. *Ellis v. Bonner*, 731.
3. **CONDITION SUBSEQUENT — EVIDENCE.** — Where a purchaser from the agent of the vendor signs an unconditional memorandum for the purchase of a quantity of hops at a certain price, with an oral reservation of a condition that if it is subsequently discovered that the price named is not the market price, there is to be no sale, and the vendor confirms the memorandum of sale, after which the purchaser informs him by letter that as the agent misrepresented the market price, the hops will not be accepted unless a concession is made, without mentioning the oral condition, the sale is a present sale, and the condition is a condition subsequent, parol evidence of which is inadmissible as a defense, or to vary the terms of the memorandum, in an action to recover the price of the hops after a refusal to accept. *Lilienthal v. Suffolk Brewing Co.*, 234.
4. **FRAUDULENT REPRESENTATION BY VENDOR, WHEN NO DEFENSE.** — Where a vendor of hops fraudulently states the market price thereof to an experienced prospective purchaser, who says he does not believe the statement, and subsequently signs an unconditional memorandum for the purchase of a certain quantity of hops at a certain price, orally reserving the right, if the price named is subsequently found not to be the market price, to disaffirm the sale, it will be presumed that he relied upon the oral condition, and not the fraudulent statement of the vendor. *Lilienthal v. Suffolk Brewing Co.*, 234.
5. **RECOVERY OF PROPERTY OBTAINED BY FRAUD.** — Where one induces another to part with his property by a promise to pay cash for it on the same day, showing a check to inspire confidence in his promise, when he does not intend, at the time of making such representation, to pay for the property in money at any time, but intends, after thus getting possession, to credit its value on a claim held by him against the owner or one of the owners, the sale is fraudulent and voidable at the election of such owner, who may maintain detinue, and recover the specific property, or if it cannot be found, he may maintain trover for its wrongful conversion, consummated by a refusal to surrender it on demand. *Blake v. Blackley*, 566.

6. **VENDOR'S LIABILITY FOR LOSS DURING TRANSPORTATION — CARRIER AS AGENT FOR VENDOR.** — Where a vendor specially agrees to carry and deliver goods to the purchaser at a specified place at his own expense, the delivery of the goods on board a vessel is a delivery to the master thereof, merely as the vendor's agent or bailee to perform the act of delivery for him in execution of his contract, and the vessel in which the goods are carried is *pro hac vice* the vendor's vessel; and until delivery is consummated in such manner as to be effectual between the vendor and the purchaser, the loss of the goods through the negligence of such master or the condition of such vessel, or from any other cause not due to the fault of the purchaser, must be borne by the vendor, as, until delivery, the goods are at his risk. *McNeal v. Braun*, 441.
7. **LIABILITY OF PURCHASER FOR DELAY IN DELIVERY.** — Where a vendor agrees to carry and deliver goods at his own expense, and selects a vessel as the carrier, the detention of such vessel beyond the lay days named in the contract of affreightment, or for an unreasonable time if no lay days are named, because of the crowded condition of the wharf selected by the purchaser for the discharge of the goods, or for any other fault on his part, will entitle the master to discharge the goods elsewhere, and warehouse them, or to demurrage or reasonable damages for the detention of the vessel, but it will not release him, as the agent of the vendor, from the duty of delivering the goods. *McNeal v. Braun*, 441.
8. **VENDOR'S LIABILITY FOR LOSS DURING TRANSPORTATION — RIGHT OF PURCHASER TO SELECT PLACE FOR DISCHARGING GOODS.** — Where a vendor specially agrees to carry and deliver goods at his own expense, and selects a vessel as the carrier, the purchaser has an option to designate the wharf for discharging the goods, and the master of the vessel must obey the purchaser's directions in that respect, if the option is exercised in a reasonable time and manner. The purchaser, in exercising his option, is bound to select a wharf which is safe, as well for the vessel as for the discharge of the goods, and if the sinking of the vessel and the loss of the goods are caused by the condition of the wharf selected, without the negligence of the master or the unworthy or defective condition of his vessel, the purchaser must bear the loss. *McNeal v. Braun*, 441.
9. **VENDOR'S LIABILITY FOR LOSS DURING TRANSPORTATION — PURCHASER'S RIGHT TO INSPECT AND REMOVE GOODS.** — Where a vendor specially agrees to carry and deliver goods to the purchaser thereof at a certain place and at his own expense, the purchaser is entitled to a reasonable time, within business hours, after their arrival, to inspect and examine them, to ascertain whether they correspond with the invoice, and to receive and remove them. During this period the carrier remains the agent of the vendor, and the loss of the goods is at the latter's risk. *McNeal v. Braun*, 441.
10. **SALE, EXECUTORY CONTRACT OF, RIGHT TO RESCIND CONTRACT ON NON-PERFORMANCE.** — If a contract is to furnish a monument with certain inscriptions, and it is furnished with one of such inscriptions omitted, the purchaser may for that reason not only reject the monument, but rescind the order, and the vendor has not thereafter the right to make, furnish, and require the purchaser to accept another monument conforming to the original order. *American Bronze Co. v. Gillette*, 386.
11. **WARRANTY IN SALE OF GOODS, VENDEE NOT BOUND TO INSPECT GOODS BEFORE USING THEM.** — Where goods sold under a warranty are defective, or unfit for the use intended, the vendee has a right to assume that

they are of the quality ordered, and need not inspect them for the purpose of ascertaining imperfections before using them, and if sued for the price, he may set up a breach of such warranty as a counterclaim. And in such action it is error for the court to charge the jury "that if the defendant, before using the same, had an opportunity to inspect said goods, and did not do so, and if, upon such inspection, he could have ascertained the defects claimed, then said defendant is not entitled to any damages." *Tacoma Coal Co. v. Bradley*, 890.

12. INSTRUCTION HELD CORRECT. — Where, in an action to recover the price of brick, the defendant sets up a breach of warranty as a counterclaim, and relies upon the fact that the ovens constructed out of the brick fell in as positive proof of the unfitness of the brick for the use for which they were sold, it is not error to instruct the jury: "If you believe from the evidence that the falling in of said ovens was caused by a misconstruction of the same, or any defects in said construction or material used therein, other than the goods involved in this controversy, or the misuse of said oven subsequent to said construction, the defendant is not entitled to any damage herein." *Tacoma Coal Co. v. Bradley*, 890.

13. NOTICE OF DEFECTS IN GOODS SOLD UNDER WARRANTY NEED NOT BE GIVEN. — A vendee of goods sold under a warranty may retain the goods without giving notice to the vendor of defects therein, and in an action by the vendor for the purchase price, may plead breach of warranty for the purpose of recouping damages. *Tacoma Coal Co. v. Bradley*, 890.

14. BURDEN OF PROOF OF WARRANTY AND ITS BREACH ON PARTY ALLEGING SAME. — When, in an action for the price of goods sold, the defendant alleges a warranty and a breach thereof, the burden of proving both is upon him, before he is entitled to receive any benefit therefrom. *Tacoma Coal Co. v. Bradley*, 890.

See VENDOR AND PURCHASER.

SATISFACTION.

See DEBTOR AND CREDITOR, 1; JUDGMENT, 29.

SCHOOLS.

1. MUNICIPAL BONDS — DETERMINATION OF LOCAL BOND, WHEN CONCLUSIVE IN FAVOR OF. — If a statute provides that whenever any school district shall have voted to borrow any sum, the district board of such district is authorized to issue the bonds of such district, such board is thereby vested with authority to decide whether the proceedings to vote such bonds are such as will authorize the board to issue them; and if they issue such bonds, containing recitals showing them to have been authorized, this is conclusive in favor of an innocent holder. *Olde v. School District*, 295.
2. SCHOOL TOWNSHIP WARRANTS ISSUED to pay for services of teachers who held no lawful certificate of qualification are without consideration and void. Such persons cannot be employed to teach, under the express terms of the statute. *Goose River Bank v. Willow Lake School Township*, 605.
3. NEGOTIABLE INSTRUMENTS. — SCHOOL TOWNSHIP WARRANTS ARE NOT NEGOTIABLE INSTRUMENTS, in the sense that their negotiation or ownership by innocent purchasers for value will cut off defenses. *Goose River Bank v. Willow Lake School*, 605.

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4. **VOID MUNICIPAL CONTRACT — RETENTION OF FRUITS OF.** — When a contract entered into by a school township for the payment of school money is void or prohibited by express declaration of statute, the retention by such municipality of the fruits of such contract will not subject it to liability, either under such contract or upon a *quantum meruit*. *Goose River Bank v. Willow Lake School*, 605.
5. **ESTOPPEL. — SCHOOL TOWNSHIP IS NOT ESTOPPED BY THE FALSE REPRESENTATIONS OF ITS OFFICERS** as to the existence of facts authorizing the issuance of a warrant for the payment of school money. *Goose River Bank v. Willow Lake School*, 605.
6. **UNQUALIFIED SCHOOL-TEACHER OR HIS ASSIGNEE NOT ENTITLED TO COMPENSATION.** — One who teaches school without a certificate of qualification, in violation of the express terms of a statute, is not entitled to compensation for his services, even though the school officers have issued a warrant therefor. His assignee is entitled to no greater rights than himself. *Goose River Bank v. Willow Lake School*, 605.

SEAL.

See EVIDENCE, 7.

SEED-GRAIN.

See STATUTES, 6.

SEDUCTION.

1. **DAMAGES FOR.** — A FATHER may maintain his action for damages for the seduction of his minor daughter, although she is not a member of his household, but is in the actual employment of another, enjoying the fruits of her labor with her father's consent, if he has not relinquished, past the power to recall, his right to control her services. *Simpson v. Grayson*, 52.
2. **MEASURE OF DAMAGES — EVIDENCE OF PREVIOUS UNCHASTITY.** — In an action by a father to recover damages for the seduction of his minor daughter, he is entitled, as master, to recover for the loss of her services and her lying-in expenses, and also, as parent, for the shame and mortification which the wrong brings upon him and his family if his daughter was previously chaste; but proof of her previous unchastity is admissible in mitigation of the damages due him as parent; and if it is proved that she was notoriously unchaste prior to defendant's intercourse with her, and had thereby disgraced her family to such extent that defendant's conduct added nothing to her parent's suffering, or to the danger of corrupting the family's morals, no damages can be awarded beyond those suffered by the father as master. *Simpson v. Grayson*, 52.

SELF-DEFENSE.

See HOMICIDE, 2, 4.

SEPARATE PROPERTY.

See AGENCY, 2; HUSBAND AND WIFE, 2.

SERVANTS.

See MASTER AND SERVANT.

SET-OFF — COUNTERCLAIM.

COUNTERCLAIM. — COLLATERAL SECURITIES HAVING BEEN GIVEN TO SECURE THE PAYMENT of a debt, the amount thereof will be deducted from it, where the creditor permitted them to be lost by not exercising ordinary diligence towards their collection. *Rumsey v. Laidley*, 935.

SETTLEMENT.

See TRUSTS, 2.

SEVERALTY.

See PARTITION, 2-5.

SHERIFFS.

1. **INDEMNITORS OF AN OFFICER** who has levied upon property not subject to his writ are jointly and severally liable as principals for the original unlawful taking. *Dyett v. Hyman*, 533.
2. **INDEMNITORS, LIABILITY OF, NOT LIMITED BY THEIR BOND.** — Though the code of New York gives indemnitors of the sheriff, in the event of suit being brought against him, the right to apply to the court to be substituted as defendants in his place, it does not limit their liability to the amount of their bond, nor otherwise impair the right of the person injured by the act of the officer for which he has been indemnified, to recover from him or his indemnitors, either jointly or severally, full compensation for the injuries suffered from his wrongful act. *Dyett v. Hyman*, 533.
3. **INDEMNITORS — LIABILITY OF THE INDEMNITORS OF A SHERIFF IS NOT LIMITED** to the amount of their bond, when the party injured by the unlawful act, against the consequences of which they agreed to indemnify the officer, elects to treat them as having adopted and become parties to his wrongful acts. The remedy is not upon the bond, and recovery may therefore be had for the full amount of damages suffered, whether it is more or less than the penalty of the bond. *Dyett v. Hyman*, 533.
4. **SHERIFF'S OFFICIAL BOND, SURETIES ON, LIABLE FOR WHAT ACTS OF THEIR PRINCIPAL.** — Where the sheriff of a county in the state of Nebraska, having in his hands a warrant issued by a justice of the peace of that county for the arrest of a resident of the state of Kansas on a criminal charge, proceeds to the latter state, and there, by fraud, induces him to submit to arrest, and then, without obtaining from the governor of Kansas any warrant of extradition, brings his prisoner into the state of Nebraska, and wrongfully and unlawfully keeps him in prison there, by virtue of his office and the warrant held by him, the sureties on his official bond will be liable in damages for so much of the imprisonment as took place within the state of Nebraska, although his acts in Kansas were without either the virtue of office or the color of office, for which he alone, if he had never brought his prisoner to Nebraska, would have been liable. *Kendall v. Aleckire*, 367.

SIGNATURE.

See JUDGMENT, 10; WILLS, 2-4.

SLANDER.

1. **WORDS SLANDEROUS PER SE.** — A false statement made by one of another, that he is a scoundrel, a rogue, and a damned rascal, and that he has stolen all the property owned by him, uttered in a public place and

manner, in the presence of by-standers, is *slanderosus per se*. *Savoie v. Scanlan*, 200.

2. ONE WHO UNLAWFULLY INTERFERES WITH THE RIGHT OF ANOTHER to enjoy that degree of respect, good-will, and social and business distinction to which his own acts and his social and business habits entitle him, by circulating slanderous reports, renders himself liable to consequential damages. *Savoie v. Scanlan*, 200.
3. IMPLIED MALICE JUSTIFYING RECOVERY WITHOUT PROOF. — Malice is implied from the use of opprobrious epithets which are slanderous *per se*; and proof of special injury is not necessary to a recovery of damages. *Savoie v. Scanlan*, 200.
4. BOTH DAMAGE AND MALICE MAY BE INFERRED from the nature and falsity of the words used, and from the circumstances under which they were uttered, without special proof. *Savoie v. Scanlan*, 200.

See LIBEL.

SLEEPING-CAR COMPANIES.

See RAILROADS, 33.

SOCIETIES.

See ASSOCIATIONS.

SPECIFIC PERFORMANCE.

1. CONTRACTS — WHEN WILL BE DECREED. — Where the breach of a contract between corporations engaged in manufacturing an article from material the supply of which is limited will result in depriving one of them of its share of such material, and cause a continuing injury to, and possibly a destruction of, its business, it has no adequate remedy at law in damages, and is entitled to specific performance of the contract. *Gloucester etc. Co. v. Russia etc. Co.*, 214.
2. CONTRACTS — FAILURE OF CONSIDERATION — AFFIRMANCE. — Where a contract to avoid competition and regulate prices, between corporations manufacturing fish-glue under a patent supposed by both of them to be valid, has for its principal consideration a compromise of litigation between them relating to an infringement of such patent, a subsequent discovery of the invalidity of the patent, after part performance of the contract, will not constitute such failure of consideration as to defeat an action for specific performance thereof, especially when the contract has been affirmed after the discovery of the invalidity of the patent. *Gloucester etc. Co. v. Russia etc. Co.*, 214.
3. MODIFIED CONTRACT. — When the parties to a contract have modified the execution of it in details by common understanding and mutual consent, specific performance of the modified contract may be decreed, if the rights of the parties under it are still clear. *Gloucester etc. Co. v. Russia etc. Co.*, 214.
4. SPECIFIC PERFORMANCE OF A PERSONAL COVENANT WILL BE DECREED if it is of such a character and purpose that its performance was what was contemplated by the parties, and not mere damages for its breach. Therefore, an agreement not to erect flats in a designated neighborhood, because its breach cannot be compensated in damages, will be specifically enforced. *Lewis v. Gollner*, 516.
5. SPECIFIC PERFORMANCE cannot be enforced in equity of a parol contract for

an interest in land, unless such contract is definite and certain in all its parts. *Crocodale v. Langum*, 551.

See CONTRACTS, 2, 3.

STAKE-HOLDER.

See WAGNER.

STALE DEMANDS.

See EQUITY, 4, 5.

STATES.

See CHATTEL MORTGAGES, 4; EXTRADITION; INTERSTATE COMMERCE; RIOT, 5; STATUTES; USURY.

STATUTE OF FRAUDS.

See CONTRACTS, 3, 4; LANDLORD AND TENANT, 7; LICENSEE; VENDOR AND PURCHASER, 1, 2.

STATUTE OF LIMITATIONS.

See LIMITATIONS OF ACTIONS.

STATUTES.

1. **CONSTITUTIONAL LAW — GIVING ONE PERSON'S PROPERTY TO ANOTHER.** — An act of the legislature which provides for the involuntary transfer of property from one person to another without due process of law, whether with or without compensation, violates the principle of the fundamental law, whatever may be the pretext upon which it is founded. *Gilman v. Tucker*, 464.
2. **CONSTITUTIONAL LAW — VALIDATING VOID EXECUTION SALE.** — A statute declaring that if the title of a grantee under an execution sale, or his assignee, shall, for any cause whatsoever, be adjudged null and void in an action brought by the judgment debtor, or his assignee, such judgment shall have no force or effect, unless, within twenty days after its entry, the plaintiff shall pay to such grantee, or his assignee, the sum of money which was paid upon the sale, with interest from the time of the sale, including the costs and expenses of the defendant in defending the action in which such judgment was recovered, and in the event of the plaintiff's failure to pay such purchase-money and expenses within the time specified, said title shall be valid in such grantee, attempts to deprive a person of property without due process of law, and is void. *Gilman v. Tucker*, 464.
3. **CONSTITUTIONAL LAW — DEPRIVING PERSON OF PROPERTY, WHAT IS.** — A statute which assumes to destroy or invalidate a party's muniments of title is just as effective in depriving him of his property as one which bestows it directly upon another. *Gilman v. Tucker*, 464.
4. **INTERSTATE COMMERCE — POWER OF STATE TO REGULATE.** — A state statute imposing a penalty upon railroad companies for a failure to ship freight within five days, and which operates alike upon freight to be shipped outside as well as inside the state, is valid, and not unconstitutional, as an interference with the power of the federal Congress to regulate commerce between the states. *Bagg v. Wilmington etc. R. R. Co.*, 569.
5. **INTERSTATE COMMERCE — POWER OF STATE TO REGULATE.** — A state stat-

ute which, without discriminating, operates uniformly in aid of domestic and interstate trade alike, is valid, and should be enforced, when the federal Congress has not acted, or has no power to afford so complete a remedy for the existing evil as the state legislature. *Bagg v. Wilmington etc. R. R. Co.*, 569.

6. CONSTITUTIONAL LAW — SEED-GRAIN STATUTE. — A statute authorizing counties to issue bonds to procure seed-grain for needy farmers resident therein, and providing for the payment of such bonds by the levy of a general county tax, if necessary, is not invalid on the ground that the tax authorized is not for a public purpose, or that such statute authorizes counties to make donations or lend their aid or credit to individuals, otherwise than for the necessary support of the poor, and in direct violation of the express terms of the state constitution. *State v. Nelson County*, 609.
 7. CONSTITUTIONAL LAW — POLICE POWER. — The legislature, in the exercise of its discretion, and within the limits of the county indebtedness prescribed by the state constitution, may clothe county commissioners with discretionary authority to make small loans, secured by prospective crops or general county taxation, to those whose condition is so impoverished and desperate as to reasonably justify the fear that, unless they receive help to enable them to raise crops, they and their families will become a charge upon the counties in which they live. And it will be presumed that, in passing a statute for their benefit, the legislature acted upon the fullest knowledge of the necessities of the situation, and it will also be presumed, in favor of the validity of such statute, that it was passed after due deliberation, and with the clearest apprehension of the scope and purpose of the language used in the state constitution. *State v. Nelson County*, 609.
 8. REPEAL OF STATUTE BY ACT WHICH RE-ENACTS PROVISIONS OF ACT REPEALED, EFFECT OF. — When a repealing act re-enacts substantially the provisions of the act repealed, the latter act is not thereby destroyed or interrupted in its operation. Where, therefore, a state legislature passes an act repealing a statute providing for the appointment of county boards of health, and constituting them corporations, but by another section of the same act enacts substantially the provisions of the act repealed, the repealing act must be construed as an amendment of the act repealed, and the boards created under the latter act are continued in existence with such modifications as are contained in the former act. *Forbes v. Board of Health*, 63.
- See CORPORATIONS, 1; HOMESTEAD, 1, 2; INJUNCTION, 1; INTERSTATE COMMERCE; LEGISLATURE; MUNICIPAL CORPORATIONS, 1-5; SCHOOLS, 1, 2, 4; TRIAL, 3, 5.

STOCK AND STOCKHOLDERS.

See CORPORATIONS, 4-14; LIMITATIONS OF ACTIONS, 2; RECEIVERS, 1.

STREET-RAILROADS.

See RAILROADS, 53.

STREETS.

See MUNICIPAL CORPORATIONS, 12.

SUBCONTRACTOR.

See CONTRACTS, 1.

SUBROGATION.

See MORTGAGES, 2.

SUMMONS.

See PROCESS, 1.

SURETYSHIP.

See EXECUTORS AND ADMINISTRATORS, 4-6; JUDGMENT, 9; PARTNERSHIP, 2, 6; SHERIFF, 4.

SURGEONS.

See PHYSICIANS AND SURGEONS.

SURVEY.

See BOUNDARIES.

SURVIVAL.

See ABATEMENT; COVENANT, 4.

TAXES.

1. PAYMENT OF TAXES IS NOT VOLUNTARY when made under protest to prevent a tax sale then advertised, though, because of the illegality of the taxes, the sale would have been void, and any cloud upon the title resulting therefrom might have been removed by legal proceedings. *Whitney v. City of Port Huron*, 291.
2. PROTEST AGAINST PAYMENT, WHEN SUFFICIENTLY SPECIFIC. — A receipt for taxes, across the face of which is written, "Paid under protest, to protect property from being sold, and on account of taxes being illegal," establishes a protest sufficiently specific, when the whole proceeding on which the taxes were founded was without jurisdiction and void. *Whitney v. City of Port Huron*, 291.

See INTERSTATE COMMERCE, 4-6; VENDOR AND PURCHASER, 2, 3.

TELEGRAPH COMPANIES.

1. TELEGRAPH COMPANY LIABLE FOR MISTAKE IN TRANSMITTING MESSAGE. — A telegraph company is liable to the sender of a message for the damages sustained by him by reason of its failure to transmit the message correctly. And a statute which makes a telegraph company liable "for all mistakes in transmitting messages, made by any person in its employ," and declares that it "shall not be exempted from any such liability by reason of any clause, condition, or agreement contained in its printed blanks," is reasonable in its requirements, and binding upon all telegraph companies in the state. *Kemp v. Western U. Tel. Co.*, 363.
2. TELEGRAPH MESSAGE TRANSMITTED OUT OF STATE, LIABILITY FOR MISTAKE IN TRANSMISSION. — A telegraph company which undertakes to correctly transmit a message to another state is liable for a breach of its contract, and the sender of the message may recover all the damages he sustains by reason of such breach. *Kemp v. Western U. Tel. Co.*, 363.
3. STIPULATION LIMITING LIABILITY. — A stipulation by a telegraph company that it will not be liable unless a claim for damages is presented, in writing, within sixty days from the time the message is sent is reason-

able, and will be enforced, even though the company is guilty of negligence. *Western Union Tel. Co. v. Dougherty*, 33.

See NEGLIGENCE, 12.

TENANTS IN COMMON.

See CO-TENANCY; PARTITION.

TESTIMONY.

See WITNESSES.

THREATS.

See RIOT, 4; TRIAL, 11.

TICKETS.

See RAILROADS, 32, 35.

TORTS.

See ACTIONS, 1; MASTER AND SERVANT, 1; RAILROADS, 38.

TOWNSHIP WARRANTS.

See SCHOOLS, 2, 3.

TRADE-MARKS.

1. WORDS "MICROBE KILLER," employed in their ordinary sense, do not constitute a trade-mark, nor does their employment by a manufacturer of a patent medicine give him any proprietary right to their exclusive use. *Radam v. Capital Microbe etc. Co.*, 783.
2. INFRINGEMENT. — When there is no intent to defraud, and the labels, trade-mark, and packages are not so similar as to make them, one and all, calculated to deceive purchasers of ordinary caution, there can be no infringement of a trade-mark by one manufacturing goods similar to those for which the trade-mark is claimed. *Radam v. Capital Microbe etc. Co.*, 783.
3. INFRINGEMENT. — GENERAL CLAIM FOR DAMAGES is properly stricken out in an action for infringement of a trade-mark, especially when the proof shows that there was no infringement upon which damages, if specially alleged, could have been predicated. *Radam v. Capital Microbe etc. Co.*, 783.
4. INFRINGEMENT. — EVIDENCE of the identity of medicines is inadmissible to prove an alleged infringement of trade-mark, unless it is also shown that the similarity in the trade-marks created the reputation of identity in the medicines. *Radam v. Capital Microbe etc. Co.*, 783.
5. HEARSAY EVIDENCE is inadmissible to prove that purchasers have been deceived by an alleged infringement of a trade-mark. If they have been so deceived, they must be called to testify to that fact. *Radam v. Capital Microbe etc. Co.*, 783.
6. DAMAGES — EVIDENCE. — In an action for infringement of a trade-mark, evidence of loss by sales of a rival medicine is inadmissible, in the absence of proof of an infringement. *Radam v. Capital Microbe etc. Co.*, 783.
7. EXPERT EVIDENCE. — Where, in an action involving the question of an infringement of a trade-mark, the marks, labels, jugs, and packages of the contestants, as presented for sale in the market, are before the court

trying the case without a jury, it is within the province of the court to decide what impression would be made by them upon persons of ordinary intelligence and care, and expert evidence is inadmissible to decide the question. *Radam v. Capital Microbe etc. Co.*, 783.

TRANSFER OF STOCK.

See CORPORATIONS, 13-16.

TRESPASS.

1. **TRESPASS, CONTINUING, DAMAGES RECOVERABLE FOR BY VENDOR.** — If an elevated railway is constructed and maintained in front of a city lot, interfering with the owner's easements of light, air, and access, without making any compensation, whereby the market value of the property is depreciated, and he afterwards sells it, his vendee is entitled to maintain suit to recover damages sustained during his (the vendee's) ownership, and to enjoin the further maintenance of the railroad unless compensation is made for permanent loss and damage, and in estimating the amount of such permanent damage, is entitled to have the lot valued as though such road were not yet in existence. In other words, his damages should not be diminished by the fact that the property had, before his purchase, already depreciated in value on account of the railway, and loss had thereby already resulted to his vendor. *Pappenheim v. Metropolitan etc. Ry Co.*, 486.
2. **TRESPASS, CONTINUING, FIXING DAMAGES FOR PERMANENCE OF.** — In a suit in equity to enjoin the continuance of a trespass, the court may determine the amount of damages which the owner will sustain if the trespass shall be permanently continued, and it may provide that upon payment of that sum the plaintiff shall give a deed or convey a right to the defendant, and it will refuse an injunction when the defendant is willing to pay upon receipt of a conveyance. If the case is one in which the defendant has no right to acquire the property, and the plaintiff wishes to stop further trespass, an injunction will issue without imposing on him any condition to convey when tendered the amount which would compensate him for the permanent continuance of the trespass, and the damages recoverable will be limited to the commencement of the action. *Pappenheim v. Metropolitan etc. Ry Co.*, 486.
3. **BURDEN OF PROVING RIGHT TO RECOVER POSSESSION OF LAND ON PLAINTIFF.** — In an action of trespass to try title to land, the burden of showing a right to recover is upon the plaintiff, and if neither he nor the defendant shows a right to the possession, judgment must be rendered in favor of the defendant. *Allen v. Long*, 755.

See ACTIONS, 2; ANIMALS, 2; EQUITY, 2; RAILROADS, 11, 14, 24, 33; TRIAL, 2.

TRESPASS TO TRY TITLE.

See CO-TENANCY, 6; EXECUTION, 4; TRESPASS, 2.

TRIAL.

1. **CONSTITUTIONAL LAW.** — The provision of the constitution declaring that "a trial by jury, in all cases in which it has heretofore been used, shall remain inviolate forever," relates to the trial of issues of fact in civil cases or criminal prosecutions, and not to the trial of issues in equity. *Lynch v. Metropolitan etc. Ry Co.*, 523.
2. **ASSESSMENT OF DAMAGES IN EQUITY.** — In a suit to enjoin the continuance

- of acts of trespass, and to recover for damages already inflicted by those acts, the amount of such damages does not present an issue upon which the parties are entitled to a trial by jury. *Lynch v. Metropolitan etc. Ry Co.*, 523.
3. **VOIR DIRE, EXAMINATION OF JUROR UPON, SCOPE OF.** — The examination of jurors upon their *voir dire* is not to be confined strictly to the questions formulated in the statute, but should be varied and elaborated as the circumstances surrounding the juror under examination in relation to the case on trial may seem to require, so as to obtain a fair and impartial jury whose minds are free and clear from all interest, bias, or prejudice that might prevent their finding a just and true verdict. *Pinder v. State*, 75.
 4. **VOIR DIRE, PROPER QUESTION TO ASK JUROR UPON HIS, IN TRIAL OF NEGRO.** — In testing a juror upon his *voir dire* as to his competency, etc., to serve upon the trial of a colored prisoner, it is pertinent and proper to ask him, "Could you give the defendant, who is a negro, as fair and impartial a trial as you could a white man, and give him the same advantage and protection as you would a white man, upon the same evidence?" and it is error for the trial court to refuse to allow such question to be propounded to the juror. *Pinder v. State*, 75.
 5. **EXAMINATION OF JUROR ON VOIR DIRE, BY WHOM TO BE CONDUCTED.** — Although there is nothing in the statute to prohibit the court from exclusively conducting the examination of jurors on the *voir dire*, it is the most convenient and better practice, having the sanction of long and almost universal usage, to allow such examinations to be conducted by the counsel in the cause, the court judicially supervising and directing the same, and taking part therein either to supplement or to rectify. *Pinder v. State*, 75.
 6. **JURISDICTION — SURGICAL EXAMINATION OF PERSON.** — In an action for personal injuries, the court has no jurisdiction to require plaintiff to submit to a surgical examination of his person by surgeons appointed by the court, with a view of enabling them to testify on the trial as to the existence of his alleged injuries. *McQuigan v. Delaware etc. R. R. Co.*, 507.
 7. **EVIDENCE PROPERLY EXCLUDED, BUT RENDERED COMPETENT** by the admission of subsequent evidence, must be again offered in rebuttal, to become available. *Shaners v. Proprietors of Locks and Canals*, 223.
 8. **DEMURRER TO EVIDENCE** admits all that may be reasonably inferred from the evidence given by the adverse party, and waives all evidence in conflict therewith, or the credibility of which is impeached, and all inferences from the evidence of the party demurring which do not necessarily follow from it. *Williamson v. Newport News etc. Co.*, 927.
 9. **REQUESTS FOR INSTRUCTIONS.** — The judge may, in his discretion, refuse to receive further requests for charges or instructions to the jury, when he has already given the complaining litigant an opportunity, and this opportunity has been made available by asking for all the charges which the party then thought proper to ask, and the judge in the charge given has fully and fairly laid down the law applicable to the facts of the case. *O'Neil v. Dry Dock etc. R. R. Co.*, 512.
 10. **APPELLATE PRACTICE.** — Where the charge of a judge to the jury does not contain any erroneous statement of the law, but tends to improperly bias the jury and to influence their verdict, it may be a ground in the court below to set aside the verdict upon a motion for a new trial, but it will

not be considered by the court of appeals where it has been urged in the court below and the motion for a new trial denied. *Hurlbert v. Hurlbert*, 482.

- 11 SPECIAL FINDINGS OF FACT—DISCRETION.—Where trial courts are given discretionary power either to give or withhold questions for special findings of fact, a judgment will not be reversed in the absence of clear proof of an abuse of such discretion. *Nebraska etc. Ins. Co. v. Christensen*, 407.
- 12 THREATS, WHAT ARE, WHEN A QUESTION FOR THE JURY.—Whether language indicating that persons denounced by the speaker will suffer for acts imputed to them by him was used and intended as a threat or as a mere prophecy is a question to be determined by the jury. *People v. Most*, 458.

See APPEAL, 1; NEW TRIAL.

TROVER.

See SALE, 5.

TRUSTS.

1. JUDICIAL SALES—AGREEMENT TO HOLD IN TRUST FOR THE DEBTOR.—Where the owner of real estate charged with judgment and mortgage liens agrees in writing with his judgment creditor, that the latter shall purchase the lands at a judicial sale soon to be had to satisfy such liens, and shall take and hold the title for their payment, and that when they are satisfied the balance of the real estate or the proceeds thereof shall be reconveyed to the judgment debtor, the contract is based upon a sufficient consideration, and such judgment creditor purchasing at the proposed judicial sale takes the land charged with a trust, and holds it as trustee for his judgment debtor according to the terms of such contract. *Carter v. Gibson*, 381.
2. DISCHARGE OF TRUSTEE, AND LIABILITY TO ACCOUNT.—When a trustee has entered upon the execution of the trust, he cannot afterwards free himself of its discharge by a denial of its existence, and without the consent of the *cetui que trust*, unless by order of court. *Carter v. Gibson*, 381.
2. VOLUNTARY SETTLEMENT—REVOCATION.—A voluntary settlement, completely executed, with no power of revocation reserved, cannot be set aside, except upon proof of mental incapacity, mistake, fraud, undue influence, or the accomplishment of the purposes of the trust, or the consent of all parties. Consequently, if a married woman voluntarily conveys her property in trust, to place it beyond her husband's control, with no power of revocation reserved, the trustee to hold for her during her life, and upon her death as she may appoint by will, or in default of appointment, to her issue, her children have a beneficial interest in the trust fund, and she is not entitled, after divorce, to have the trust revoked without her children's consent. *Petition of Thurston*, 278.
4. TRUST DEED.—WORDS OF INHERITANCE are not necessary in a conveyance vesting property in a trustee, if the purposes of the trust indicate that an estate in fee was intended. *Kennedy v. Gramling*, 676.
5. TRUST DEED MADE TO A GRANTEE, "FOR THE BENEFIT AND BEHOOF OF THE GRANTOR'S WIFE," is not presumed to be upon the same trusts as are set forth in an antenuptial trust deed, whereby certain property was vested in the same trustee. *Kennedy v. Gramling*, 676.

TUG-BOAT.

See NEGLIGENCE, 1.

TURN-TABLES.

See RAILROADS, 24.

ULTRA VIRES.

See CORPORATIONS, 17.

UNINCORPORATED SOCIETIES.

See ASSOCIATIONS.

UNLAWFUL ASSEMBLY.

See RIOT.

UNLAWFUL DETAINER.

See FORCIBLE ENTRY.

USURY.

CONFLICT OF LAWS — CONTRACT, WHERE DEEMED TO BE MADE. — When an agreement to give and accept a promissory note is made in the state where the payee resides, and it is then drawn up pursuant to the agreement and given to the maker for execution, who takes it to his home in another state, where he signs it and procures it to be indorsed and transmitted to the payee at the latter's place of residence, it must be deemed a contract of the state wherein the latter resides, though it is made payable in the state of the maker's residence, and if not usurious by the law of the state where the payee resides, cannot be attacked for usury in the state in which it is payable. *Staples v. Nott*, 490.

VARIANCE.

See PLEADING, 7.

VENDOR AND PURCHASER.

1. **STATUTE OF FRAUDS. — A DEFECT IN THE DESCRIPTION OF REAL PROPERTY** in a contract or memorandum of sale may be supplied by evidence showing the situation and surrounding circumstances of the parties; and if from such evidence it is apparent that both parties referred to the same property, the requirements of the statute of frauds are fulfilled, and parol evidence may be resorted to for the purpose of designating the particular piece of property to which the parties so referred. *Kennedy v. Gramling*, 676.
2. **STATUTE OF FRAUDS — DESCRIPTION OF REALTY.** — If a person in writing offers another a specified price for property, without describing it otherwise than by stating, in connection with his offer, that if it is accepted, deeds and papers should be sent for examination, and if not accepted, that he is "ready at any time to settle for the year's rent," and the owner responds that he accepts the offer for his house, clear of expenses of title, that the taxes are paid, and that there is one year's insurance on the house which he expects the purchaser to pay, and it further appears by parol evidence that the intending purchaser was a tenant as to a certain house and lot, the proposal and acceptance will be considered

as relating to the property of which the purchaser was such a tenant, and that property being ascertained, the offer and acceptance together constitute a memorandum of sale containing a sufficient description to satisfy the statute of fraud. *Kennedy v. Gramling*, 676.

3. OFFER, MUST BE ACCEPTED WITHOUT QUALIFICATION. — If a proposal to buy real property for a price specified, and no more, is followed by an acceptance providing that the property is to be clear of expenses of taxes, and that the purchaser is to repay one year's insurance which has been paid on the property, this is not an unqualified acceptance of the offer, and there is no contract between the parties. *Kennedy v. Gramling*, 676.

See FRAUDULENT CONVEYANCES; REAL PROPERTY; SPECIFIC PERFORMANCE,

VERDICT.

See APPEAL, 7, 9, 10; DAMAGES, 7; PLEADING, 5; TRIAL, 2, 10.

SHIPS AND SHIPPING.

See SALES, 6-8.

VESTED RIGHTS.

See HOMESTEAD, 5.

VETERINARY SURGEONS.

See PHYSICIANS AND SURGEONS.

VICE-PRINCIPAL.

See MASTER AND SERVANT, 6.

VOIR DIRE.

See TRIAL, 3-5.

VOLUNTEER.

See MASTER AND SERVANT, 12.

WAGERS.

RECOVERY FROM STAKE-HOLDER. — Money deposited with a stake-holder, as a wager on the result of a horse-race, can be recovered from him by the losing party depositing it, if demanded before it has been paid to the winner. *Denver v. Bennett*, 415.

WAIVER.

See APPEAL, 1; INSURANCE, 5, 6; PLEADING, 2.

WARRANT.

See SCHOOLS, 5, 6; SHERIFF, 4.

WARRANTY.

See CO-TENANCY, 2; COVENANTS, 3; SALES, 1, 11, 13, 14.

WARRANTY DEED.

See REAL PROPERTY.

WATERS AND WATERCOURSES.

INJUNCTION AGAINST OBSTRUCTION. — Where a railroad company, in constructing its road across a natural watercourse, totally diverts the water therein from the land of an owner, where it naturally flowed prior to the construction of the road, such land-owner is entitled to a mandatory injunction against the company. *Atchison etc. R. R. Co. v. Long*, 165.

See NUISANCE.

WILLS.

1. **CONSTRUCTION OF INSTRUMENT IN FORM OF DEED.** — An instrument in the form of a deed, or a contract for a deed, disclosing the intention of the maker respecting the posthumous destination of his property, and which is not to operate until after his death, is a will, and may be revoked. *Hawley v. Reed*, 86.
2. **SIGNATURE.** — AN OLOGRAPHIC WRITING, containing testamentary dispositions, offered for probate as a will, having a caption beginning "Testament d'Aglæe Armant," but without any signature at the end, is void as the will of Aglæe Armant, because it does not contain such signature as is required to an olographic will. *Succession of Armant*, 183.
3. **OLOGRAPHIC WILL — SIGNATURE.** — Testamentary dispositions following the signature of an olographic will are invalid, although it does not affect the validity of the will that superfluous or useless words connected with the signature follow it. *Succession of Armant*, 183.
4. **OLOGRAPHIC WILL — SIGNATURE.** — Where the name of a testatrix does not appear at the end of a writing claimed to be her will, but is written in the beginning thereof, without the distinctive characteristics attached to her signature to other documents which she invariably signed at the end, the writing will fail as her will, on the ground that the name was not intended as a signature, and that, whether so intended or not, it was not at the end of the writing, as required by law. *Succession of Armant*, 183.
5. **FORMALITIES PRESCRIBED BY LAW FOR EXECUTION OF OLOGRAPHIC WILLS** must be strictly observed or the will is void. *Succession of Armant*, 183.

See TRUSTS, 3, 4.

WITNESSES.

1. **EVIDENCE — OPINIONS.** — The testimony of a witness, not based on specific facts, but consisting of an opinion as to the lump amount of damages sustained by breach of a contract, is inadmissible as a basis for the estimation of damages. *Sherman Center etc. Co. v. Leonard*, 101.
2. **EVIDENCE OF AN EXPERT AS TO THE DISTANCE WITHIN WHICH A LOADED TRUCK** could be stopped, under circumstances assumed in the question to him, is competent, though questions of this class should not be encouraged. *O'Neil v. Dry Dock etc. R. R. Co.*, 512.
3. **EXPERT EVIDENCE IS RESORTED TO** for the purpose of informing the court or jury upon subjects not commonly understood, but where the nature of the inquiry appeals to the common understanding and ordinary intelligence of mankind, such evidence is not admissible. *Radam v. Capital Microbe etc. Co.*, 783.

See APPEAL, 3. DEPOSITIONS; EVIDENCE; TRADE-MARKS, 7.

WRITS.

See PROHIBITION.



